

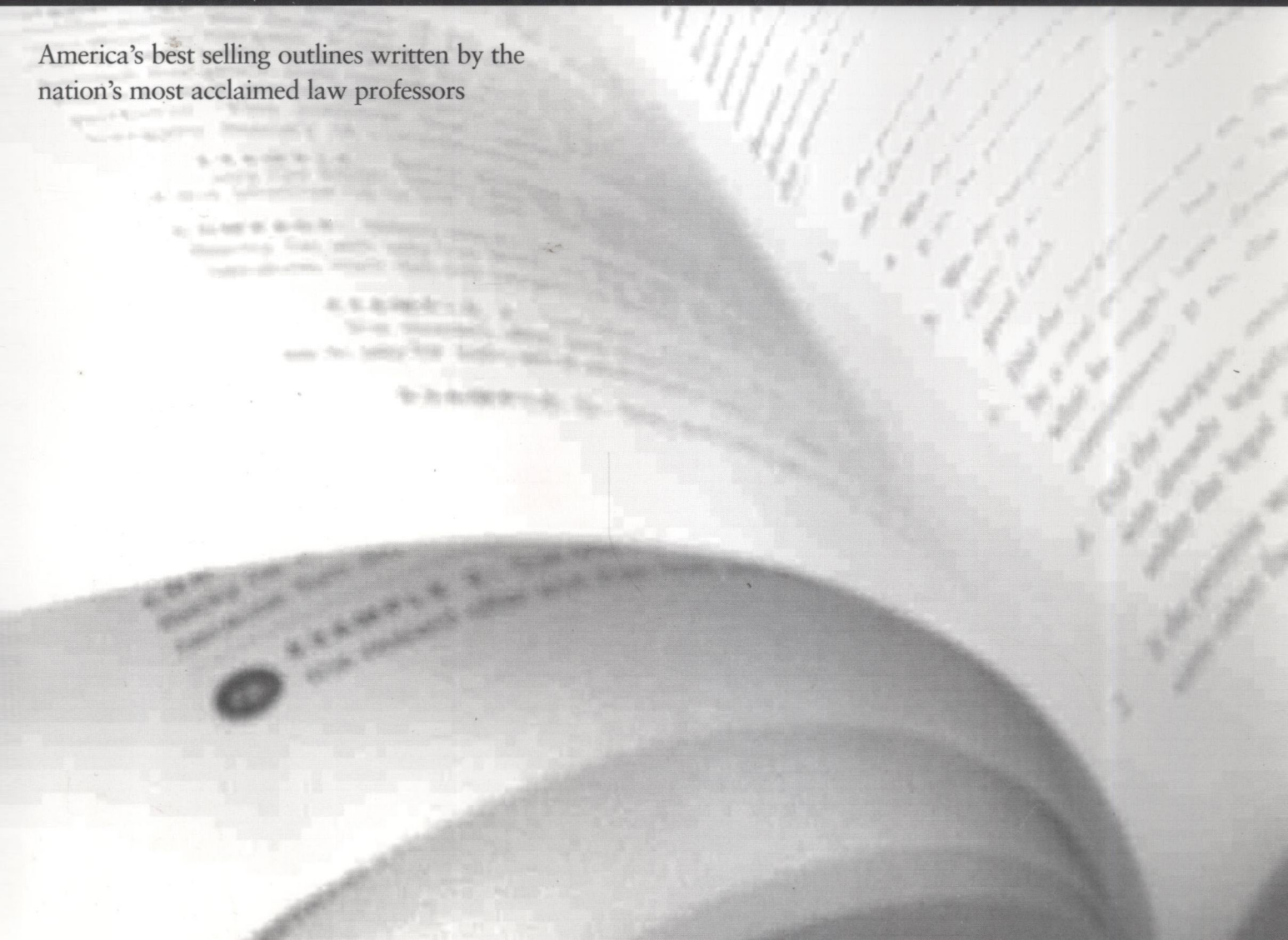
# **gilbert**<sup>®</sup>

## LAW SUMMARIES

### Wills

Stanley M. Johanson

America's best selling outlines written by the  
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# Wills

BY STANLEY M. JOHANSON

University of Texas

Twelfth Edition

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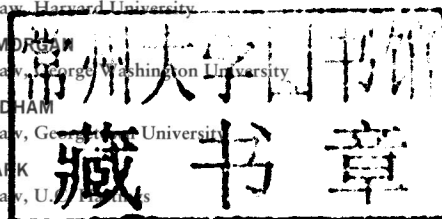
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# Capsule Summary

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## I. UNIFORM PROBATE CODE

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### A. INTRODUCTION §1

While more than one-third of the states have enacted all or most of the Uniform Probate Code (“UPC”), other states have adopted many of the substantive, but not procedural, provisions. Still other states have made selective adoptions of several UPC provisions. The great variations among the states have resulted in a lack of uniformity as to the impact of the UPC on state laws regarding decedents’ estates.

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### B. TWO UNIFORM PROBATE CODES

#### 1. In General §3

There are two versions of the UPC: the original UPC and the revised UPC. States have adopted various combinations of provisions from both the original UPC and the revised UPC.

#### 2. Revised Uniform Probate Code §5

The UPC was substantially modified to include nonprobate transfers, e.g., revocable trusts, life insurance, and employee benefit plans. Additionally, the intestate shares of surviving spouses were greatly increased and significant changes were made to anti-lapse statutes.

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## II. INTESTATE SUCCESSION

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### A. INTRODUCTION

#### 1. When Intestate Distribution Rules Apply §7

Intestacy statutes govern distribution of the property of a person when the person dies ***without a valid will***, the will is ***denied probate***, or the will does ***not completely dispose*** of the estate, resulting in a ***partial intestacy***.

#### 2. Common Law §8

At common law, there were separate rules for real property and for personal property.

#### 3. Modern Law §9

Today, intestate distribution is governed by statutes, and in nearly all states, the rules are the same for real and personal property. “Heirs” (preferred term) and “next of kin” are now synonymous and describe persons who take either real or personal property by intestacy.

4. **What Law Governs** §10  
Generally, the law of the state where the decedent was **domiciled at death** determines the disposition of **personal property**; disposition of **real property** is determined by the law of the state where the property is located.
5. **Property Subject to Intestate Distribution** §11  
Intestacy statutes (or a will) apply only to a decedent's **probate (or testamentary) estate**. This consists of assets that pass by will or inheritance and that are subject to administration by the decedent's personal representative (e.g., cash, real estate, personal effects).
- a. **Nonprobate assets** §13  
Property that passes under a **contract** (e.g., life insurance proceeds), property held with another **with the right of survivorship** (e.g., joint tenancies), **trust assets** where the decedent is a trustee or beneficiary, and assets over which the decedent holds a **power of appointment** pass outside of probate, and the laws of intestate succession do **not apply**.

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**B. PATTERNS OF INTESTATE DISTRIBUTION**

1. **Rules Vary from Jurisdiction to Jurisdiction** §18  
Intestacy laws differ, even among the states that have adopted the UPC. This Summary covers the general patterns of intestate distribution of many states, both common law and community property states. (Most separate property in community property states is covered by these general rules; community property is governed by other intestacy statutes.)
2. **Intestate Share of Surviving Spouse** §22  
A surviving spouse takes an intestate share in **all** jurisdictions.
- a. **Decedent survived by descendants—non-UPC states** §23  
If the decedent is survived by a **spouse and descendants**, the spouse usually takes **one-third or one-half** of the estate.
- b. **Decedent survived by descendants—original UPC** §25  
If the decedent is survived by a spouse and descendants and the descendants are not descendants of the surviving spouse, **one-half** of the estate passes to the spouse and one-half passes to all of the decedent's descendants. If all of the decedent's descendants are also descendants of the surviving spouse, the spouse takes the **first \$50,000 plus one-half of any balance** of the estate, while the remaining one-half passes to the descendants.
- c. **Decedent survived by descendants—revised UPC** §26  
If all of the decedent's descendants are also descendants of the surviving spouse, the spouse inherits the **entire estate**. If the surviving spouse also has descendants who are not descendants of the decedent, the surviving spouse inherits the **first \$225,000 plus one-half of any balance** of the estate, while the remaining one-half passes to the **decedent's descendants**. If any of the decedent's descendants are not descendants of the surviving spouse, the surviving spouse takes the **first \$150,000**

- plus one-half of any balance**; the remaining one-half passes to the decedent's descendants.
- d. **Decedent not survived by descendants** §30
- The majority rule is that if the decedent is survived by a spouse but not descendants, the **spouse inherits the entire estate**. A substantial minority of states allow the surviving spouse to inherit one-half of the estate with the remaining one-half passing to the decedent's surviving parent(s). If there are no surviving parents, the surviving spouse inherits the entire estate.
- (1) **Revised UPC** §33
- Under the revised UPC, the spouse inherits the **first \$300,000 plus three-fourths of any balance** and the remaining one-fourth passes to the decedent's parent(s).
- e. **When spouse disqualified from taking as heir** §34
- In several states, a surviving spouse is disqualified from taking an intestate share under certain circumstances, e.g., abandonment or failure to support the spouse.
3. **Intestate Share of Children and Other Descendants** §35
- The remainder of the estate after satisfaction of the spouse's share (or the entire estate if there is no surviving spouse) passes to the decedent's children and descendants of deceased children. Note that, in all states, the decedent's parents and collateral kin **never inherit** if the decedent is survived by children or their descendants.
4. **Distributions Among Descendants of Deceased Children**
- a. **Common law—classic per stirpes** §37
- A minority of jurisdictions distribute shares among children and descendants of deceased children by **division of stirpital shares at the child level**, regardless of whether there are any living children.
- b. **Majority rule—per capita with representation** §38
- Many states and the original UPC use the per capita with representation method under which the shares are **determined at the first generational level at which there are living takers**; e.g., each living child takes one share and the share of a deceased child is divided among her children by representation.
- c. **Revised UPC—per capita at each generation** §39
- Under the revised UPC and in several non-UPC states, the property is divided into **equal shares** at the first generational level with living takers. Shares of deceased persons at that level are combined and then divided equally among takers at the next generational level so that persons in the **same degree of kinship** to the decedent **always take equal shares**.
5. **Decedent Not Survived by Spouse or Descendants** §48
- If the decedent is not survived by a spouse or descendants, the decedent's surviving parents inherit the estate (majority rule). By statute in several states, a parent cannot inherit if he did not openly treat the child as his or refused to

support the child. Under the revised UPC, a parent cannot inherit from a child if the parent's parental rights were terminated or could have been terminated due to nonsupport, abandonment, abuse, or neglect.

6. **Decedent Not Survived by Spouse, Descendants, or Parents** §51  
If the decedent is not survived by a spouse, descendants, or parents, in nearly all states the estate passes to the **descendants of the decedent's parents**—i.e., the decedent's brothers and sisters (or their descendants). If there are **no siblings** (or their descendants), the estate passes to the decedent's **grandparents**—one-half to the maternal and one-half to the paternal grandparents (**or their descendants**).
7. **Intestate Distribution Beyond Grandparent Level** §53  
The majority of states distribute one-half of the estate to the **nearest kin on each side** of the family (i.e., maternal and paternal), no matter how remote the relationship to the decedent.
  - a. **Inheritance beyond nearest kin** §55  
Under the revised UPC and in several states, the estate passes to the descendants of the previously deceased spouse of the decedent before it escheats to the state.
  - b. **Minority rule—"laughing heir" statutes** §56  
The UPC and several states prevent inheritance by remote relatives, usually those related to the decedent beyond the grandparent (or descendant of grandparent) level.
8. **Escheat** §57  
If the decedent has no surviving relations (or is survived by relations too remote in states having "laughing heir" statutes), the estate escheats to the **state**.
9. **Ancestral Property** §58  
A few states hold that if a decedent leaves no surviving spouse or descendants, property received by gift, will, or inheritance from a parent reverts back to the parent (or to his heirs).

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## C. **INTESTATE DISTRIBUTION IN COMMUNITY PROPERTY STATES**

1. **Introduction** §59  
The laws of the ten community property states vary considerably, but all use the same basic definitions.
  - a. **Separate property** §60  
This is property owned by a spouse **before marriage**, and property acquired during marriage by **gift, will, or inheritance**. In three states, the income from separate property is community property. Separate property passes according to the above intestacy rules.
  - b. **Community property** §61  
This is all property acquired **during marriage** that is **not separate property**. All property on hand on dissolution of marriage (by divorce or death) is **presumed to be community property**.

- c. **Quasi-community property** §62  
Quasi-community property is property acquired by one spouse while **domiciled in another state** that would have been classified as community property had it been acquired while domiciled in the community property state. (Real property situated in another state is not quasi-community property.)

2. **Decedent Survived by Spouse But Not Descendants** §63  
If the decedent is not survived by descendants, his one-half share of the community estate passes to the surviving spouse. This results in the spouse owning the entire community estate.

3. **Survived by Spouse and Descendants** §64  
In several states, the surviving spouse takes the entire community estate. Under the revised UPC and other states, the surviving spouse takes the entire community estate **only if** all of the decedent's descendants are also the surviving spouse's descendants; otherwise the decedent's community property interest passes to his descendants.

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#### D. ATTEMPTS TO DISINHERIT—NEGATIVE BEQUESTS

1. **Majority Rule** §68  
When a testator expressly disinherits an heir but then dies partially intestate, most states permit the heir to take an intestate share in the undisposed of property.
2. **Revised UPC—Negative Bequest Rule** §69  
Under the revised UPC and in several non-UPC states, a decedent may expressly exclude an individual from taking property passing by intestate succession by a provision in her will.

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### III. INHERITANCE RIGHTS AS AFFECTED BY STATUS OF CHILD OR SIBLING

#### A. ADOPTED CHILDREN

1. **Early Law** §70  
Absent a relevant statute, early court decisions permitted an adopted child to inherit from the adopting parents but not from their relatives ("stranger to the adoption" rule). Usually, the adopted child continued to have inheritance rights from and through the genetic parents.
2. **Modern Law**
- a. **Adopting parents** §73  
Today, all relevant statutes allow an adopted child to have the **same inheritance rights as a genetic child**. The adopted child and her descendants thus can inherit from the adopting parents and their kin.
- b. **Genetic parents** §74  
In nearly all states, adoption by a new family severs the parent-child relationship between the child and the genetic parents. Thus, an adopted child and her descendants have **no** inheritance rights from or through the genetic parents (and vice versa). An exception is made when a child is

adopted by the spouse of a genetic parent; the relationship between that parent as well as the adopting parent and the child is not affected. However, in some states adoption by the spouse of a genetic parent terminates inheritance rights from the **other** genetic parent. In other states and under the original UPC, such an adoption has no effect on the relationship between the child and **either** genetic parent.

- c. **Revised Uniform Probate Code—one-way street rule** §80  
Under the revised UPC, an adopted child and her descendants have inheritance rights from and through **both** genetic parents, but the other genetic parent (the nonmarrying parent) and his kin have **no inheritance rights** from or through the child.
- d. **Adult adoptions** §85  
Most intestacy statutes do not distinguish between adoption of a minor child and adoption of an adult. Some statutes do establish special rules for adult adoptions, and courts are divided on whether an adopted adult is included in a bequest to the adoptive parent's "children," "issue," "descendants," or "heirs."

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## B. STEPCHILDREN AND FOSTER CHILDREN

- 1. **General Rule** §86  
A stepchild or foster child has **no** inheritance rights from his stepparent or foster parents.
- 2. **Exception—Adoption by Estoppel** §87  
In many jurisdictions, a stepchild or foster child can inherit from the stepparent or foster parent in cases involving an **unperformed agreement to adopt**. However, the rule applies only to those claiming through the stepparent or foster parent (e.g., child cannot inherit from stepparent's sister) and operates only in favor of the child; *i.e.*, stepparents or foster parents do **not inherit** from the child.

---

## C. NONMARITAL CHILDREN §91

At common law, a nonmarital child had no inheritance rights from either parent. Today, all states permit the child to inherit from and through his genetic **mother**. Also, the child can inherit from and through the genetic **father** upon certain proof of paternity (e.g., adjudication or formal acknowledgment).

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## D. POSTHUMOUS CHILDREN §98

Under both the common law rules and statutory authority, a child born (typically within 280 days) after his father's death is considered the decedent's child for inheritance purposes. The UPC goes further to permit **any relative** of the decedent in gestation at the decedent's death to inherit if the child lives for at least 120 hours after birth.

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## E. ARTIFICIAL INSEMINATION AND IN VITRO FERTILIZATION §102

Several states provide that a child conceived by the artificial insemination of a married woman is the husband's legitimate child for inheritance purposes **if the husband consented** to the insemination. Statutes are increasingly applying the same rule to children produced by in vitro fertilization or other reproductive technology.

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- F. COLLATERAL KIN OF THE HALF BLOOD** **§104**
- Most states make *no distinction* between siblings of the half blood and whole blood, although some states provide that half bloods take half as much as whole bloods.

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**IV. SUCCESSION PROBLEMS COMMON TO INTESTACY AND WILLS**

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**A. SIMULTANEOUS DEATH**

**1. Uniform Simultaneous Death Act** **§110**

The Uniform Simultaneous Death Act (“USDA”) or the equivalent 120-hour survival rule of the UPC have been enacted in every state except Louisiana, which has statutes similar to the USDA. The original USDA provides that when there is *no sufficient evidence* that the parties have died otherwise than simultaneously, the property of each person is disposed of *as if he had survived* the other person.

**a. Application of USDA** **§113**

In cases of simultaneous deaths, *intestate estates, testamentary assets* under a will, and *life insurance proceeds* pass as though the “owner” survived the “heir.” In cases involving *joint tenancies, tenancies by the entirety, or community property*, one-half of the property passes as though one party survived and the other half passes as though the other party survived.

**b. Evidence of survival—USDA does not apply** **§116**

Remember that if there is sufficient evidence that one party survived the other, even for a brief interval, the USDA does *not apply*. Nor does it apply if the decedent’s will (or other instrument) has a contrary survival provision.

**2. Uniform Probate Code and Revised Uniform Simultaneous Death Act—120-Hour Rule** **§121**

The UPC addresses the problem of deaths in quick succession by stating that absent a contrary will provision, a person must survive the decedent by **120 hours** in order to take as an heir or will beneficiary. The revised USDA incorporates the UPC’s 120-hour rule. This rule does not apply if it would result in an escheat to the state, and it does not apply to survivorship estates (*i.e.*, joint tenancies, tenancies by the entirety), although the *revised UPC* and several states have extended the 120-hour rule to survivorship estates.

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**B. ADVANCEMENTS AND SATISFACTION OF LEGACIES**

**1. Advancement of Intestate Share**

**a. Common law** **§127**

At common law and in a few states today, a lifetime gift to a *child* is *presumed* to be an advance payment of the child’s intestate share of the donor’s estate.

**b. Modern law** **§128**

Most state statutes permit advancements to be made to *any heir* (*e.g.*, spouse or sister). More importantly, these statutes *reverse the common*

**law presumption** and provide that a lifetime gift to an heir is **not an advancement** unless so proved. In many states, such proof must be shown by an express declaration or acknowledgment in a writing signed by the donor or the donee.

**c. Procedure if advancement found** **§135**

If an advancement is found, the value of the property given to the advancee is added to the estate (“brought into the hotchpot”) in determining the intestate shares. This is done only if the advancee elects to share in the intestate distribution. Note that the advancee never has to return the property.

**d. When valuation of advancement is made** **§136**

The majority view values the advanced property at the **date of gift**; the UPC values it at the date of the advancee’s possession or decedent’s death, whichever occurs first.

**e. Partial intestacy** **§137**

In most states, the advancement doctrine does not apply if the decedent left a will that does not make a complete disposition of the estate. However, the revised UPC treats such advancements the same as those under a total intestacy.

**f. Advancee predeceases decedent** **§139**

In most states, if the advancee predeceases the decedent, the advanced property is **not** taken into account in determining the intestate share of the advancee’s descendants unless the written declaration or acknowledgment requires the property to be taken into account.

**2. Satisfaction of Legacies** **§140**

At common law and in states without relevant statutes, a gift to a child of the testator is **presumed** to be in partial or total satisfaction of any gifts made to the child in a **previously executed** will. This presumption usually applies also to the child’s descendants (e.g., grandchild), but not to other will beneficiaries (i.e., someone other than a child or descendant). The rule applies to general legacies (i.e., legacies payable out of the general assets of the estate and that do not require delivery of a particular item).

**a. Testator’s intent controls** **§144**

Application of the satisfaction of legacies doctrine depends on the testator’s intent. In determining intent, courts look to the will or to **extrinsic evidence** (e.g., testator’s declaration at or near time of gift), and apply certain presumptions (e.g., bequest made for a specific purpose).

**b. Statutory solutions** **§146**

Most states that have advancement statutes have similar statutes for the satisfaction of legacies (e.g., if state requires signed writing for advancement, it may have a statute requiring proof of satisfaction of legacies in the same manner).

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**C. DISCLAIMER BY HEIR OR WILL BENEFICIARY**

1.	<b>Introduction</b>	<b>\$149</b>
	If a beneficiary makes a valid disclaimer, the disclaimed interest passes as though the <b>disclaimant predeceased</b> the decedent.	
a.	<b>Statutory requirements for disclaimer</b>	<b>\$151</b>
	For tax advantages, a disclaimer must satisfy the federal gift tax statute governing disclaimer. Most importantly, the disclaimer must be: (i) in <b>writing</b> ; (ii) <b>irrevocable</b> ; and (iii) <b>filed within nine months</b> after the decedent's death or the beneficiary's 21st birthday. Additionally, state disclaimer statutes must be satisfied.	
2.	<b>Interests that May Be Disclaimed</b>	<b>\$155</b>
	Testamentary gifts and intestate shares may be validly disclaimed. In many states, life insurance and employee benefit proceeds, trust interests, survivorship tenancies, life estates (in which case, the future interests are accelerated), and future interests may be disclaimed. The disclaimer may be <b>partial or total</b> .	
3.	<b>Disclaimer by Personal Representative or Guardian</b>	<b>\$166</b>
	Most states allow a disclaimer to be filed by a personal representative or guardian on behalf of a minor, deceased, or incompetent beneficiary with <b>court approval</b> .	
4.	<b>Estoppel</b>	<b>\$168</b>
	A beneficiary or heir is estopped from disclaiming an interest after having " <b>accepted</b> " the property or any of its benefits.	
5.	<b>Creditors' Claims</b>	<b>\$169</b>
	A majority of states allow an heir or beneficiary to disclaim in order to defeat the claims of creditors.	
6.	<b>Public Assistance</b>	<b>\$171</b>
	Courts have not allowed an applicant for public assistance to disclaim so as to stay eligible for the assistance program.	
7.	<b>Disclaimer Cannot Defeat Federal Tax Lien</b>	<b>\$172</b>
	A disclaimer cannot defeat a federal tax lien which, immediately upon a person's death, attaches to the right to inherit.	

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#### D. SLAYER OF THE DECEDENT

1.	<b>Common Law</b>	<b>\$173</b>
	The <b>majority</b> of cases hold that one who wrongfully brings about the death of a decedent <b>forfeits</b> any interest in the decedent's estate.	
2.	<b>Statutory Solutions</b>	<b>\$177</b>
	State statutes governing a killer's right to inherit vary (e.g., some require a conviction for the statute to apply; others do not). Under the UPC and in many states, even if the killer was found not guilty of murder, the court can determine that the killing was intentional by a <b>preponderance of the evidence</b> .	
3.	<b>Forms of Dispositions Affected</b>	<b>\$185</b>
	Forfeiture occurs where a killer is to "take" under a decedent's <b>will or life insurance policy</b> . In most states and under the UPC, <b>survivorship estates</b> between the victim and killer are <b>severed</b> .	

4. **Conviction of Felony—Corruption of Blood** §189  
Modern law has virtually eliminated the common law rule that a felon's real and personal property escheats to the state. The felon is treated as if he predeceased the victim.

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- E. **ALIENS** §191  
Contrary to common law, nearly all states give aliens an **unrestricted right** to inherit or hold title to real or personal property within the state.

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V. **RESTRICTIONS ON THE POWER OF TESTATION—PROTECTION OF THE FAMILY**

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A. **PROTECTION OF THE SPOUSE**

1. **Common Law** §198  
A surviving spouse's **only** right in a decedent's estate was dower (for a widow) or curtesy (for a widower). A decedent's estate escheated to the Crown if he was survived by a spouse but no kindred.
- a. **Dower** §199  
Upon the husband's death, the widow was entitled to a **life estate** in an **undivided one-third** of all real property owned by the husband before marriage or acquired during marriage.
- b. **Curtsey** §201  
Upon a wife's death, the husband received a **life estate** in **all** of the real property of which the wife was seized during marriage. However, curtesy rights arose **only if** issue were born of the marriage.
- c. **Dower and curtesy as limitations** §202  
Dower and curtesy rights could be asserted regardless of the decedent's will. Also, lifetime transfers (e.g., sale to a bona fide purchaser) were **ineffective** to limit dower or curtesy rights (unless the spouse had joined in the conveyance). The spouse's interest also superseded claims of the decedent's creditors.
- d. **Modern status** §204  
Although most states have replaced dower and curtesy with elective share statutes, these common law estates still exist in a few states.
2. **Elective Share Statutes**
- a. **In general** §206  
Most jurisdictions have enacted statutes that allow the surviving spouse to elect a statutory share of the decedent's estate **in lieu of taking under the will**. In most states, this statutory share may be claimed regardless of the will's provisions.
- (1) **As limitation on lifetime and nonprobate transfers** §208  
Several elective share statutes apply only to property owned by the decedent at death (**probate** estate); thus, a lifetime transfer **may** cut off a surviving spouse's statutory share with respect to that property. However, some courts have widened the scope of the

elective share right to include certain lifetime transfers; *i.e.*, the elective share applies to the **augmented** estate.

(2) **Community property states**

§209

Because the community property system has an inherent protection against disinheritance of spouses, none of the community property states has an elective share statute. However, the quasi-community property statutes found in four states are a form of elective share statute.

b. **Amount of elective share**

§211

In many states and under the original UPC, the elective share amount is **one-third** of the net estate regardless of whether the decedent was survived by descendants. Some states provide a different amount if the decedent was survived by descendants. Also, the original UPC and most states do not take into account the length of the marriage in determining the share. Under the revised UPC, the amount of the elective share depends on the number of years that the couple was married.

(1) **Revised UPC**

§212

Under the **original UPC**, the elective share applies to the decedent's **augmented estate**, which comprises the decedent's probate estate plus certain nonprobate transfers made during the decedent's lifetime. The revised UPC approach differs radically from the original UPC. Under the **revised UPC**, the augmented estate also includes the **couple's combined assets**, including those of the surviving spouse. The revised UPC assures the surviving spouse a **minimum** elective share.

c. **Property subject to elective share**

§217

In some states, the elective share applies to the **net probate estate** after payment of administration expenses, creditors' claims, and after satisfaction of the family allowance, homestead right, and any exempt personal property set-aside for the surviving spouse. In other states, the elective share applies to the **augmented estate** (see *supra*).

(1) **Situs rule**

§218

The situs rule limits the elective share of **real property** to that located within the state; a few states include the value of real property located in another state. The elective share applies to **all** of the decedent's **personal property** wherever located.

(2) **Settlement agreement with former spouse**

§221

In some states, a former spouse's right to accrued and unpaid alimony payments or a right secured by a property settlement agreement takes precedence over the surviving spouse's elective share. Other states hold that the surviving spouse's rights are superior.

(3) **Property subject to contractual will**

§224

In most states, property received by the decedent from a former spouse under a contractual will, giving the decedent full use of the