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## PROPOSED LEGISLATION AMENDING THE INTESTATE SUCCESSION LAWS OF NEW JERSEY

### 1. INTRODUCTION

There were 220,830 deaths of New Jersey residents during a five year period, 1934-1938 inclusive, according to the annual reports of the State Department of Health. The reports of the Surrogates of New Jersey on file in the office of the Secretary of State show that there were 44,249 wills probated and 30,044 letters of administration granted during the same period. This evidence indicates that out of every 100 persons who die annually in New Jersey, there are approximately 66 who leave no property to be reported to the probate courts. The records of the Surrogates disclose that out of the remaining 34, approximately 14 die intestate, and 20 leave wills providing for the distribution of their property.

PERCENTAGES OF TESTACIES AND INTESTACIES  
AMONG RESIDENT DECEDENTS IN NEW JERSEY  
FROM 1934-1938, INCLUSIVE

Counties	Number of Resident Deaths	Wills Probated	Letters of Administration Granted	Wills	Percentages Adminis- trations	Balance
Atlantic	8,744	1,541	1,040	.176	.119	.705
Bergen	17,741	4,424	2,379	.249	.134	.617
Burlington	5,766	1,258	664	.218	.115	.667
Camden	14,592	2,620	1,470	.179	.101	.720
Cape May	2,239	620	217	.277	.097	.626
Cumberland	4,537	934	553	.206	.122	.672
Essex	44,640	8,874	5,893	.199	.132	.669
Gloucester	4,297	935	403	.217	.094	.689

Counties	Number of Resident Deaths	Wills Probated	Letters of Administration Granted	Percentages		
				Wills	Adminis- tration	Balance
Hudson	34,806	5,115	5,290	.147	.152	.701
Hunterdon	2,514	817	369	.325	.147	.528
Mercer	10,399	1,846	1,383	.178	.133	.689
Middlesex	10,067	1,796	1,741	.178	.173	.649
Monmouth	10,437	2,465	1,310	.236	.126	.638
Morris	6,514	1,691	840	.260	.129	.611
Ocean	2,644	613	522	.232	.197	.571
Passaic	14,913	2,695	2,133	.181	.143	.676
Salem	2,307	477	275	.207	.119	.674
Somerset	3,550	920	498	.259	.140	.601
Sussex	1,891	509	272	.269	.144	.587
Union	15,065	3,353	2,346	.222	.156	.622
Warren	3,167	746	446	.235	.141	.624
	220,830	44,249	30,044	.200	.136	.664

About two-thirds of the decedents leave no estates to be reported to the probate courts. This number is not necessarily identical with the number of persons who die penniless, because many persons dispose of their property by giving it away during their lifetime, or they use numerous survivorship and trust devices which operate automatically at their death; such as, estates by the entirety in real property, joint accounts with survivorship provisions in the case of personal property, and trust arrangements for the benefit of relatives and dependents. Of course, it is well known that there are few estates among persons dying under 21, and an average of more than 10 of each 100 resident deaths are minors.

In the absence of one of the above devices or a will, the property of a decedent is distributed according to the intestate succession laws of New Jersey. The intestacy statutes of a state should coincide with the probable wishes of the majority of the people who die having made no testamentary disposition of their property. In New Jersey these statutes affect 40 per cent of the persons who die owning an interest in property that does not cease at death, and the writer is of the

opinion that New Jersey should revamp its laws, relative to intestacy in accordance with the general plan of the New York and Pennsylvania statutes.

The economic and social life of New Jersey is very closely tied up with that of New York and Pennsylvania, and, therefore, the experience of those states should be considered when any improvements in the laws of New Jersey are contemplated. More than 70 per cent of all the people in New Jersey live in ten counties which constitute one contiguous area from New York City to Philadelphia.<sup>1</sup> This area also has the greatest "commuting population" in the United States, and the suburbs adjacent to New York and Philadelphia are growing.

The original source of the law of descent and distribution of all three states was the law of England. However, in 1925 England fundamentally changed the law pertaining to the descent and distribution of property,<sup>2</sup> and Pennsylvania passed the Intestate Act of 1917,<sup>3</sup> which abolished dower and curtesy, but gave a substantial share of the decedent's estate outright to the surviving spouse; and also removed all distinctions between real and personal property and between ancestral and non-ancestral property in disposing of the estate. New York in 1929 enacted the Decedent Estate Law which completely revised and modernized the laws of intestate succession of New York.<sup>4</sup> The general effect of the new legislation was to recognize the decreased importance of real estate and the increased importance of personal property in modern life and to cause both kinds of property to pass to the same classes of beneficiaries on the death intestate of the owner; to abolish curtesy and dower in property acquired after August

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1. (1939) *New Industrial Digest of New Jersey*, The New Jersey Council, Trenton, N. J.

2. Administration of Estates Act, 15 Geo. V., c. 23 (1925).

3. P. L. 1917, 419; Pa. Stat. (West, 1920) Sections 8342-8396.

4. N. Y. Laws of 1929, Chapter 229; Sections 1-123 of the New York Decedent Estate Law. Throughout this study the Law of New York will be referred to as N. Y. D. E. L., and the particular section referred to will be given.

31, 1930, and to assure to a surviving spouse financial provision from the estate of the predeceasing spouse, regardless of whatever the will of the latter may provide; and it increased the authority and power of a representative of a decedent over the real property of the latter. It also concentrated the estate in the nearer and more dependent relatives. New Jersey still retains, subject to statutory modifications, dower and curtesy,<sup>5</sup> and it still has separate statutes of descent and distribution for real and personal property.<sup>6</sup> New Jersey also maintains the distinction between ancestral and non-ancestral property with reference to the inheritance of real property by parents and collateral relations.<sup>7</sup> There is no discrimination against half bloods in the distribution of personalty in New Jersey while there is discrimination against them in the descent of land.<sup>8</sup> New York permits relatives of the half blood to take equally with those of the whole blood in the same degree and the representatives of such relatives take in the same manner as the representatives of the whole blood.<sup>8a</sup>

At this time proposed amendments to the New Jersey Statutes will be submitted and reference will be made specifically to some of the provisions of the present Laws.

## II. PROPOSED AMENDMENTS TO THE NEW JERSEY STATUTES

### A. *Abolition of Dower and Curtesy*

**Section I. THE ESTATES OF CURTESY AND DOWER ARE HEREBY ABOLISHED. THE SURVIVING SPOUSE IN CASE OF INTESTACY SHALL HAVE AS AN HEIR THAT SHARE IN THE WHOLE ESTATE OF THE DE-**

5. New Jersey Revised Statutes of 1937, Title 3:3-15; 3:37-1; 3:37-2; 3:37-3. The references to New Jersey Statutes in this study will be found in the New Jersey Revised Statutes of 1937, published by the State of New Jersey and the following abbreviation will be used: R. S., 1937.

6. R. S., 1937, 3:3 and 3:5.

7. R. S., 1937, 3:3-7; 3:3-8; 3:3-6.

8. R. S., 1937, 3:3-5; 3:3-7; 3:3-8.

8a. N. Y. D. E. L., section 83.

**CEASED WHICH IS PROVIDED IN SECTION 4 OF THIS STATUTE.**

In 1927 the New Jersey legislature increased the widow's dower from a life estate in one-third to a life estate in one-half the land in which the husband had a legal or equitable estate of inheritance during coverture unless the widow had properly released by deed.<sup>9</sup> The legislature in 1927 also reduced curtesy from a life estate in all the lands to a life estate in one-half the lands in which the wife had a legal or equitable estate of inheritance and the common law requirement that issue be born alive was abolished.<sup>10</sup> At common law and until 1929, when the above enactment took effect, four things were essential in order for an estate by curtesy to vest in a husband. They were: a valid and legal marriage; actual seizen by the wife; issue, born alive, capable of inheriting from the mother; and the death of the wife in the life time of the husband.<sup>11</sup> The 1927 statute made the estates of dower and curtesy equal. Curtesy has been abolished in New York.<sup>12</sup> Dower, with a single exception, has been abolished in New York State. Where the parties intermarried prior to September 1, 1930, the widow is still endowed with a life estate in one-third of all the realty whereof her husband was, prior to that date but during the time of the marriage, seized of an estate of inheritance. In all other cases dower is abolished after August 31, 1930.<sup>13</sup> The widow's loss of dower, however, is amply compensated for by the other and more substantial provisions now made for her benefit under the Decedent Estate Law. It should be noted that a widow entitled to dower must elect between her dower and the pecuniary provisions made for her

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9. P. L. 1927, p. 124, section 1; R. S., 1937, 3:37-1.

10. P. L. 1927, p. 128, section 1; R. S., 1937, 3:37-2.

11. 2 Bl. Comm., 127-128.

12. N. Y. Laws of 1929, chap. 229; section 189 of Real Property Law of N. Y.

13. N. Y. Laws of 1929, chap. 229; section 190 of Real Property Law of N. Y.; N. Y. D. E. L., sections 18 and 83.

benefit by section 18 of the New York Decedent Estate Law, or the absolute share in fee in her husband's realty now given her under section 83 of the same law. She cannot claim both.

In several states dower has been abolished and other provisions have been made in favor of wives in lieu thereof. Such statutes have been held constitutional though abolishing inchoate rights of dower then existing.<sup>14</sup> The effect of the Married Woman's Act<sup>15</sup> in New Jersey was to reduce curtesy initiate from a life estate in the husband to an inchoate interest similar to inchoate dower. The Chancery Court of New Jersey has held that the statutes of 1927 which equalized dower and curtesy<sup>16</sup> in New Jersey apply only where the decedent became seized after the effective dates of the statutes,<sup>17</sup> because otherwise a vested curtesy interest would be reduced<sup>18</sup> or an encumbrance would be added to an already vested fee.<sup>19</sup> The writer has found no case in which the Court of Errors and Appeals of New Jersey has passed upon this point. The decisions of the New Jersey Chancery Court indicate that the proposed statute will only progressively abolish inchoate dower and curtesy and that it will have no retroactive effect. How-

14. WALSH, LAW OF PROPERTY, Second Edition, at pages 186 and 187.

15. R. S., 1937, 37:2-12; Rev. 1877, pp. 636, 637, sections 1 to 3; Bucci v. Popovich, 93 N.J.Eq. 121, 115 Atl. 95 (Ch. 1921); WALSH, THE LAW OF PROPERTY, Second Edition, page 220; The American Jurisprudence, vol. 15, section 6.

16. P. L. 1927, ch. 68, p. 124; P. L. 1927, ch. 71, p. 128, amended P. L. 1928, ch. 209, p. 380. The effective date of the dower statute was December 31, 1928, and the curtesy statute took effect January 1, 1929.

17. Stabel v. Gertel, 11 N.J.Misc. 247, 165 Atl. 876 (S. C., 1933); Riley v. Riley, 107 N.J.Eq. 372, 152 Atl. 665 (Ch. 1930).

18. Walker v. Bennett, 107 N.J.Eq. 151, 152 Atl. 9 (Ch. 1930); Doremus v. Paterson, 69 N.J.Eq. 188, 57 Atl. 548 (Ch. 1905), *aff'd*, 69 N.J.Eq. 775, 61 Atl. 396 (E. & A. 1905); Hackensack Trust Co. v. Tracy, 86 N.J.Eq. 301, 99 Atl. 846 (Ch. 1917); Mullen v. Mullen, 98 N.J.Eq. 90, 129 Atl. 749 (Ch. 1925); Reese v. Stires, 87 N.J.Eq. 32, 103 Atl. 679 (Ch. 1917); Bucci v. Popovich, 93 N.J.Eq. 511, 116 Atl. 923 (E. & A. 1922); Wheeler v. Kirtland, 27 N.J.Eq. 534 (E. & A. 1875); *In re* Alexander, 53 N.J.Eq. 96, 30 Atl. 817 (Ch. 1894); Weaver v. Patterson, 92 N.J.Eq. 170, 111 Atl. 506 (Ch. 1920).

19. Gerhardt v. Sullivan, 107 N.J.Eq. 374, 152 Atl. 663 (Ch. 1930).

ever, it should be given effect whenever no vested rights can be shown before its passage.

The average layman thinks that the surviving spouse acquires outright in fee simple a one-half interest of the deceased spouse's real estate, but she actually gets, during her lifetime only, one-half of the income.

Very often the husband may die intestate leaving as the sole asset of his estate the home place. If the property is not held as an estate by the entirety, the widow will be entitled only to dower in the property while the fee therein will descend to the children.

There is no law in New Jersey that requires a husband to consult his wife in the disposition of his personal property, regardless of its value, yet if he wishes to convey free from his wife's dower right a vacant lot worth \$50 he must consult his wife and secure her signature to the deed.

*B. Abolition of Present Canons of Descent and Statutes of Distribution.*

**Section 2. ALL STATUTES OF DESCENT AND COMMON LAW CANONS OF DESCENT OF REAL PROPERTY AND THE STATUTE OF DISTRIBUTION OF PERSONAL PROPERTY, IN SO FAR AS THEY ARE INCONSISTENT WITH THIS ACT, ARE HEREBY ABOLISHED AND REPEALED.**

The purpose of this section is to abolish the two separate statutes regulating the descent of real property<sup>20</sup> and the distribution of personalty of New Jersey,<sup>21</sup> and to clear the way for the adoption of one uniform system of rules governing the devolution of an intestate's property. This would bring to the law of New Jersey an improvement already made by New York<sup>22</sup> and Pennsylvania.<sup>23</sup>

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20. R. S. 1937, 3:3.

21. R. S. 1937, 3:5.

22. N. Y. D. E. L., section 81.

23. P. L. of 1917, 419; Pa. Stat. (West, 1920) sections 8342-8396.

The retention of the two distinct systems at the present time is purely arbitrary and productive of inequality in the settlement of an estate. The distinction came to us as a part of our heritage from England. But England in 1925<sup>24</sup> passed a law which provides that both realty and personalty shall pass to the same persons. The nature of the property owned by a person at his death is a matter of pure accident. An illustration of this is as follows: When there are no descendents, real estate acquired before marriage or acquired by descent after marriage by a deceased spouse passes to brothers and sisters in New Jersey<sup>25</sup> and the surviving spouse gets a dower or curtesy right. If the property was encumbered by a mortgage which was paid off, it would enhance the interest of the brothers and sisters to a large extent, but the dower or curtesy interest only slightly. However, if the deceased had deposited his savings in a bank account and had not cancelled the mortgage the surviving spouse would take all of the money in the account.<sup>26</sup> It seems illogical that the right of inheritance of the spouse or by the brother and sister should depend upon the nature of the property left. If all property is treated alike, then the persons to take would count their rights in terms of valuation rather than according to the accidental circumstances of being an heir to one class of property or another.

Under the present law of New Jersey title to real property vests immediately in the heirs<sup>27</sup> whereas only the surplus

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24. Administration of Estates Act, 15 Geo. V, c. 23 (1925).

25. R. S. 1937, 3:3-5; 3:3-4: "When a married person dies seized of real estate in his own right in fee simple without devising the same in due form of law, and leaves no lawful issue, but leaves a spouse, such spouse shall take an entire fee simple of all such real estate purchased by decedent during coverture. *Kicey v. Kicey*, 114 N.J.Eq. 116, 168 Atl. 424 (E. & A. 1934); *Stable v. Gertel*, 111 N.J.L. 296, 168 Atl. 645 (E. & A. 1933): "If the decedent dies after the passage of the act, it matters not that the title to the land was acquired prior thereto." "Purchased" is used in the Descent Act in a technical sense of acquisition of title in any other way than by descent.

26. R.S. 1937, 3:5-3.

of the personal property which remains after the payment of debts, funeral charges and just expenses is distributed by the personal representative.<sup>28</sup> This distinction presents an interesting problem when equitable conversion occurs. By the doctrine of equitable conversion realty is considered personalty and personalty is considered realty for purposes of devolution on the death of its owner. It is an exception to the general rule that property is transmitted as realty or personalty according to the form in which it exists at the owner's death. It is a fiction built upon the presumed intention of the decedent had he thought of the matter. Equity regards title to real property as having passed to the vendee from the time the contract is made, although payment and delivery of the deed are postponed. Equity regards the land as already a part of the vendee's realty, so that if he dies, his heir can compel his legal representative to pay for it out of the personalty, and the deed from the vendor will be made to the heir; it regards the unpaid purchase price as a part of the vendor's personalty, and the money, when paid, will go to the vendor's legal representative in case the vendor dies. These questions are important in New Jersey where the rules of descent are different from the rules for distribution.<sup>29</sup>

The game of chance produced by the distinction in New Jersey between the law of descent of land and the distribution of personalty is made active in many situations. There is no discrimination against half bloods in the distribution of personalty,<sup>30</sup> while there is against them in the descent of land.<sup>31</sup>

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27. R. S. 1937, 3:3.

28. R. S. 1937, 3:5.

29. *Haughwout v. Murphy*, 22 N.J. Eq. 531 (E. & A. 1871); *Stockfleth v. Britten*, 105 N.J. Eq. 3, 146 Atl. 583 (Ch. 1929); *Maddock v. Astbury*, 32 N.J. Eq. 181 (Ch. 1880); *Keep v. Miller*, 42 N.J. Eq. 100, 6 Atl. 495 (Ch. 1886); *McCormick v. Stephany*, 57 N.J. Eq. 257, 41 Atl. 840 (Ch. 1898); *First National Bank of Woodbury v. Scott*, 109 N.J. Eq. 244, 156 Atl. 836 (Ch. 1931); *Roy v. Monroe*, 47 N.J. Eq. 356, 20 Atl. 481 (Ch. 1890).

30. R. S. 1937, 3:5-4; 3:5-6.

31. R. S. 1937, 3:3-5; 3:3-7; 3:3-8.

Grandparents may take shares in the personal estate of an intestate,<sup>32</sup> but may not inherit his real property.<sup>33</sup> Parents share with brothers and sisters and their issue in the distribution of personalty,<sup>34</sup> while brothers and sisters and their issue take real property to the total exclusion of parents.<sup>35</sup> The surviving spouse takes all in the default of descendants in the distribution of personalty,<sup>36</sup> but only to a limited extent on the descent of land, if the land was acquired prior to marriage or by descent after marriage.<sup>37</sup> The doctrine of ancestral estates applies to realty<sup>38</sup> but it does not apply to personalty.<sup>39</sup> The descent statute does not permit representation among remote collaterals<sup>40</sup> but representation is unlimited among remote next of kin in the distribution statute.<sup>41</sup>

*C. Abolition of Distinctions between Real and Personal Property, between Ancestral and Non-Ancestral Property and between Relations of the Whole Blood and those of the Half Blood.*

**Section 3. IN INTESTATE SUCCESSION THERE SHALL BE NO DISTINCTION BETWEEN REAL AND PERSONAL PROPERTY, OR BETWEEN ANCESTRAL AND NON-ANCESTRAL PROPERTY. AND IN THE DEVOLUTION OF PROPERTY THERE SHALL BE NO DISTINCTION BETWEEN RELATIONS OF THE WHOLE BLOOD AND THOSE OF THE HALF BLOOD IN ANY CASE.**

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32. R. S. 1937, 3:5-6.

33. *Bray v. Taylor*, 36 N.J.L. 415 (E. & A. 1872). The common law rule has not been changed by statute.

34. R. S. 1937, 3:5-4.

35. R. S. 1937, 3:3-5; 3:3-6.

36. R. S. 1937, 3:5-3.

37. R. S. 1937, 3:37-1; 3:37-2; 3:3-4.

38. R. S. 1937, 3:3.

39. R. S. 1937, 3:5.

40. R. S. 1937, 3:3-5; 3:3-7; 3:3-8.

41. R. S. 1937, 3:5-6.

As previously indicated, New Jersey still retains in her intestacy laws extensive provisions regarding ancestral realty and also discriminates against the half bloods in the descent of land. The proposed statute would eliminate these ancestral estate laws and abolish the distinction between relations of the whole blood and those of the half blood. The effect of the law would be to cause all property to pass according to one common rule whatever its character and from whatever source derived. New York<sup>42</sup> and Pennsylvania<sup>43</sup> distribute realty and personalty without regard to the source of the intestate's title and the kindred of the half blood take equally with those of the whole blood of the same degree of consanguinity.

The doctrine of ancestral estates begins with parents in the New Jersey Descent Statute and continues through the inheritance by brothers and sisters of the half blood and the more remote relatives of the decedent.<sup>44</sup> This doctrine applies when an inheritance of real property came to the decedent by descent, devise, or gift from an ancestor of the decedent, in which case all those not of the blood of such ancestor shall be excluded from such inheritance. There is no exclusion unless there is a person in being, although more remote, of the blood or half blood of such ancestor capable of inheriting said real estate. It does not apply where property was acquired through purchase. The word "ancestor" refers to the immediate person from whom the intestate derived his title and hence when the ancestor is the father of the intestate, only the paternal collaterals may take the property, but when the ancestor is the brother of the intestate both paternal and maternal collaterals inherit since both classes are of the blood of the brother.<sup>45</sup> When the ancestor is the survivor of tenants by

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42. N. Y. D. E. L., sections 81, 83.

43. Pa. Stat. Ann. (Purdon 1930), c. 20, sections 62, 75.

44. R. S. 1937, 3:3-6; 3:3-7; 3:3-8.

45. *Wills v. Le Munyon*, 90 N.J.Eq. 353, 107 Atl. 159 (Ch. 1919). In this

the entirety and the heirs of the intestate must be determined among collaterals, the fee goes to the nearest collateral of the blood of the survivor.<sup>46</sup> In a case where the mother is the ancestor, the maternal grandmother of the intestate may not inherit, even though the grandmother is only two degrees removed from the intestate because the common law does not permit inheritance by ascendants.<sup>47</sup> Where the statute does not control the descent, the common law applies. If the intestate inherited from his maternal grandfather as a *per stirpes* representative of his mother, then the father of the intestate may not inherit.<sup>48</sup>

Only in the case of spouses<sup>49</sup> and adopted children<sup>50</sup> has the legislature of New Jersey broken from the common law principle that land in its devolution on intestacy follows the blood.

It is quite evident that the half bloods have been neglected when you compare their position in the line of descent of land with the position of the adopted and illegitimate children. An illegitimate is considered as a brother or sister of every other child of his mother, whether the other child is legitimate or illegitimate. The mother of an illegitimate child, her heirs and next of kin, the maternal grandparents of such child and the illegitimate child and its heirs and next of kin inherit from each other in the same manner and to the same extent as if the child was born in lawful wedlock.<sup>51</sup> The children by adoption and by birth inherit from and through each other

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case it was held that where a person inherited a tract of land, one-half from his father and one-half from his brother, and dies intestate, both his maternal and paternal uncles share in the one-half part inherited from the intestate's brother, but the paternal uncles only in the part inherited from his father.

46. *Daly v. Connolly*, 10 N.J.Misc. 407, 159 Atl. 314 (S. Ct. 1932).

47. *Bray v. Taylor*, 36 N.J.L. 415, (E. & A. 1872).

48. *Banta v. Demarest*, 24 N.J.L. 431 (S. Ct. 1834); *Haring v. Van Buskirk*, 8 N.J.Eq. 545 (Pre. 1851); *Post v. Rivers*, 40 N.J.Eq. 21 (Ch. 1885).

49. R. S. 1937, 3:3-4; 3:3-9.

50. R. S. 1937, 9:3-9; 9:3-10.

51. R. S. 1937, 3:3-10.

as if all had been lawful natural children of the same parents<sup>52</sup> and adopted adults acquire the same status, in point of inheritance, as adopted children.<sup>53</sup> The case of a brother or sister of the half blood should be as strong in the inheritance of land as that of the adopted or illegitimate, yet the half blood has less chance of inheriting because they come behind the father or mother in the line of inheritance, whereas the adopted persons come before the parents, and the illegitimate come before the mother.

*D. A New Statute of Descent and Distribution for New Jersey*

**Section 4. DESCENT AND DISTRIBUTION**

**THE REALTY OF A DECEASED, MALE OR FEMALE, NOT DEVISED, DESCENDS, AND THE SURPLUS OF HIS OR HER PERSONALTY AFTER PAYMENT OF DEBTS, FUNERAL CHARGES, AND JUST EXPENSES IS DISTRIBUTED AS FOLLOWS:**

**A. WHERE THE INTESTATE LEAVES A SURVIVING SPOUSE, IRRESPECTIVE OF WHETHER THERE BE ISSUE OR NOT, THE SURVIVING SPOUSE TAKES ALL PERSONAL CHATTELS AND A SUM OF \$5,000, ABSOLUTELY WITH INTEREST AT 5 PER CENT PER ANNUM FROM THE DATE OF DEATH TILL PAYMENT OR APPROPRIATION.**

**B. SUBJECT TO THE PROVISION FOR THE SURVIVING SPOUSE IN DIVISION A. THE ESTATE OF AN INTESTATE IS FURTHER DISTRIBUTED AS FOLLOWS:**

**(1) ONE-THIRD TO THE SURVIVING SPOUSE AND THE RESIDUE IN EQUAL PORTIONS TO THE CHILDREN, OR THEIR DESCENDANTS, PER STIRPES, IF ANY HAVE DIED BEFORE THE DECEASED.**

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52. R. S. 1937, 9:3-9; 9:3-10.

53. R. S. 1937, 9:3-9; 9:3-10.

(2) IF THERE BE NO SURVIVING SPOUSE, TO THE CHILDREN OF SUCH INTESTATE OR THEIR LINEAL DESCENDANTS, PER STIRPES.

(3) IF THERE BE NO CHILDREN OR LINEAL DESCENDANTS, ONE-HALF TO THE SURVIVING SPOUSE AND ONE-HALF TO THE PARENTS OF THE INTESTATE, EQUALLY, OR THE SURVIVING PARENT.

(4) IF THERE BE SURVIVING A SPOUSE AND A BROTHER OR SISTER, NEPHEW OR NIECE, BUT NO CHILDREN OR THEIR LINEAL DESCENDANTS AND NO SURVIVING PARENTS, THE SURVIVING SPOUSE TAKES AN ADDITIONAL \$5,000, AND ONE-HALF THE RESIDUE, AND THE BALANCE IS DISTRIBUTED AMONG THE BROTHERS AND SISTERS AND THEIR REPRESENTATIVES.

(5) IF THERE BE NO CHILDREN OR LINEAL DESCENDANTS, NO PARENTS, NO BROTHER OR SISTER, NO NEPHEW OR NIECE, THE SURVIVING SPOUSE TAKES THE WHOLE.

(6) IF THERE BE NO SURVIVING SPOUSE AND NO CHILDREN OR LINEAL DESCENDANTS, TO THE PARENTS OF THE INTESTATE EQUALLY, OR THE SURVIVOR OF SUCH PARENTS.

(7) IF THERE BE NO SURVIVING SPOUSE, NO CHILDREN OR THEIR LINEAL DESCENDANTS, AND NO SURVIVING PARENT, TO THE BROTHERS AND SISTERS OF THE INTESTATE, OR THEIR LINEAL DESCENDANTS, PER STIRPES.

(8) IF THERE BE NO PERSONS OF THE CLASSES CONTAINED IN THE PRECEDING SUBDIVISIONS, THEN TO THE NEXT OF KIN, IN EQUAL DEGREES, AS DETERMINED BY THE RULES OF THE CIVIL LAW, WITHOUT REPRESENTATION.

(9) THERE SHALL BE NO RIGHT OF REPRESENTATION.

TATION AMONG LINEAL OR COLLATERAL KINDRED OF AN EQUAL DEGREE OF CONSANGUINITY, SUCH KINDRED IN ALL CASES BEING REQUIRED TO TAKE PER CAPITA. AMONG COLLATERAL KINDRED THERE SHALL BE NO RIGHT OF REPRESENTATION AMONG THOSE FURTHER REMOVED THAN DESCENDANTS OF BROTHERS AND SISTERS.

(10) RELATIVES OF THE HALF BLOOD TAKE EQUALLY WITH THOSE OF THE WHOLE BLOOD IN THE SAME DEGREE AND THE REPRESENTATIVES OF SUCH RELATIVES TAKE IN THE SAME MANNER AS THE REPRESENTATIVES OF THE WHOLE BLOOD.

(11) DESCENDANTS OF THE DECEASED, BEGOTTEN BEFORE HIS DEATH BUT BORN THEREAFTER, TAKE IN THE SAME MANNER AS IF THEY HAD BEEN BORN DURING THE LIFETIME OF THE DECEASED AND HAD SURVIVED HIM.

(12) THE MOTHER OF AN ILLEGITIMATE CHILD, HER HEIRS AND NEXT OF KIN, THE MATERNAL GRANDFATHER AND GRANDMOTHER OF SUCH CHILD AND THE ILLEGITIMATE CHILD, ITS HEIRS AND NEXT OF KIN, SHALL HAVE CAPACITY TO TAKE REAL AND PERSONAL PROPERTY FROM EACH OTHER AS NEXT OF KIN UNDER THE PROVISIONS OF THIS SECTION, IN THE SAME MANNER AND TO THE SAME EXTENT AS IF SUCH CHILD HAD BEEN BORN IN LAWFUL WEDLOCK AND EVERY ILLEGITIMATE CHILD SHALL BE CONSIDERED A BROTHER OR SISTER OF EVERY OTHER CHILD OF ITS MOTHER, LEGITIMATE OR ILLEGITIMATE.

(13) IF THE FATHER AND MOTHER OF A CHILD BORN OUT OF WEDLOCK, SUBSEQUENTLY ENTER

INTO THE BONDS OF LAWFUL WEDLOCK AND COHABIT THEREAFTER AS HUSBAND AND WIFE AND SUCH CHILD SHALL HAVE RESIDED WITH AND BEEN RECOGNIZED AND TREATED BY SUCH PARENTS AS THEIR CHILD, SUCH CHILD SHALL BE ENTITLED TO SHARE IN THE ESTATES OF SUCH FATHER AND MOTHER EQUALLY WITH CHILDREN BORN OF LAWFUL MARRIAGE OF THE INTËSTATE.

(14) THE RIGHT OF AN ADOPTED CHILD OR ADULT TO SHARE IN THE ESTATE OF HIS NATURAL AND FOSTER PARENTS, AND THE RIGHT OF SUCCESSION TO THE ESTATE OF AN ADOPTED CHILD SHALL CONTINUE AS PROVIDED IN TITLE 9, CHAPTER 3, SECTIONS 7 AND 9 OF THE NEW JERSEY REVISED STATUTES OF 1937.<sup>54</sup>

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54. R. S. 1937, 9:3-7. " \* \* \* It shall make a decree reciting the facts at length, and the name by which the child shall hereafter be known, declaring and adjudging that, from the date of such decree, the rights, duties, privileges and relations theretofore existing between the child and his parent or parents shall be in all respects at an end *excepting the right of inheritance*; and that the rights, duties, privileges and relations between the child and his parent or parents by adoption shall thenceforth, in all respects, be the same including the right of inheritance, as if the child had been born to such adopted parent or parents in lawful wedlock, excepting only as otherwise provided in this chapter."

R. S. 1937, 9:3-9. " \* \* \* The child shall be invested with every legal right, privilege, obligation and relation in respect to education, maintenance and the rights of inheritance to real estate, or the distribution of personal estate on the death of such adopting parent or parents, as if born to them in lawful wedlock; subject, however, to the limitations and restrictions hereinafter in this section set forth.

"The adopted child shall not be capable of taking property expressly limited to the heirs of the body of the adopting parent or parents, nor property coming from the collateral kindred of such adopting parent or parents by right of representation.

"On the death of the adopting parent or parents and the subsequent death of the child so adopted, without issue and without having disposed of the property, real or personal, coming to him on the death of the adopted parent or parents during his lifetime by deed or by his last will and testament, the property of such adopting deceased parent or parents shall descend to and be distributed among

(15) IF THE DECEASED LEAVES NO RELATIVES CAPABLE OF TAKING UNDER THE FOREGOING SUBDIVISIONS, THE LAND OF AN INTESTATE ESCHEATS TO AND VESTS IN THE STATE AT THE INSTANT OF HIS DEATH,<sup>55</sup> AND THE PERSONALTY OF AN INTESTATE IS TO BE PAID TO THE MUNICIPALITY OF THE INTESTATE'S RESIDENCE FOR THE USE OF THE POOR, IF NOT CLAIMED IN SEVEN YEARS.<sup>56</sup>

(16) THE AMOUNTS OF ADVANCEMENTS MADE TO A CHILD OF AN INTESTATE DURING HIS LIFETIME ARE TO BE DEDUCTED FROM THE SHARE OF THE REALTY OR PERSONALTY OF THE INTESTATE WHICH SUCH CHILD WOULD TAKE UNDER THIS SECTION. IF THE BENEFICIARY OF SUCH ADVANCEMENT DIES IN THE LIFETIME OF THE INTESTATE, HIS DESCENDANTS SHALL, TO THE EXTENT OF THE ADVANCEMENT, BE BARRED FROM PARTICIPATION IN THE ESTATE OF THE DONOR OR GRANTOR OF THE AD-

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the next of kin of such parent or parents and not to the next of kin of the adopted child. The adopted child shall, however, have the right, during his lifetime, to dispose of any property, real or personal, coming to him from his adopted parent or parents, absolutely and in the same manner as though the same had been acquired by purchase.

"If the adopting parent or parents shall have other child or children, the children by birth and by adoption shall, respectively, inherit from and through each other, as if all had been children of the same parents born in lawful wedlock.

"Where a parent who has procured a divorce or a surviving parent, having lawful custody of a child, lawfully marries again or where an adult unmarried person who has become a foster parent and has lawful custody of a child marries, and such parent or foster parent consents that the person who thus becomes the step-father or the step-mother of such child may adopt such child, such parent or such foster parent so consenting shall not thereby be relieved of any of his or her parental duties toward or be deprived of any of his or her rights over such child, or to his property by descent or succession."

55. R. S. 1937, 2:53-1.

56. R. S. 1937, 3:5-7, 8, 9, 11.

VANCEMENT TO THE SAME EXTENT AND UPON THE SAME CONDITIONS AS WOULD THE BENEFICIARY OF THE ADVANCEMENT HAD HE SURVIVED THE DONOR.

(17) THE SHARES OF THE SURVIVING SPOUSE, AS PROVIDED IN THIS SECTION, IN THE REALTY OF A DECEASED SPOUSE ARE IN LIEU OF ANY RIGHT OF DOWER OR CURTESY ENJOYED UNDER THE PRESENT LAW OF THIS STATE.

(18) NO DISTRIBUTIVE SHARE OF THE ESTATE OF A DECEASED SPOUSE SHALL BE ALLOWED UNDER THE PROVISIONS OF THIS SECTION TO A HUSBAND WHO HAS WILFULLY NEGLECTED OR REFUSED TO PROVIDE FOR HIS WIFE OR HAS WILFULLY AND MALICIOUSLY ABANDONED HER OR TO A WIFE WHO HAS WILFULLY AND MALICIOUSLY ABANDONED HER HUSBAND.<sup>57</sup>

The general plan of the proposed statute is patterned after the intestate succession law of New York. However, when the blood of the intestate becomes extinct, the present statutes of New Jersey are followed. At this point the New York law provides for step-children and the next of kin of a deceased spouse, whereas the New Jersey law gives the personalty to the municipality in which the intestate resided, for the use of the poor, and the realty reverts to the State.

The provision giving the surviving spouse the personal chattels and the first \$5000 absolutely, was copied from the English law.<sup>58</sup> This will give the surviving spouse the entire estate in many instances. It can be presumed that in the modest and small estates the percentages of intestacies in-

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57. *In re Administrator of Runyon*, 12 N.J.L.J. 15, 16 (Orph. Ct. 1899); *Morello v. Cantalupo*, 91 N.J.Eq. 415, 111 Atl. 255 (Ch. 1920); R. S. 1937, 3:39-2; R. S. 1937, 3:39-3.

58. HALBURG'S LAW OF ENGLAND, Second Edition, Distribution and Descent, section 833; Adm. of Estates Act, 1925 (15 Geog. 5, c. 23) s. 55 (1) (x).)

crease. It is therefore reasonable that the rules of succession should be framed primarily for cases where no great amount of property is left by the decedent. The fact that the surviving spouse has the duty of supporting dependent children should be considered when distributing the estate. The present statute of distribution of New Jersey is better in this respect than the present descent act because in the latter only income is given to the surviving spouse whereas the share in the former is given outright. But a scheme of distribution giving one-third to the surviving spouse and two-thirds to the children is not a proper one in small estate, when dependency is considered. The minor children cannot give their share to the parent to help run the home, it can be touched only by court order and in small amounts. Where the estate is small this provision should help the surviving spouse keep the family together and also preserve the assets. The expense of premium on bonds to protect the childrens' shares will be greatly reduced, and there will be less delay in the distribution of the estate. And if the children are of such an age that they will no longer look to the surviving parent for support, then said parent will have reached the stage in life which would call for such a share in the property of the deceased as will most nearly insure to the parent an independent and comfortable old age.

*E. Right of Election of Surviving Spouse Against a Will*

Section 5. WHERE A TESTATOR DIES AFTER THE EFFECTIVE DATE OF THIS ACT, AND LEAVES A WILL THEREAFTER EXECUTED AND LEAVES SURVIVING A HUSBAND OR WIFE, A PERSONAL RIGHT OF ELECTION IS GIVEN TO THE SURVIVING SPOUSE TO TAKE HIS OR HER SHARE OF THE ESTATE AS IN INTESTACY. AN ELECTION MADE UNDER THIS SECTION SHALL BE IN LIEU OF ANY RIGHT OF DOWER OR CURTESY ENJOYED UNDER THE PRESENT LAW

OF THIS STATE. NO RIGHT OF ELECTION IS AVAILABLE TO A HUSBAND WHO HAS WILFULLY AND MALICIOUSLY ABANDONED OR WILFULLY NEGLECTED TO PROVIDE FOR HIS WIFE OR TO A WIFE WHO HAS WILFULLY AND MALICIOUSLY ABANDONED HER HUSBAND. THE ELECTION MUST BE MADE WITHIN SIX MONTHS FROM THE DATE OF THE ISSUANCE OF LETTERS TESTAMENTARY OR IF LETTERS TESTAMENTARY HAVE NOT BEEN ISSUED FROM THE DATE OF THE ISSUANCE OF LETTERS OF ADMINISTRATION WITH THE WILL ANNEXED, AND SHALL BE MADE BY SERVING WRITTEN NOTICE OF SUCH ELECTION UPON THE REPRESENTATIVE OF THE ESTATE AND BY FILING AND RECORDING A COPY OF SUCH NOTICE WITH PROOF OF SERVICE IN THE PROBATE COURT HAVING JURISDICTION OVER THE ESTATE.

Under dower and curtesy, if the surviving husband or wife desires to take the present cash value of income provided by the dower or curtesy right, this value will be computed on the basis of life expectancy according to mortality tables. The older the spouse is the less valuable will be the dower or curtesy right. If dower and curtesy are to be abolished, the spouse should be given a substantial portion of the estate absolutely. This provision will not affect the average will because a testator usually gives the bulk of his property to the surviving spouse, but it will remedy some exceptional cases of hardship.

The New York statute<sup>59</sup> permits the testator to leave the surviving spouse's elective share in the form of a trust for life or in the form of a legal life estate. There is danger in this system if the surviving spouse dies before the children have attained years of self-support and the testator has not

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59. N. Y. D. E. L., section 18.

provided for them. In such a case the right to receive income ceases with the death of the spouse and children are not sure of receiving the unexhausted portion. The children have a better chance of receiving something under the proposed statute where the elective share must be paid outright.

*F. Exemption for Decedent's Family.*

Section.6. IF A PERSON DIES LEAVING A WIDOW OR HUSBAND, OR A MINOR CHILD OR CHILDREN, THE FOLLOWING ARTICLES ARE NOT DEEMED ASSETS OF HIS ESTATE FOR ANY PURPOSE BUT MUST BE SET FORTH IN THE INVENTORY OF THE ESTATE AS PROPERTY SET OFF TO HIS WIDOW (OR HER HUSBAND, IN CASE OF A MARRIED WOMAN'S ESTATE) OR MINOR CHILD OR CHILDREN: (1) ALL HOUSE-KEEPING UTENSILS, MUSICAL INSTRUMENTS, FURNITURE, FUEL AND FOOD, AND CLOTHING OF THE DECEASED, IN ALL NOT EXCEEDING THE VALUE OF ONE THOUSAND DOLLARS; (2) THE FAMILY BIBLE, FAMILY PICTURES AND SCHOOL BOOKS, USED BY AND IN THE FAMILY, AND BOOKS NOT EXCEEDING FIFTY DOLLARS IN VALUE WHICH WERE KEPT AND USED AS PART OF THE FAMILY LIBRARY; (3) DOMESTIC ANIMALS WITH THEIR NECESSARY FOOD FOR SIXTY DAYS, THE FARM MACHINERY AND ONE MOTOR VEHICLE OR TRACTOR, NOT EXCEEDING FOUR HUNDRED FIFTY DOLLARS IN VALUE; (4) MONEY OR OTHER PERSONAL PROPERTY NOT EXCEEDING FIVE HUNDRED DOLLARS IN VALUE EXCEPT, HOWEVER, THAT THE ADMINISTRATOR OR OTHER REPRESENTATIVE OF THE ESTATE MAY, WHERE THERE ARE INSUFFICIENT ASSETS TO PAY THE REASONABLE FUNERAL EXPENSES OF THE DECEDENT, APPLY ANY SUCH MONEY OR OTHER PERSONAL PROPERTY TO MEET ANY DEFICIENCY IN

THE PAYMENT THEREOF. PROPERTY SO SET APART IS THE PROPERTY OF THE SURVIVING HUSBAND OR WIFE, OR OF THE MINOR CHILD OR CHILDREN, IF THERE BE NO SURVIVING HUSBAND OR WIFE. NO SUBSTITUTED ALLOWANCE MAY BE MADE IN MONEY OR THE PROPERTY UNDER SUBDIVISIONS (1), (2), (3) IF THE ARTICLES THEREIN ENUMERATED DO NOT EXIST.

Generally the debts of the deceased have priority over distribution to the heirs and next of kin. However, the law does not permit the creditors to take everything and leave the widow and children wholly destitute. The proposed statute is a copy of the New York statute<sup>60</sup> with only one change. The money or other personal property is three hundred dollars in the New York law whereas the proposed statute exempts five hundred dollars.

In a recent article in the New Jersey Law Journal it was advocated that the widow be assured a minimum for subsistence free from debts of her deceased husband and possibly free from her previous personal debts as well. The amount of \$5,000 was suggested in the article.<sup>61</sup> A part of the comment on this point is as follows: "Socially it would seem more desirable to keep a widow out of the poor house than to make the total resources of a married man the basis upon which credit should be extended to him. As creditors take into consideration the possibility of a widow's dower and state exemptions in bankruptcy, so they should be made to take into consideration her possible statutory interest in the personality of her deceased husband, when they extend credit to him."

A 1915 Act<sup>62</sup> in New Jersey gives the surviving spouse an absolute right to the whole estate of the decedent free

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60. The Surrogate's Court Act of New York, section 200.

61. Alpert, *Intestate Succession to Personality in New Jersey*, 60 N.J.L.J. 33 (1937).

62. R. S. 1937, 2:26-99.

from debts and administration, if the total value of the realty and personalty were not more than \$200. A Pennsylvania statute<sup>63</sup> permits a widow's exemption to the extent of \$500. Children forming part of the family are included under the act.

In New Jersey there is a homestead estate, created by statute,<sup>64</sup> which permits a man to hold the land he lives on, for use as a house for himself and his family free from execution on his debts, provided the land is not worth more than \$1,000. The land must be occupied by the family and may be so occupied after the man's death, for the lifetime of the widow and until the youngest son becomes 21 years old. It can be readily seen that this statute renders no protection at all under present conditions and since there has been a shift in wealth from realty to personalty, the proposed statute should be enacted for the protection of the average family.

ARTHUR D. MARKLE.

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63. 1917 Pa. P. L. 447; section 12 of the Fiduciaries Act of June 7, 1917.

64. R. S. 1937, 2:26-110; 2:26-113.