Haunting the Title from the Beyond: When is a Probate Required in Arkansas?

By

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I. The Duty to Pay the Lessor

By statute, the lessee must pay the lessor within 6 months of the date of first sales for the well unless there is unmarketable title or the amount of the royalty is less than $150.[1] Failure to pay by the 6 month mark will result in 12% interest if favor of the owner.[2] It is possible to be found to be willfully or fraudulently withholding payment, which may result in lease cancellation.[3]

The marketable title exception is the go-to shield for claims of non-payment. By statute, marketable title is to be "determined according to principles of real property governing title to oil and gas interests."[4] The rules alluded to are from case law. Marketability of a title is to be determined by the public record.[5] Marketable title is free from reasonable doubt, and "there is reasonable doubt when there is uncertainty as to some defects appearing in the course of its deduction, and the doubt must be such as affects the value of the land or that will interfere with its sale."[6]

Lastly, the lease itself may provide for more stringent terms of payment. Always make certain that any unusual terms of the lease are noted when an ownership transfer is requested.

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[1] Ark. Code Ann. §15-74-601 et. seq.
[2] *See Id.*
[3] *See Id.*
[4] *Id.* at 15-72-305.
[5] *TXO Production Corp v. Page Farms, Inc.*, 287 Ark. 304, 698 S.W.2d 791 (1985).
[6] *Griffith v. Maxfield*, 63 Ark. 548, 39 S.W. 852 (1897).

II. The Intestate Owner

A. Who is Intestate?

To begin, it is necessary to identify whether someone is, in fact, an intestate. One is generally said to be intestate when one dies without a will.[7] This, however, is an oversimplified definition of intestacy because intestacy can encompass more than just those dying without a will. In Arkansas, one is intestate for failing to probate the will within the 5 year statute of limitation,[8] not disposing of all property in the will,[9] leaving a child out of a will,[10] and as to nonresidents with valid probates in other states, they are intestate relative to their Arkansas real property until somebody conducts an ancillary probate in Arkansas.[11]

These are general statements, and there are some important finer points about the statute of limitations to probate a will to address. Prior to 1949, there was no statute of limitation for probating a will. With the passage of Act 140 of 1949, the legislature imposed a 5 year statute of limitations on all wills, both of residents and non-residents. The legislature amended the law with Act 166 of 1963, which added the provision in the current that allows probate of the wills of non-residents at any time if already done so in their home jurisdiction. Cases interpreting the effect of these statutes create irreconcilable problems. It is clear that non-residents who died between 1949 and 1963 with a valid probate in their jurisdiction but no Arkansas probate are intestate with little hope of having their final wishes respected.[12] What happens to the unprobated will of a non-resident who died prior to the 1949 statute change is less certain. There is a 1951 case that allowed, in 1950, the probate of the will of a resident that died in 1935.[13] The court held that the 1949 statute change was prospective only and that the law applicable at the time of the deceased's death (1935) applied.[14] In 1961, the court, apparently oblivious to its prior holding, held that the will of a non-resident who died in 1923 offered for probate in 1959 was subject to the 1949 statute change (that is, the law had retrospective application) because the purpose of the law change was to clear titles.[15] It is not possible to conclusively determine that someone who died prior to 1949 with an unprobated will is an intestate. The only way to know for certain is to attempt to probate the will. Most likely, if there is no party that wishes to object, the court will accept the will into probate.

B. Fundamentals of Intestate Succession

Once it is established that a person is an intestate, title passes to the intestate's heir under the applicable Table of Descents.[16] Tables of Descents are statutory declarations directing the descent of the property of the intestate. The law of intestate succession in effect at the time of

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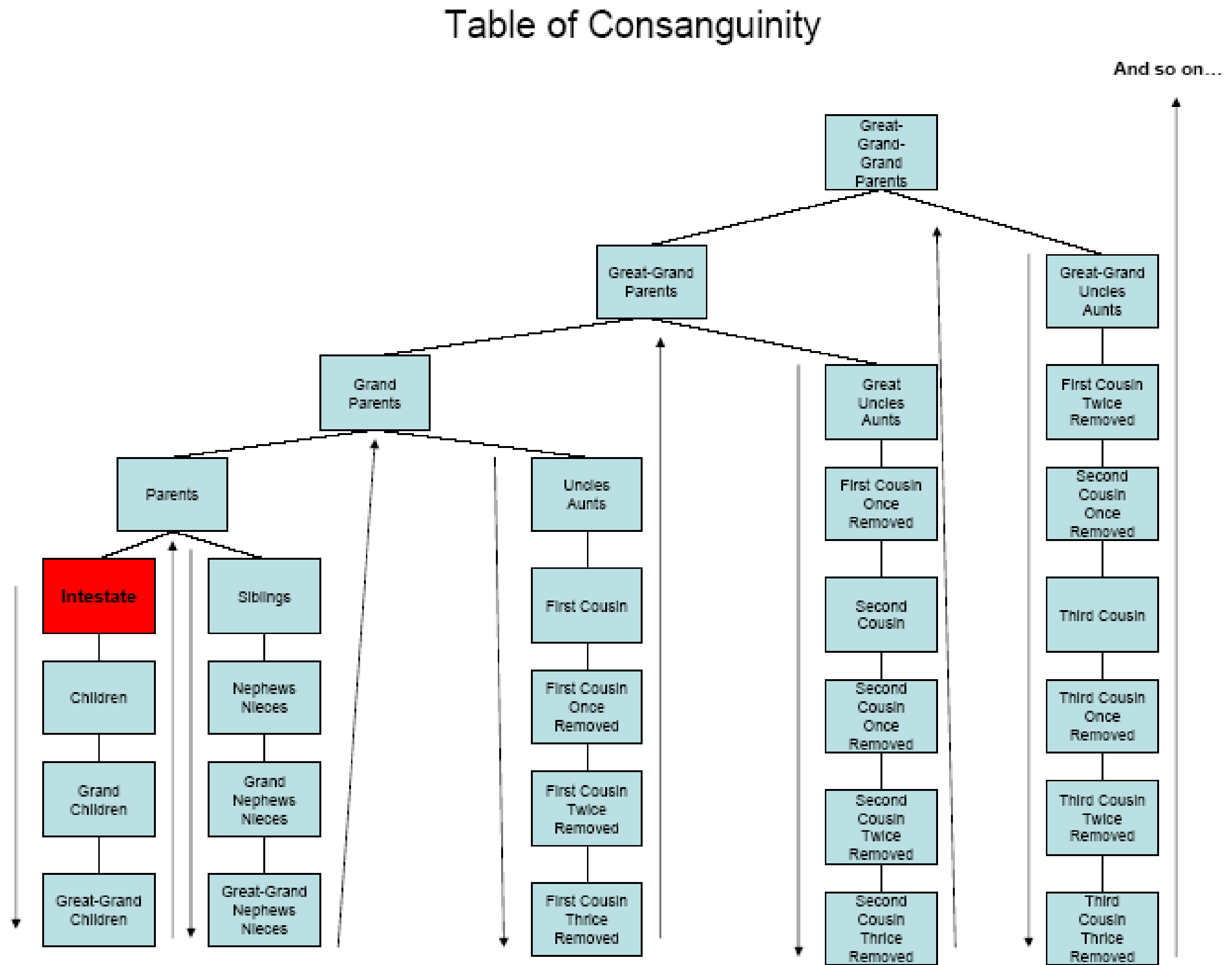
[7] BLACK'S LAW DICTIONARY 369 (2nd Pocket ed. 2001).
[8] *See* ARK. CODE ANN. § 28-40-103(a). This is applies to Arkansas residents only.
[9] *Id.* at § 28-26-103
[10] *Id.* at § 28-39-407
[11] *See Id.* at § 28-9-203(c)(1) and *Cooper v. Tosco Corporation*, 272 Ark. 294, 613 S.W.2d 831 (1981).
[12] *See Delafield v. Lewis*, 299 Ark 50, 770 S.W.2d 659 (1989).
[13] *See Hudson v. Hudson*, 219 Ark. 211, 242 S.W.2d 154 (1951).
[14] *See Sims v. Schavey*, 234 Ark. 166, 351 S.W.2d 145 (1961).
[15] *Id.*
[16] ARK. CODE ANN. § 28-9-214.

the intestate's death governs.[17] Prior to discussing Arkansas Tables of Descents, the reader should be familiar with some basic terminology and principles that guide the flow of an intestate's property through a Table of Descents.

The first concept of intestacy is consanguinity. This term is a Latin-rooted word meaning "with blood." The English usage of the word essentially means "related by blood." At common law, consanguinity was the sole means to identify an intestate's heirs. A common teaching device to understand consanguinity is the Table of Consanguinity, pictured below.



As the arrows on the table indicate, the intestate's interest will descend down the table of consanguinity to the intestate's children and their descendants, or "issue." Issue is a synonym for the intestate's children and descendants of the intestate's children.[18] Should the intestate have no issue, the interest ascends back to the intestate's parents. If the parents are deceased, the intestate's interest jumps up to the next level of consanguinity—the intestate's siblings and their descendants. This process of moving down and up the table of consanguinity repeats until the nearest living relatives of the intestate emerge. Relatives beyond the line of an intestate's

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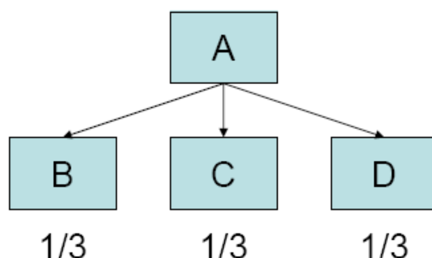
[17] *See Wheeler v. Myers*, 330 Ark. 728, 956 S.W.2d 863 (1997).
[18] BLACK'S, infra note 1 at 373.

grandparents are often called "laughing heirs" because in all likelihood, they did not personally know the intestate and "laugh all the way to the bank."[19] Many statutory schemes and the Uniform Probate Code seek to eliminate laughing heirs.[20] Arkansas's current scheme is not one of them, though it greatly reduces the already low probability of inheritance by laughing heirs by heavily favoring a surviving spouse.[21]

Consanguinity provides a general direction of property flow, but it does not provide a means of dividing the intestate's property among the intestate's heirs. Property divides among the intestate's heirs by two legal concepts rooted in the Latin language: per capita and per stirpes. The term per capita literally means "by the person,"[22] while per stirpes means "by the line."[23] At common law and under Arkansas Statutes, per capita means that all members "of a class who inherit real or personal property from an intestate…related to an intestate in equal degree…will inherit the intestate's property in equal shares."[24] Per stirpes inheritance at common law and under Arkansas Statutes occurs when "the intestate is predeceased by one (1) or more person who would have been entitled to inherit from the intestate had such a person survived the intestate."[25] To illustrate per capita inheritance, if A dies intestate with children B, C, and D surviving him, then A's property passes as follows:



B, C, and D are members of a class who inherit real or personal property from an intestate in an equal degree, so they take their shares per capita

Now suppose that B, C, and D have a brother E who predeceased them but who left two children, F and G. In this instance, B, C, D, and E still take per capita, but E's share flows per stirpes to his children F and G, who are members of a class related in equal degree, so they take per capita. The following diagram depicts this scenario.

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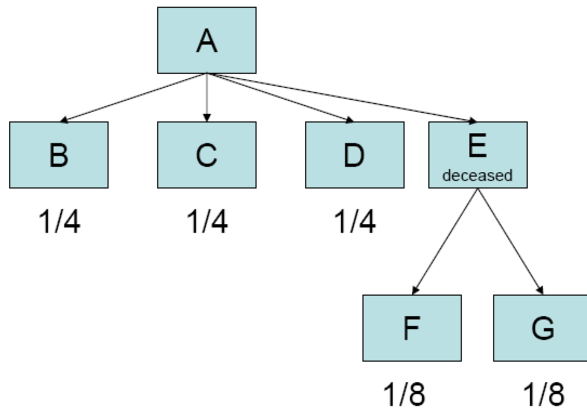
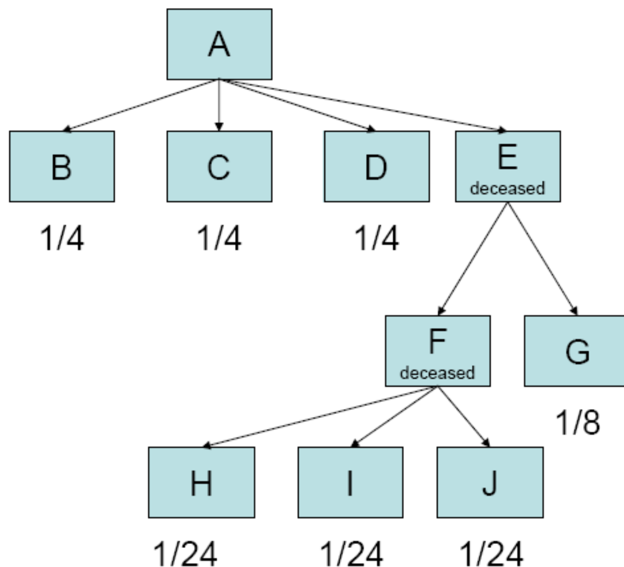
[19] WILLIAM M. MCGOVERN, JR. AND SHELDON F. KURTZ, WILLS, TRUSTS AND ESTATES INCLUDING TAXATION AND FUTURE INTERESTS 59 (3d Edition Thomson-West 2004) (1987).
[20] *See Id.*
[21] *See* Exhibit A, *supra.* The only instance where collateral heirs are favored over a surviving spouse in the current Arkansas scheme is where the decedent had no issue and there is either no surviving spouse or a surviving spouse of less than 3 years.
[22] BLACK'S, *infra* note 1 at 522.
[23] *Id.* at 526.
[24] ARK. CODE ANN. § 28-9-204(1)(A).
[25] *Id.* at § 28-9-205(a)(1).



B, C, D, E are members of a class who inherit real or personal property from an intestate in an equal degree, so they take their shares per capita. F and G take from through their deceased parent per stirpes. Amongst themselves, F and G are members of the same class related to one another in equal degree, so they take per capita.

As final illustration of the concept, let us assume that F predeceased E and A, but left his children H, I, and J. In this case, H, I, and J take F's share per stirpes and it divides among them per capita. A depiction of this scenario follows.



B, C, D, E are members of a class who inherit real or personal property from an intestate in an equal degree, so they take their shares per capita. F and G take from through their deceased parent per stirpes. Amongst themselves, F and G are members of the same class related to one another in equal degree, so they take per capita. H, I, and J take per stirpes through F and per capita among themselves.

In addition to the general concepts of consanguinity, per capita, and per stirpes, there are important miscellaneous legal principles that guide intestacy. While seeming to be a matter of common sense, the identity of an intestate's issue is sometimes a delicate matter. Naturally

born[26] and legitimate children of the deceased are always entitled to take from an intestate.[27] Adopted children are also always included among a person's intestate heirs.[28] Illegitimate children, however, are treated vastly different from either of the former classes of children. In the case of a mother giving birth to an illegitimate child, that child will automatically take both from and through the mother.[29] That is, all property descending from the illegitimate child's mother or mother's family will go to the illegitimate child. With regard to the father of the illegitimate child's property, the illegitimate child will not take from his or her father unless the illegitimate child files a claim against the father's estate within 180 days of the father's death and meets a statutory evidentiary requirement.[30]

Another consideration of intestacy law is the distinction between ancestral property and new acquisitions. This distinction is inapplicable to the current inheritance code, but should be considered for older Arkansas intestate schemes. Ancestral property is real property that came from an intestate's ancestor "in consideration of blood and without a pecuniary equivalent" by "devise from a now dead ancestor or by deed of actual gift from a living one."[31] A new acquisition, also termed "non ancestral property," is property acquired by any other means.[32]

The final miscellaneous consideration is the estate taken by intestate heirs. Under both the current inheritance code and the historical schemes, the heirs of the intestate take as tenants in common.[33]

C. Current and Former Arkansas Tables of Descent

Due to the size of the intestacy law flow charts, they are attached and incorporated as Exhibits A-D for intestate succession applicable from 1970 to present, 1933-1959, 1959-1969, and 1894-1933, respectively.

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[26] A trap for the unwary with regard to natural born children is ACA § 9-9-215, effective in 1977 which provides that a final order of adoption terminates the right to inherit from a natural parent. This provision applies when the deceased dies after 1977. *See Wheeler*, 330 Ark. 728, 956 S.W.2d 863 (1997).
[27] ARK. CODE ANN. § 28-1-102(a)(1).
[28] *Id.*
[29] *Id.* at § 28-9-209(d). This is also true of all other past Arkansas intestate schemes.
[30] *Id.* The statute requires an illegitimate child to present one of the following to establish paternity for purposes of inheriting from the intestate father: "A court of competent jurisdiction has established the paternity of the child…; The man has made a written acknowledgment that he is the father of the child; The man's name appears with his written consent on the birth certificate as the father of the child; The mother and father intermarry prior to the birth of the child; The mother and putative father attempted to marry each other prior to the birth of the child by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid; or The putative father is obligated to support the child under a written voluntary promise or by court order." This became the law by Act 1015 of 1979. For a recent examination of this statute in a quiet title decree, *see Defir v. Reed*, 103 Ark. App. 319, 2008 WL 4735543 (2008). Prior to this act, the statutes consistently required the father of the illegitimate child to marry the mother of the illegitimate child, and the father had to perform some act acknowledging the paternity of the illegitimate child. *See* A.S.A. 1947 § 61-103; Crawford and Moses § 3474 (1921); English 56:4-5. Alternatively, the child could be a product of a legally defective marriage. *Id.*
[31] *Webb v. Caldwell*, 128 S.W.2d 691, 694, 198 Ark. 331, 332 (1939).
[32] *Id.*
[33] ARK. CODE ANN. § 28-9-207.

D. Title transfer methods for intestates.

1. The Affidavit of Death and Heirship

An affidavit of death and heirship is a legitimate means of evincing title to the interests of an intestate. The affidavit, however, should contain all necessary information to apply the Arkansas Table of Descents and ascertain the rights of the surviving spouse. The affidavit "should be made by a person competent to testify in court" and "state facts rather than conclusions."[34] At a minimum, the substance of the affidavit of death and heirship to cure the interests of an intestate should affirmatively state:[35]

1. Whether or not decedent had a will;
2. Date and place of death;
3. The relationship, if any, of the affiant to the decedent and the source of knowledge concerning the decedent;
4. The marital status of the decedent at the time of death, name of surviving spouse, and the duration of the marriage up to the time of the intestate's death;
5. If the spouse predeceased the intestate, then the time and place of the spouse's death;
6. Whether the intestate had children;
7. The names of all natural or adopted children of the intestate;
8. If there are no children or a surviving spouse of more than 3 years, then all other all other information necessary to determine the decedent's heirs-at-law in accordance with the applicable Arkansas Tables of Descent;
9. The same information set out in items 1-8 regarding any deceased child, grandchild, or other applicable descendent.

The affidavit should be sworn and acknowledged by a notary.[36] Details are important in drafting an affidavit of death and heirship. The draftor should obtain all possibly relevant information about the intestate and review it carefully prior to drafting the affidavit. Exhibits containing corroborating evidence such as obituaries, census records, and the like should be encouraged.

Affidavits are merely evidentiary in Arkansas.[37] To conclusively "prove" heirship for an intestate, a person claiming an interest to the property can file an action for Determination of Heirship.[38]

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[34] ARKANSAS BAR ASSOCIATION, STANDARD FOR EXAMINATION OF REAL ESTATE TITLES IN ARKANSAS 26 (2000).
[35] *Id.*
[36] *Id.*
[37] ARKANSAS BAR ASSOCIATION at 25, *infra* note 55.
[38] ARK. CODE ANN. § 28-53-101. This action is a species of declaratory judgment, but it allows any interested person to file the action without having to alleging the how the petitioner's interest might be harmed.

2. Petition to Determine Heirship

This is the closest thing to a gold standard for intestate heirship. The relevant statute is Ark. Code Ann. § 28-53-101. This statute permits one with an interest in property left by someone in Arkansas "to determine the heirs and distributees of the decedent and their respective interests in the estate."[39] The petition is done in Circuit Court with a hearing and newspaper publication.[40] After 90 days past the entry of an order, the order becomes binding on the named heirs.[41] The only risk with the order is that it is not binding on any person not personally served with notice for 3 years, and in the case of minors, incompetents, or someone out of the country, 3 years past the ending of the respective disability.[42]

3. The Affidavit for Collection of Small Estates

The Affidavit of Collection of Small Estates is a very streamlined, inexpensive process for estates with a value, excluding homestead of and statutory allowances for spouse and minor children, of $100,000.[43] The estate must not have a personal representative or have an application pending for the appointment of a personal representative, and 45 days must have elapsed since the decedent's death.[44] If the estate meets all prerequisites, any distributee of the estate may file an affidavit with the probate clerk of the circuit court setting forth:

1. That there are no unpaid claims or demands against the decedent or his or her estate, that the Department of Human Services furnished no federal or state benefits to the decedent, or, that if such benefits have been furnished, the department has been reimbursed in accordance with state and federal laws and regulations;

2. An itemized description and valuation of the personal property and a legal description and valuation of any real property of the decedent, including the homestead;

3. The names and addresses of persons having possession of the personal property and the names and addresses of any persons possessing or residing on any real property of the decedent; and

4. The names, addresses, and relationship to the decedent of the persons entitled to and who will receive the property.[45]

The distributee may also attach a copy of the decedent's will.[46] The distributee files the affidavit with the clerk, and the clerk provides a certified copy of the affidavit to "any person owing any money, having custody of any property, or acting as registrar or transfer agent of any

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[39] *Id*. at (a).
[40] *Id*.
[41] *Id*. at (d)(1).
[42] *Id*. at (d)(2).
[43] *Id.* at § 28-41-101(a)(3). The cost to file the affidavit is only $25. *Id.* at § 28-41-101(b)(1).
[44] *Id.* at (a)(1-2).
[45] *See Id.* at (a)(4)(A-D)
[46] Though not explicitly required, it is an implied requirement if the affidavit seeks to prove devise by will rather than intestacy. Also, the statute provides that there be no additional charge for attaching the will. *Id.* at (b)(1).

evidence of interest, indebtedness, property, or right" of the estate.[47] To distribute real property, the statute gives the distributee the option to publish notice to creditors of the estate containing the following information:

1. The name of the decedent and his or her last known address;

2. The date of death;

3. A statement that the affidavit was filed, the date of the filing, and a legal description of all real property listed in the affidavit;

4. A statement requiring all persons having claims against the estate to exhibit them, properly verified, within three (3) months from the date of the first publication of the notice, or they shall be forever barred and precluded from any benefit in the estate;

5. The name and mailing address of the distributee or his or her attorney; and

6. The date the notice was first published.[48]

The distributee must publish notice of the collection once a week for two consecutive weeks in the newspaper of general circulation in the county of the probate.[49] In addition to publication, the statutes require that all persons whose names appear in the petition be served by regular mail.[50] Once the notice period is complete, the distributee may issue him or herself an administrator's deed.[51]

The statute releases one making payment under the affidavit "to the same extent as if made to a personal representative of the decedent."[52] It also provides that one making payment under the affidavit "not be required to see to the application thereof or to inquire into the truth of any statement in the affidavit."[53] Refusal to pay under the affidavit allows the distributee to compel payment in an action brought before Circuit Court.[54]

Though the statute does not require inquiry into the facts stated in the affidavit and provides indemnity, it is unwise to ignore the basic duty to pay those with marketable title. That is, if the affidavit does not provide all of the facts necessary to establish marketable title under the rules of intestate sucession, then an oil and gas operator is within its rights to refuse payment. Remember, the duty to pay those with marketable title is also statutory.

Also, the affidavit should be very carefully scrutinized for statutory compliance. Because the affidavit is statutory in nature, the distributee must strictly comply. All information required

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[47] *Id.* at (a)(5).
[48] *Id.* at (b)(2)(A-B).
[49] *See* ARK. CODE ANN. §§ 28-40-111(d)(1) and 28-1-112(b)(4)(A).
[50] *Id.* at § 28-1-112(b)(4)(B).
[51] *Id.* at § 28-42-102(d).
[52] *Id.* at § 28-42-102(a).
[53] *Id.*
[54] *Id.* at § 28-42-102(c).

by the statute must appear on the face of the affidavit. There must be proof of publication notice filed in the case file that also complies with the statute and also proof of mailing of notice by regular mail. For non-residents, consider whether the estate was administered in the home jurisdiction of the owner. By the terms of the statute, anytime there has been an appointed estate fiduciary (administrator, executor, personal representative), the distributee has no right to the affidavit.[55] Many times, those seeking the affidavit are attempting to substitute the affidavit for an ancillary probate of a will. Most of the time, the affiant will tip their hand by stating "there is no petition for the appointment of a personal representative pending or granted in the State of Arkansas." In that case, it is prudent to begin asking questions about a probate in the owner's home state.

5. Estate administration.

A party with an interest it the estate petitions the Court to appoint an administrator to oversee the distribution of the estate. The administrator becomes an intermediary between the estate and heirs, and upon presentation of the petition to appoint an administrator, order appointing the administrator and the letters of administration, the oil and gas operator should pay the administrator until the administrator distributes the estate. While the underlying mineral estate does not come under the administrator's power unless needed to sell to satisfy debts, the royalty income is an asset in the hands of the administrator.

E. Summary of Intestate Succession

Who is Intestate?

1) No will
2) Past applicable statute of limitation for probate of will
   a. Residents: 5 years
   b. Non-residents: 5 years, BUT can be forever if the will was timely probated in another jurisdiction
   c. Be mindful of when the owner died when applying the statute of limitations. Dates to keep in mind:
      i. Pre-1949: Should always be eligible
      ii. 1949-1963: Hard 5 year statute for all persons who died in this time frame.
      iii. 1963 to date: Current law.
      iv. Contact attorney to nail down exact dates.
3) Will has no residuary clause and minerals or "real property" are not otherwise disposed of under will's terms. Intestacy applies for that property.
4) Pretermitted children, or if child predeceases, pretermitted grandchildren.
5) Out-of-state residents who have been dead more than 5 years, have a valid probate in their state, but have yet to have a probate in Arkansas.

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[55] *Id*. at § 28-41-101(a)(1).

Who Takes?

1) Natural born, legitimate children or legally adopted children
2) Illegitimate children from mother
3) Illegitimate children from father if claim is made within 180 days of death and evidentiary requirement is met.
4) Adoption out of family terminates right to inherit by intestate succession.

How to divide the interest?

1) Passes per capita/per stirpes
2) Pure per capita possible if all members of generation predecease owner.
3) Date of death determines scheme:
    a. 1894-1933
    b. 1933-1959
    c. 1959-1969
    d. 1970 to present

Documentation Needed to Transfer Interest?

1) Death certificate is gold standard for proof of death.
2) Proof of heirship is always a gamble. There is no real gold standard.
3) Affidavit of Heirship required items (never let one slip past you without checking off each item)
    a. Whether or not decedent had a will;
    b. Date and place of death;
    c. The relationship, if any, of the affiant to the decedent and the source of knowledge concerning the decedent;
    d. The marital status of the decedent at the time of death, name of surviving spouse, and the duration of the marriage up to the time of the intestate's death;
    e. If the spouse predeceased the intestate, then the time and place of the spouse's death;
    f. Whether the intestate had children;
    g. The names of all natural or adopted children of the intestate;
    h. If there are no children or a surviving spouse of more than 3 years, then all other all other information necessary to determine the decedent's heirs-at-law in accordance with the applicable Arkansas Tables of Descent;
    i. The same information set out in items a-h regarding any deceased child, grandchild, or other applicable descendent.
4) Petition to Determine Heirship
    a. This is the closest thing we have to a gold standard for intestates.
    b. Review petition, proof of notice, and order.
    c. The order is not final until 90 days past entry.
    d. Unknown heirs, those with no personal notice, and those who were incompetent, minors or overseas have 3 years to contest the order.
5) Estate administration

a. Essentially a means to marshal estate assets for payment of creditor claims. It is not a required proceeding.
b. Upon presentation with petition, order appointing administrator, and letters of administration, the administrator should be paid royalties until final distribution.

III. The Testate Owner

This is generally a much simpler affair than an intestate owner. Either the owner had a will, or did not. The will is either within the applicable statute of limitations, or not.[56] Probate of a will entails presenting a petition to the Circuit Court, obtaining an order admitting the will to probate, and noticing heirs and devisees. Probate is essential for an owner's claim if the result of the probate will work against intestate succession (e.g. a disinherited child, an institutional devisee). Put simply by statute, "[n]o will shall be effectual for the purpose of proving title to or the right to the possession of any real or personal property disposed of by the will until it has been admitted to probate."[57]

As used in the statute "admitted to probate" means "admitting to probate in Arkansas." It is not sufficient to probate a will in another state, then file the will in the real estate records of the county of the mineral interest. The particular danger posed by unprobated foreign wills can be found in Ark. Code Ann. §28-40-103(c)(2):

> [T]he rights and interests in the real property which, after the death of the testator if it is assumed that he or she died intestate, have been acquired by purchase, as evidenced by one (1) or more appropriate instruments which have been properly recorded in the office of the recorder of the county in the which the real property situated and which would be valid and effective had the decedent died intestate, shall not be adversely affected by the probate of the will in this state after the expiration of the time limit imposed by subsection (a) of this section.[58]

The subsection (a) referenced in the statute is the 5 year limit imposed on the probate of wills of residents of Arkansas.[59]

The only case interpreting this statute is *Cooper v. Tosco Corporation*, 272 Ark. 294, 613 S.W.2d 831 (1981). In *Cooper*, the appellants, Cooper and Adams, were the beneficiaries of Rowland's will.[60] Rowland died testate in 1966 in Louisiana, and his will was probated in 1968 in Louisiana.[61] Under his will, Rowland did not leave his Arkansas real estate to his only child, Edith.[62] Instead, Cooper and Adams were his devisees as to the Arkansas real estate.[63] In 1979 only weeks before Rowland's will was offered for probate in Arkansas and more than 5 years

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[56] Refer to Section II(A) for applicable statutes of limitation.
[57] Ark. Code Ann. § 28-40-104(a).
[58] *Id.* at § 28-40-103(c)(2).
[59] *Id.* at § (a).
[60] *Cooper*, 272 Ark. at 295, 613 S.W.2d at 831.
[61] *Id.*
[62] *Id.*
[63] *Id.*

after Rowland's death, Edith conveyed the minerals to the Arkansas property to her aunt Fahy.[64] Cooper and Adams contended that the above quoted statute implies that the purchaser must be a good faith purchaser without notice.[65] The court refused to impute "good faith purchaser without notice" into the statute and found that the deed to aunt Fayh cut off the rights of the will devisees.[66] In other words, it is a pure race to the courthouse.

Undoubtedly, aunt Fahy knew Edith had no right to the Arkansas property. Fayh's full name was Fayh Rowland,[67] and she was probably the decedent's sister or sister-in-law. The statute and the case worked a rather unjust result, but both statute and case leave room for a future court to soften the law under the right set of facts. For one, the *Cooper* court notes that neither Rowland nor Cooper alleged fraud.[68] Also, the language of the statute indicates that it should apply "if it is assumed that he or she (the decedent) died intestate." Perhaps "assumed" is synonymous with "presume." A common "curative" technique seen in Arkansas is simply to file the nonresident's will or foreign probate of record in the real estate records of the County of the situs of the property. It is possible that this would serve to defeat the "assumption" that the decedent died intestate. This is entirely speculative, and it would not serve clients very well to gamble on the court softening its interpretation of the statute in the future. The only certain cure to a problem such as in *Cooper* is an ancillary probate.

Petitioning for ancillary probate is a relatively simple process.[69] The petition should include an authenticated copy of the will and order admitting the will to probate in the foreign jurisdiction.[70] If administration in the foreign jurisdiction is closed, the petition should also include a certified copy of the final order distributing the estate.[71] The will should be executed with two witnesses or be entirely in the handwriting of and executed by the testator.[72] If not, the petition should state the time and place of execution and the testator's domicile at the time of execution and of death.[73] The attorney should file the ancillary petition in the county of the greatest value of the testator's property.[74] If the probate needs administration, then the petition

[64] *Id.*
[65] *Id.* at 296, 831.
[66] *See Cooper* 272 Ark. at 296-97, 613 S.W.2d at 832-33.
[67] *Id.* at 295, 831.
[68] *Id.* at 296, 831.
[69] *See* ARK. CODE ANN. § 20-40-107 for the general requirements of the petition.
[70] *Id*. at § 28-40-120.
[71] This is not required by the statute, but it should be done where the estate is closed in the foreign jurisdiction so that the Arkansas court and those searching real estate records have notice of the foreign court's final judgment. This both hastens the process and provides certainty.
[72] *Id.* at §§ 28-40-120(c), 28-25-103, and 28-25-104
[73] *Id.* at § 28-40-120(c).
[74] *Id.* at §§ 28-40-120(d)(1) and 28-40-102.

to probate the will should also include a petition to appoint a personal representative.[75] A personal representative must furnish a fiduciary bond, or seek waiver from the court.[76]

Lastly, the statutes require notice of the ancillary probate.[77] This is the most time-consuming aspect of probate. The statutes entitle all creditors and those with claims against the deceased to notice of the probate.[78] The administrator or proponent of the will (in the case of an estate without administration) must publish notice of the probate once a week for two consecutive weeks in the newspaper of general circulation in the county of the probate.[79] The notice must state the date of the administrator's appointment, or if there is no administration, then the address of the will's proponent and attorney.[80] The notice should substantially comply with the statutory form, include a statement to the effect that all claims against the decedent and the estate be made in the time permitted by law, and a statement that contest of the will must be filed in time permitted by law.[81] In addition to the publication, the statutes require that all persons whose names appear in the petition be served by regular mail.[82] One month following notice by publication, a notice to all outstanding creditors (if applicable) should be served by registered mail or process server.[83]

For an estate long-closed in the foreign jurisdiction, the ancillary probate is simply a petition for probate without petitioning for an administrator and a long wait for all notices to expire. Once the applicable notice periods expire without claim or contest, the statutes bar all claims against the estate.[84] In the interim, a lessee or purchaser from a will's beneficiary should file a certified copy of the will and order admitting the will to probate in all counties where he or she purchased or leased property from the decedent in order to obtain the protection of the recording statutes. At the close of the estate, a certified copy of the final order should also be filed of record in each county where the decedent had real property.

Probate of a will may be done alone or with a petition to appoint a personal representative. This is important to know because many believe that the fiduciary deed is a requirement to transfer title. It is not. The probate of the will alone transfers title. If, however, the Court appoints a fiduciary, like the administrator, the personal representative will be entitled

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[75] The statutes do not require the appointment of a personal representative with the filing of the petition for probate. See ARK. CODE ANN. § 28-40-107. For an estate closed in another jurisdiction with no personal property to devise, there is no need for the appointment of a personal representative unless a creditor comes forward who requires payment from the estate. In that instance, the proponent can file a separate petition for to appoint a personal representative. The personal representative can then do whatever is necessary with the estate property to satisfy the estate's debts. For a probate currently under administration in a foreign jurisdiction, the foreign personal representative can petition to be the personal representative for the ancillary proceeding, but the court will likely require a separate bond. See *Id.* at § 28-42-101 *et. seq.*

[76] *Id.* at § 28-48-201.

[77] *Id.* at §§ 28-40-120(d)(2) and 28-40-111.

[78] *Id.* at § 28-40-111(a)(1)(A).

[79] *Id.* at §§ 28-40-111(d)(1) and 28-1-112(b)(4)(A).

[80] *Id.* at § 28-40-111(a)(1)(A) and (b).

[81] ARK. CODE ANN. 28-40-111(c)(1-4), (a)(1)(A), and (a)(3).

[82] *Id.* at § 28-112(b)(4)(B). A waiver of this requirement is common, and it is best practice to obtain written waivers from the will beneficiaries prior to filing the petition to file them with the petition.

[83] *Id.* at §§ 28-40-111(a)(4)(A) and 28-1-112(b)(1-3).

[84] *Id.* at § 28-40-111(a)(1)(A). This represents the point at which title is clear if there were no claims against the estate and there was no contest of the probate.

to payment of the royalties for the estate during the administration process. Obtain a copy of the petition, order admitting will to probate, order appointing personal representative, and letters testamentary prior to authorizing payment. When the will is probated, but there is no personal representative appointed, lawyers refer to this as "probate as a muniment of title only."

Perhaps the most controversial problem with probate is the use of the affidavit for collection of small estate with a will attached.[85] In 2009, the Arkansas Supreme Court upheld the use of one of these to transfer title to real estate in the case of *Osborn v. Bryant*, 2009 Ark. 358, 324 S.W.3d 687 (2009). The Court found that Ark. Code Ann. § 28-40-104(a) was not applicable to the affidavit because it was specifically exempted under Ark. Code Ann. § 28-40-104(b).[86] That is, the will attached to the affidavit does not have to be declared valid by the probate Court to prove a devise under the terms of the will.

Given the ability of a distributee under an affidavit for collection of small estates to compel payment and the duty of the oil and gas operator to pay those with marketable title, this presents a serious quandry for the analyst reviewing the affidavit. What if, for example, the will attached did not comply with the statute of wills?

The best practice is to first thoroughly scrutinize the affidavit and notice. If there is any reason to dishonor the affidavit for non-compliance with the statute, assert it. Pay particular attention to whether there was a proceeding in the other state if the owner was a non-resident. Should the affidavit meet the requirements set out by statute, review the attached will. Under the statute, a "will" may be attached. It is therefore legitimate to consider whether the document was a "will." A document is a will only if it was signed by someone 18 years or older, has two witnesses 18 years or older who have no pecuniary interest in the estate, is signed by the testator, and has a statement that the witnesses signed at the request of and in the presence of the testator after being told the document was the testator's will.[87] The will itself must make clear that it is a will from its four corners. If the will is handwritten, it must be entirely in the handwriting of the testator, bear the signature of the testator, and the handwriting corroborated by three disinterested witnesses.[88] If any of these requirements are not met, it is probably legitimate to dishonor the affidavit because the document is not a "will."

Summary of Testate Succession

When is a will probate required?

1) In most cases, a will must be admitted to probate in Arkansas to transfer title.
2) Merely filing a foreign will probated in another state in the real estate records is not sufficient.
3) Any time the will varies Arkansas intestate succession, require a probate.
4) Five years after death, a conveyance by an intestate heir defeats subsequent probate.

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[85] Refer to Section II(D)(3) for a discussion of the requirements for the affidavit.
[86] *See Osborn* at 360, 691.
[87] *See* Ark. Code Ann. §§ 28-25-101-02.
[88] *Id*. at § 28-25-104.

Types of probate and probate documents required?

1) Probate may be done alone or with an administration.
    i. Stand alone probate of will is "probate as a muniment of title."
        1. Review petition, order, notices.
        2. Will with certificate of probate should be filed in the real estate records of other counties where the probate was not conducted.
    ii. Probate with administration
        1. Review petition, order, notices, and letters testamentary.
        2. Pay fiduciary during probate.
        3. Fiduciary deed should be filed in real estate records of each county.
2) The Affidavit for Collection of Small Estates may be used to "probate" a will, but it is troublesome.
    i. Scrutinize affidavit for statutory compliance.
    ii. Is the attached document a "will?"
        1. Signed by someone 18 years or older:
        2. Two witnesses 18 years or older who have no pecuniary interest in the estate;
        3. Signed by the testator;
        4. Statement that the witnesses signed at the request of and in the presence of the testator after being told the document was the testator's will;
        5. Can be fairly read to be a will;
        6. If the will is handwritten, it must be entirely in the handwriting of the testator, bear the signature of the testator, and the handwriting corroborated by three disinterested witnesses.

IV. Rights of Surviving Spouses

The rights of a surviving spouse should be considered during a transfer of title. In general, if there is a surviving spouse, their rights must be honored or voluntarily extinguished. These rights include, dower, homestead, and community property.

A. Dower

Arkansas is a common law state with no community property (but it will recognize community property in some circumstances—read on). At common law, surviving spouses of the deceased received an interest in the estate of their deceased spouse.[89] The term "dower" at common law refers to the right of the wife to a life estate in the land of her deceased husband, and the term "curtesy" at common law refers to the right of the husband to a life estate in all of the lands of his deceased wife, provided that children were born into the marriage.[90] Today,

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[89] WILLIAM M. MCGOVERN, JR. AND SHELDON F. KURTZ, WILLS, TRUSTS AND ESTATES INCLUDING TAXATION AND FUTURE INTERESTS 59 at 137 (3d Edition Thomson-West 2004) (1987).
[90] *Id.*

statutes rather than common law govern the right of surviving spouses, but the common law terminology persists.[91] In Arkansas, most lawyers and judges refer to the surviving spouse's share as "dower" even though the surviving spouse may be male. This course will follow the convention of Arkansas practitioners by using the term "dower" to refer to the rights of surviving husbands and wives post 1981.

Regardless of whether the right is for the widow or the widower, when the surviving spouse was in a valid marriage with the deceased spouse and the deceased spouse had seisen in the land during the marriage, then the surviving spouse has a dower or curtesy right.[92] The requirement of marriage presents few pitfalls. Rare exceptions exist. For example, the marriage could be void for want of capacity or legal defect.[93] Seisen, the other prerequisite for dower, is a legal term of art meaning that the owner had the right to possession of the land.[94] Because it is a somewhat nebulous legal concept, there are many reported cases that examine whether a spouse had seisen. Generally, seisen will not attach to any remainder or reversion interest that does not consummate during the lifetime of the spouse holding the remainder or reversion interest.[95] For example, if A holds a life estate with a remainder to B who is married to C, and B dies before A does, then B can never be seized of the land during his lifetime. Thus, C has no right in the land. The same reasoning applies to reversions.[96] Seisen will attach to an equitable estate, including contracts to purchase land in which the deceased spouse had paid consideration.[97]

The amount of the surviving spouse's rights varies between males and females over the course of Arkansas's history. Also, whether or not the deceased had children varies the amount of dower or curtesy. At common law, the widow received a one third life estate in all of the husband's lands in which he had seisen if the husband failed to allot specific lands.[98] In an 1899 law change, the General Assembly expanded the quantity of dower where the surviving widow had no children to a ½ fee simple interest. [99] The same definition and requirements of being a "child" under intestacy applies to the dower requirement.[100] If the deceased spouse had children, the surviving spouse gets a one-third life estate in all lands in which the deceased spouse had

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[91] Arkansas struck down all surviving spouse statutes that had gender-biased relics from the common law in 1981.
[92] ARK. CODE ANN. § 28-11-301(a). A third requirement to impute is that the surviving spouse did not murder the deceased spouse . *Id.* at § 28-11-204. This statutory provision has fact-specific exceptions set out in case law and should be researched prior to making a determination of whether the slaying spouse and her heirs may have an interest.
[93] *See E.g. Spears v. Spears*, 178 Ark. 720, 12 S.W.2d 875 (1928) (contest over whether subsequent marriage of deceases was bigamous); another example might include marriage to a person under the disability of infancy. See also, Section I, *supra.*
[94] BLACK'S, supra note 1 at 631.
[95] *Maloney v. McCullough*, 215 Ark. 570, 221 S.W.2d 770 (1949).
[96] *Davis v. Davis*, 219 Ark. 623, 243 S.W.2d 739 (1951).
[97] *Spalding v. Haley*, 101 Ark. 296, 142 S.W. 172 (1911).
[98] George L. Haskins, The Development of Common Law Dower, 62 Harvard Law Rev. 42, 45 (1948).
[99] Ark. Code Ann. 28-11-307.
[100] *See E.g. Sanders v. Taylor*, 193 Ark. 1095, 104 S.W.2d 797 (1937) (dower in fee under § 28-11-307 held inapplicable for man who died with surviving adopted children). See also Section I(B), supra. By implication, the term "child or children" in both §§ 28-11-307 and 28-11-301 should meet the same requirements as with intestate succession.

seisen during the marriage.[101] This did not vary the common law. Should the deceased spouse die without children, differences between ancestral property and new acquisitions come into consideration. For new acquisitions, the surviving spouse gets one half of the lands in which the deceased spouse had seisen during the marriage in fee.[102] The surviving spouse, however, receives only a life estate in half of the lands for ancestral property.[103]

From 1939 to 1981, the law did not vary in substance from the current law with regard to surviving spouses of intestates. The only difference was semantics. As in common law, the former law labeled the share allotted the surviving husband as "curtesy" and the share allotted the wife as "dower." Prior to 1939, there were two schemes for the husband and one for the wife. From statehood to 1925, the husband could receive common law curtesy.[104] That is, a life estate in 100% of the wife's lands provided that any children were born to the marriage. In 1925, the legislature modified the common law to provide the husband with a 1/3 life estate in the lands if the wife died with children and a 1/2 life estate in the lands if the wife died without children.[105] This changed to comport with the wife's rights in 1939. Dower for the widow was a 1/3 life estate in the husband's lands from statehood to 1891 whereupon the widow began to receive dower in fee when her husband died without children.[106] From then, the provisions for the widow remained unchanged with the husband's rights becoming equal to the wife's, as previously mentioned, in 1939.[107]

The extent of dower is both far-reaching and durable.[108] A spouse's dower interest attaches to all seized lands conveyed by the deceased spouse during the marriage to the surviving spouse.[109] Furthermore, one spouse cannot unilaterally extinguish the other spouse's dower rights by conveying the land away without the other spouse's consent.[110] The non-consenting spouse may seek to recover lands conveyed by the deceased spouse.[111] The statutes bar the ability of the non-consenting spouse to recover lands conveyed after the conveyance is of record for 7 years.[112]

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[101] ARK. CODE ANN. § 28-11-301(a).
[102] *Id.* at § 28-11-307 (a)(1)
[103] *Id.* at (b).
[104] *See* Act 149 or 1925.
[105] *Id.*
[106] *See* English's Digest 59 and Act of March 24, 1891.
[107] The Arkansas Supreme Court recognized the equal treatment of surviving spouses of an intestate under the law from 1939 to 1981in *Beck v. Merritt*, 280 Ark 331, 657 S.W.2d 549 (1983).
[108] Herein, the author will refer to the surviving spouse's share generically as "dower." The extent and nature of dower and curtesy are the same.
[109] *Id.* at § 28-11-301.
[110] *Id.* at § 28-11-201(a).
[111] *See Id.* and *See also E.g. Roetzel v. Beal*, 196 Ark. 5, 116 S.W.2d 591 (1938) (widow recovered her dower interest from one purchasing the husband's in interest at an execution sale). The exception to this is dower in fee, wherein the surviving spouse's right is immediately vested, making the surviving spouse a tenant in common with the heirs of the deceased. *See* note 37, *infra*.
[112] *See* ARK. CODE ANN. § 28-11-203.

An action to compel assignment of dower generally abates upon the surviving spouse's death.[113] When the surviving spouse dies, the remainder to life estate dower interest passes by the deceased spouse's will or by intestacy, whichever is applicable.[114] A spouse with a consummate, but unassigned dower interest conveys no right to possession to a grantee.[115] Such a grantee, however, does receive the spouse's equitable right to compel the heirs to assign the dower.[116] The heirs of the intestate are under a duty to assign the surviving spouse dower.[117] Once assigned, the dower is perfected and carries the right to possession.[118]

Dower in fee comes off the top of the intestate's estate.[119] Whatever is left after the dower share is the "heritable estate."[120] Life estate dower is superior to the rights of the intestate's heirs, but does not actually reduce the heritable estate.[121] This distinction is important in the current inheritance code which provides that a surviving spouse of less than 3 years takes only one half of the "heritable estate."[122]

Under the common law, until consummated and assigned, dower is inchoate.[123] The term "inchoate" means that something is partially done or imperfect.[124] For inchoate dower interests, an operator must impound 1/3 of the royalty for the surviving spouse and withhold royalty payments "until the rights of the surviving spouse are determined."[125] Dower is not alienable in the lifetime of the seized spouse, but the unseized spouse may relinquish dower rights during the lifetime of the seized spouse.[126] To consummate dower, the only requirement is the death of the seized spouse.[127] Upon the death of the seized spouse, dower is consummate, but unassigned.[128]

Prior to assigning the dower, the heirs must execute a written agreement giving the surviving spouse the right to execute oil and gas leases and to receive all payments on any lease

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[113] *Burrus v. Butt*, 126 Ark. 584, 191 S.W. 33 (1917). (administrator of widow's estate could not sue to recoup rents from widow's unassigned dower interest). Notably, this case dealt with life estate dower rather than fee simple dower. Naturally, this abates on death. In the case of fee simple dower, the abatement should also occur, but the widow's heirs, devisees and grantees should not lose their estate for lack of an assignment. See notes 72, and 73, infra.
[114] ARK. CODE ANN. § 28-11-301.
[115] *See Barnett v. Meacham*, 62 Ark. 313, 35 S.W. 533 (1896); *Brinkley v. Taylor*, 111 Ark. 305, 163 S.W. 521 (1914).
[116] *Weaver v. Rush*, 62 Ark. 51, 34 S.W. 256 (1896); *Baum v. Ingraham*, 141 Ark. 243, 216 S.W. 704 (1919).
[117] ARK. CODE ANN. § 28-39-301(a).
[118] AM. JUR. 2D Dower and Curtesy § 32.
[119] *Id*. at § 28-9-206(b)(1).
[120] *Id*. at (c).
[121] The author believes that the correct reading of § 28-9-206 is the "subject to" language means that life estate dower is superior to the heir's interest, and that the dower in fee provisions of § 28-11-307 reduce the intestate's heritable estate.
[122] *Id*. at § 28-9-214.
[123] *See* AM. JUR. 2D Dower and Curtesy §§ 32 and 34.
[124] BLACK'S LAW DICTIONARY 337 (2nd Pocket ed. 2001).
[125] ARK. CODE ANN. at § 28-11-304. This section seeks to protect the surviving spouse until the assignment of dower, and presumably, the Legislature's intent is to encourage the heirs to assign the surviving spouse dower by directing the operator to pay nothing to the heirs or spouse until the heirs make the assignment.
[126] *Le Croy v. Cook*, 211 Ark. 966, 204 S.W.2d 173 (1947).
[127] AM. JUR. 2D Dower and Curtesy § 34.
[128] *See* AM. JUR. 2D Dower and Curtesy §§ 32 and 34.

during the surviving spouse's lifetime.[129] The assignment is a written instrument that describes the lands assigned with the endorsed acceptance of the spouse and an acknowledgment from both spouse and heirs.[130] The assignment should be recorded with the probate clerk.[131] The exception to assignment as a requirement of perfection of dower interests is dower in fee when there are no children and the property is a new acquisition.[132] If the heirs fail to make the assignment, the surviving spouse may petition the court to compel the heirs to assign dower.[133] If the court cannot partition the land without great prejudice to either party, then the court will either order the sale or rental of the land.[134]

In the case of fee simple dower, the alienation of a perfected, but unassigned dower interest should be freely alienable. While there are no Arkansas cases on point, there are cases show that an heir of devisee of a fee simple holder is a tenant in common with the heirs and devisees of the owning spouse.[135] To reconcile the common law cases, the right to assignment of specific lands would abate if not assigned during the endowed's lifetime, but not the estate in land.[136]

B. Homestead

An often overlooked right of spouses that has less relevance in this day and time is homestead. The policy of homestead is to provide place for a surviving spouse to live after the passing of his or her spouse.

Arkansas's homestead laws discern a surviving spouse's rights based upon whether or not there are children, whether or not the surviving spouse has a homestead of his or her own, and the length of the marriage.[137] First, the length of the marriage must be more than 1 year for homestead rights to attach.[138] In the case of no children and no separate homestead, the

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[129] ARK. CODE ANN. § 28-39-302.
[130] *Id.* at § 28-39-301(b).
[131] *Id.* at (c).
[132] *Barton v. Wilson*, 116 Ark. 400, 172 S.W. 1032 (1916).
[133] ARK. CODE ANN. § 28-39-303.
[134] *Id.* at § 28-39-305 and 306.
[135] *See e.g. Tennison v. Carroll*, 219 Ark. 658, 243 S.W.2d 944 (1951) (court mentioned in dicta that where widow had both dower in fee and homestead interest in same property that widow might abandon her homestead interest and become a tenant in common with the heirs).
[136] *See Arbaugh v. West,* 127 Ark. 98, 192 S.W. 171 (1917). In this case the court addressed whether a widow holding a dower in fee simple could avail herself of Kirby's Digest § 2706. This was an as-yet unaddressed question in the law. Section 2706 gave the widow the right to request commissioners in chancery to "lay off" dower "in the lands of the husband…on any part of the lands of the deceased whether or not the same shall include the usual dwelling of the deceased husband and family or not." That is, the widow could exercise a personal right to request a particular tract of land for her to own in severalty. In discussing whether widow holding a fee simple dower could exercise this statutorily granted privilege, the court observed, in dicta, that such a privilege inalienable. In no way did the court declare that the estate was inalienable or that the grantee of such a deed held no present estate. The only holding was that the widow's personal right to "cherry pick" the most valuable lands did not convey. The case does state that the widow is not a tenant in common with the heirs, but the quote should not be taken out of context. The widow is, in fact, a person with greater rights than the heirs which is what the case decided.
[137] *See* Ark. Code Ann. § 28-39-201 et. seq.
[138] *Id.* at (d).

surviving spouse receives 100% the rents and profits from the homestead for life.[139] Where there are both a surviving spouse and minor children, the split is 50% to the spouse and 50% to the minor children.[140] Upon the age of majority, the share to each minor child abates and reverts to the other minor children. Once all reach majority, the surviving spouse receives 100% until death.[141] Should the surviving spouse die during the children's minority, they receive 100%.[142] Naturally, oil, gas, mining, and timber royalties are "profits" that fall within this right.

The quantity of land for the homestead depends on whether the land is in the city limits or in the county. In the city, the homestead is only 1 acre of land. In the county, the homestead may be up to 160 acres unless the value exceeds $2500 in which case, the homestead reduces to 80 acres.[143] The homestead lands must be contiguous to the ordinary place of dwelling of the deceased.[144] Homestead rights are cumulative to dower.[145] I.e. the surviving spouse keeps a dower interest in the remainder of the lands.

To claim the homestead right, the surviving spouse guardian of the minor children must file a legal description of the lands claimed with the probate clerk.[146] With town lots, there are additional steps that render the homestead right de facto valueless to the surviving spouse. With town lots, the clerk will appoint three commissioners to report on the value of the homestead.[147] If the lot exceeds $2500 in value, the probate court must sell the lot.[148] This, obviously, is a relic from the past, but it is good law.

C. Community Property

When the spouses live in a community property state such as Texas or Louisiana but one spouse owns a property in Arkansas most of these situations work themselves out in the author's experience because the spouse who owns the property usually took the property as inheritance, putting it beyond the reach of the home state's community property laws. In that case, Arkansas dower laws apply. When the owning spouse acquired the property during the marriage, the community property laws of the home state come into play. Again, if the property was properly leased with both spouses signing the lease, this is a division order analyst problem. The lease will remain in force, and the only consideration is to whom the operator will pay royalties. The home state's laws will then apply through Arkansas's Disposition Community Property laws.

These provisions are in title 28, chapter 12 of the Arkansas Code. The statues apply to all real property acquired with community property.[149] That is, if the owning spouse sold his inherited property in Louisiana to buy property in Arkansas, the acquired Arkansas property

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[139] *Id.* at (b).
[140] *Id.*
[141] *Id.*
[142] *Id.* at (c).
[143] A small community or village with no urban amenities such as a post office or school may be considered rural for purposes of homestead. *King v. Sweatt*, 115 F. Supp. 215 (W.D. Ark 1953).
[144] *Id.*
[145] *Vesper v. Woolsey*, 231 Ark. 782, 332 S.W.2d 602 (1960).
[146] Ark. Code Ann. § 28-39-202.
[147] *Id.* at § 28-39-203.
[148] *Id.* at § 28-39-204.
[149] Ark. Code Ann. § 28-12-101(2).

remains separate property. If, on the other hand, the owning spouse bought the property with funds from the marital bank account, it is community property. This code provision allows proportional allocation of community and separate property within the same transaction.[150] Should the owning spouse acquire a $150,000 parcel of property with $50,000 in community funds and $100,000 in separate funds, the parcel is 1/3 community and 2/3 separate. There is, however, a rebuttable presumption on the books. If the property was acquired in Arkansas as a tenancy by the entirety, then the presumption is that the property is not community property.[151] This means that a surviving spouse may convey the property free of the community property claim so long as the purchaser is one for value.[152] Notice is irrelevant unless there is a court order perfecting the title as community property. In the same manner, an heir of devisee may alienate the property to purchaser for value.[153] In both cases, the allocation of community property requires only a written demand on the surviving spouse, heir, personal representative, or administrator.[154]

D. Spousal Rights Summary

What rights do non-owning spouses possibly possess?

1) Dower: Right at common law to allowance from lands of owning spouse.
    a. Requirements
        i. Marriage: Valid marriage required.
        ii. Seisen: Owning spouse must have right to possess land during lifetime. E.g. Dower does not attach to future interests.
    b. Amount
        i. Owning spouse has children: Non-owning Spouse gets 1/3 interest for life.
        ii. Owning spouse has no children: Non-owning Spouse gets ½ in fee simple.
2) Homestead: Statutory right to possess family home and attendant lands.
    a. Will never apply to severed minerals
    b. Will apply to minerals attached to family home
    c. Requirements:
        i. Marriage duration > 1 year
        ii. Spouse has no separate homestead
    d. Amount
        i. No children: Spouse receives 100% of rents and profits for life.
        ii. Minor children: 50% to spouse; 50% to children until children make it to 18 years of age.
3) Community Property: Arkansas does not have it, but will recognize it.

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[150] *Id.*
[151] *Id.* at § 28-12-102((2).
[152] *Id.* at § 28-12-106.
[153] *Id.*
[154] *Id.* at §§ 28-12-104 and 28-12-105.

a. To recognize, the surviving spouse must make a demand for allocation from heirs.
b. Allocation must be recorded in real estate records; or there must be a Court Order allocating the community property interest.
c. There is no duty to inquire whether property is community property.
d. There is no liability for paying out on possible community property without a demand from the party asserting the interest.

How do I deal with these rights?

1) Where there is a surviving spouse, you have a statutory duty to impound 1/3 of the proceeds for production until the rights of the spouse are determined.
2) Dower:
    a. Obtain release of interest from spouse; or
    b. Require recorded assignment of dower from heirs
3) Homestead:
    a. If there is a surface estate attached to the interest, obtain statement as to whether the property was homestead and the spouse has no separate homestead.
    b. If requirements are met, require claim be filed with probate clerk.
4) Community property:
    a. There is no duty to discover whether the interest is community or not.
    b. If there is no demand, pay in accordance to record title.
    c. If there is a demand, suspend until presented with a written, notarized, and recorded allocation or a Court Order.

V. Common Probate Alternatives

There is a constant push to avoid probate. Some plans to avoid probate are well-laid, but others can cause more problems than avoided. The two most common means of avoiding probate are trusts and beneficiary deeds.

A. Trusts

A trust is merely an agreement where a party holds title for the benefit or himself or others. A trust is basically an encumbrance on the property. Provided that there was a valid conveyance into the trust, the death of a trustee will trigger additional title requirements. Upon the death of the trustee, the new trustee should present the oil and gas lessee with adequate proof of death of the trustee and a Certification of Trust. The certification is authorized by Ark. Code Ann. § 28-73-1013. The certification must contain:

(1) a statement that the trust exists and the date the trust instrument was executed;

(2) the identity of the settlor;

(3) the identity and address of the currently acting trustee;

(4) the powers of the trustee;

(5) the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;

(6) the authority of cotrustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee; and

(7) the manner of taking title to trust property.

The certification of trust is important because it provides a shield to liability. One "who acts in reliance upon a certification of trust without knowledge that the representations contained therein are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification."[155]

B. Beneficiary Deeds

This alternative was passed by the legislature in 2005.[156] Thus far, it has not gained much momentum, but more of these deeds are appearing in the County records for minerals. The beneficiary deed must expressly state that it shall not take effect until the grantor's death.[157] The Grantor may continue to own, possess, and waste the property.[158] That is, the grantor is free to mortgage, lease, and even sell the property. The beneficiary deed is not a present interest in land to the grantee.[159] There is no limit to the type of grantee to a beneficiary deed so long as the grantee may lawfully hold the estate or title.[160] The deed must substantially conform to the statutory form and be recorded prior to the grantor's death.[161]

It is possible to revoke the beneficiary deed by either selling the property, filing a revocation of the beneficiary deed, or filing of a second beneficiary deed.[162] All of these must be done prior the owner's death.

To date, there has been no published title standard for dealing with beneficiary deeds other than to examine the statute for compliance. Considering the content of the statute, the best practice would be to:

1) Obtain adequate proof of death for the owner.
2) Obtain recorded copy of beneficiary deed.
3) Check that deed substantially complies with statutory form.
4) Check that recording date is prior to date of owner's death.
5) Check of title records from date of beneficiary deed forward to determine whether there was a sale of the property, revocation of the deed, or a second beneficiary deed.

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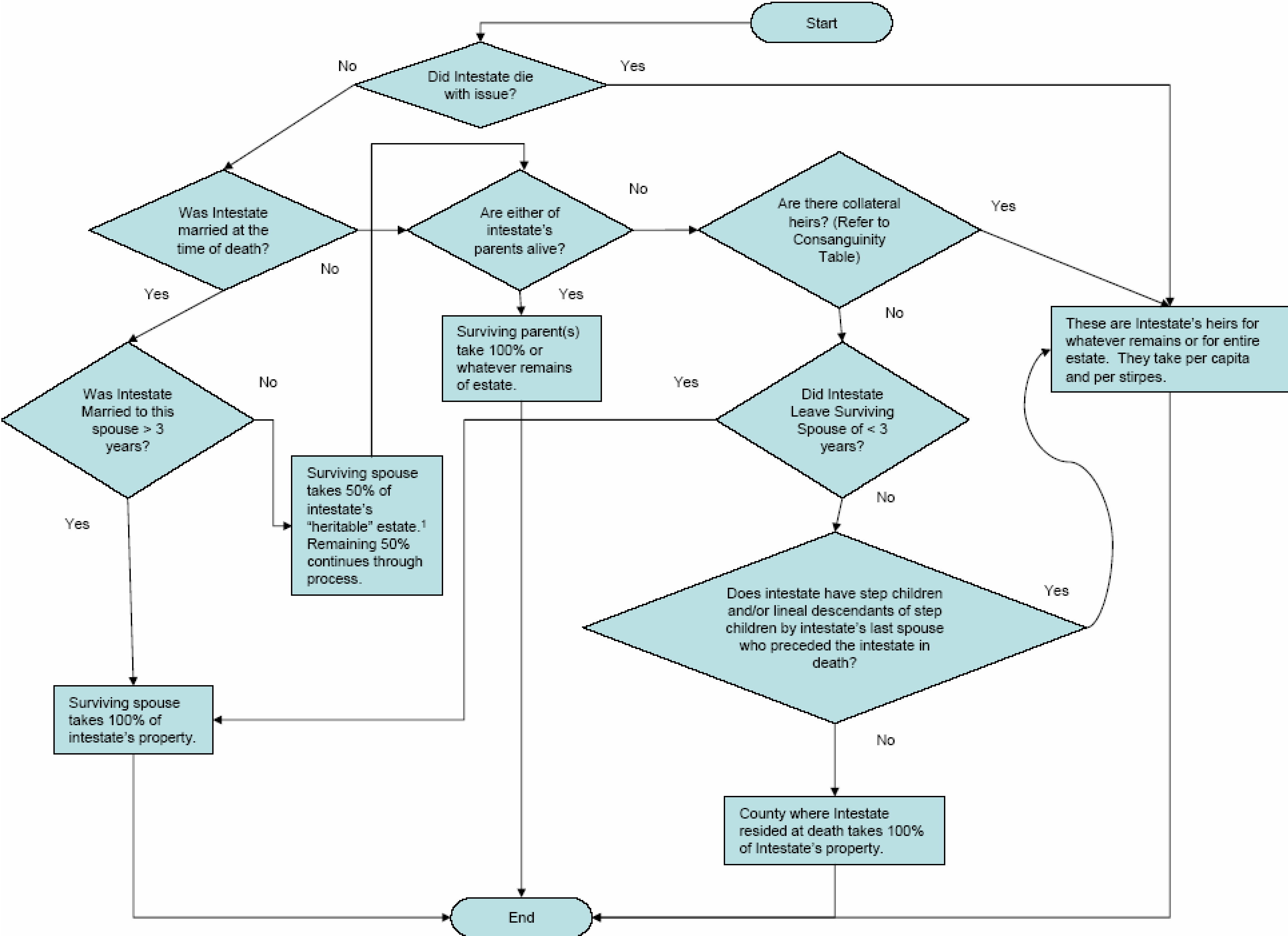
[155] Ark. Code Ann. § 28-73-1013(f)(1).
[156] Codified at Ark. Code Ann. § 18-12-608.
[157] *Id*. at (a)(1)(A).
[158] *See Id*. at (B)(i)(a).
[159] *Id*. at (b)(ii).
[160] *Id*.
[161] *Id*. at (c) and (g).
[162] *Id*. at (d) and (e).

Exhibit A: Table of Descent 1969 to Present



[1]Note the term "heritable." Dower in fee can reduce the heritable estate.

Exhibit B: Table of Descent 1959-1969

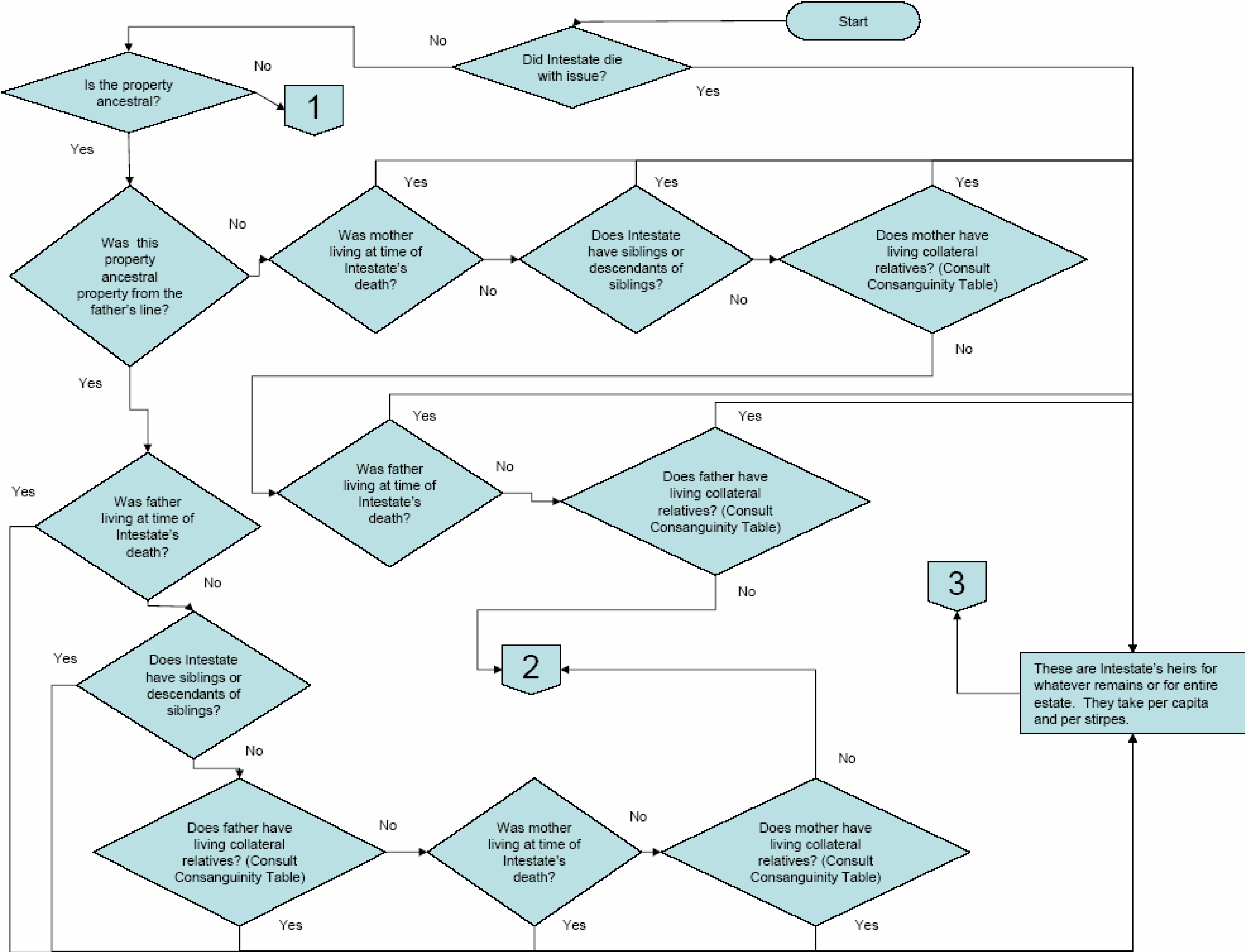
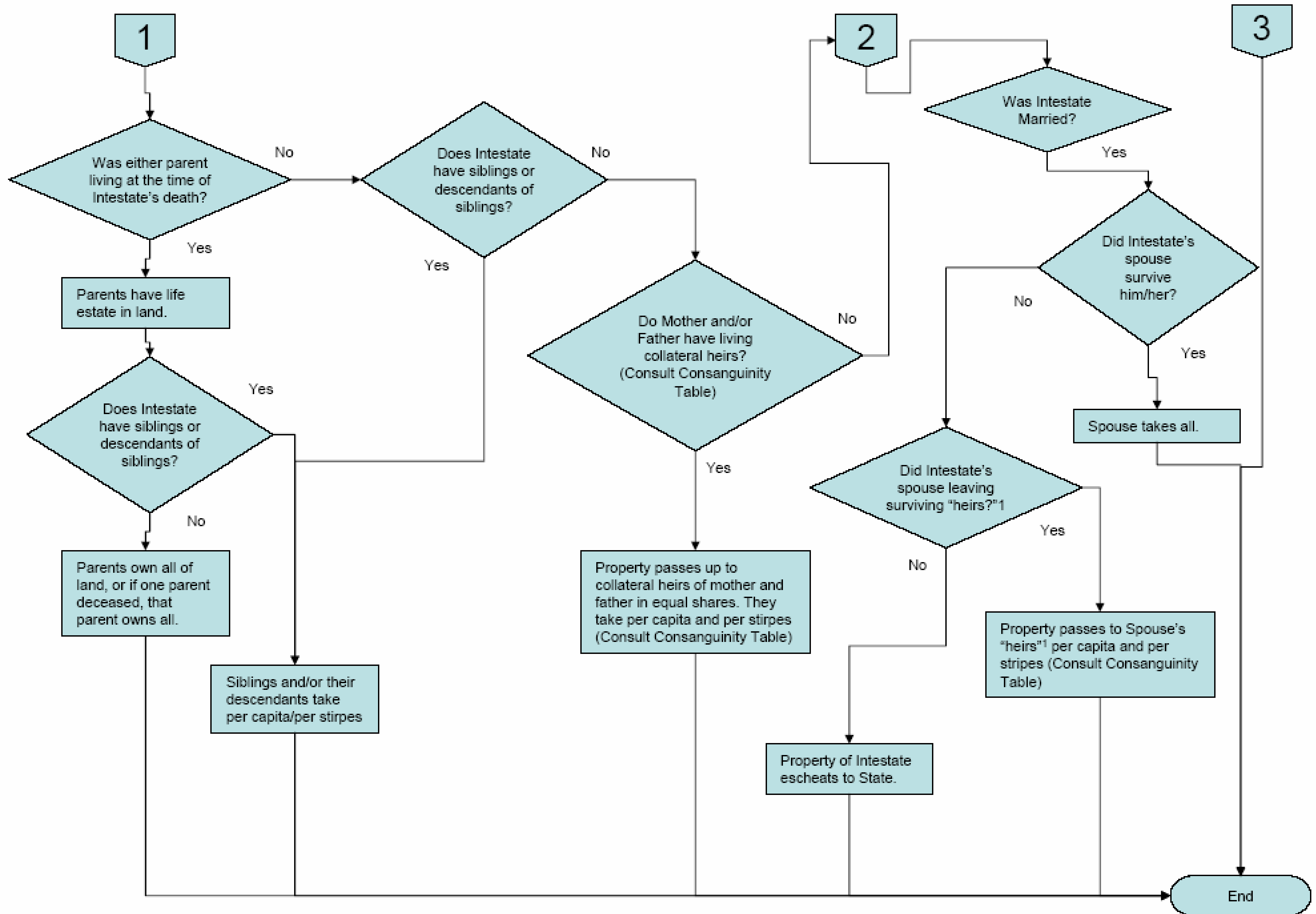


Exhibit B: Table of Descent 1959-1969 (cont)



1-The language of the statute in effect is "heir." Presumably, this would include any heir of the spouse and not just descendants.

Exhibit C: Table of Descent 1933-1959

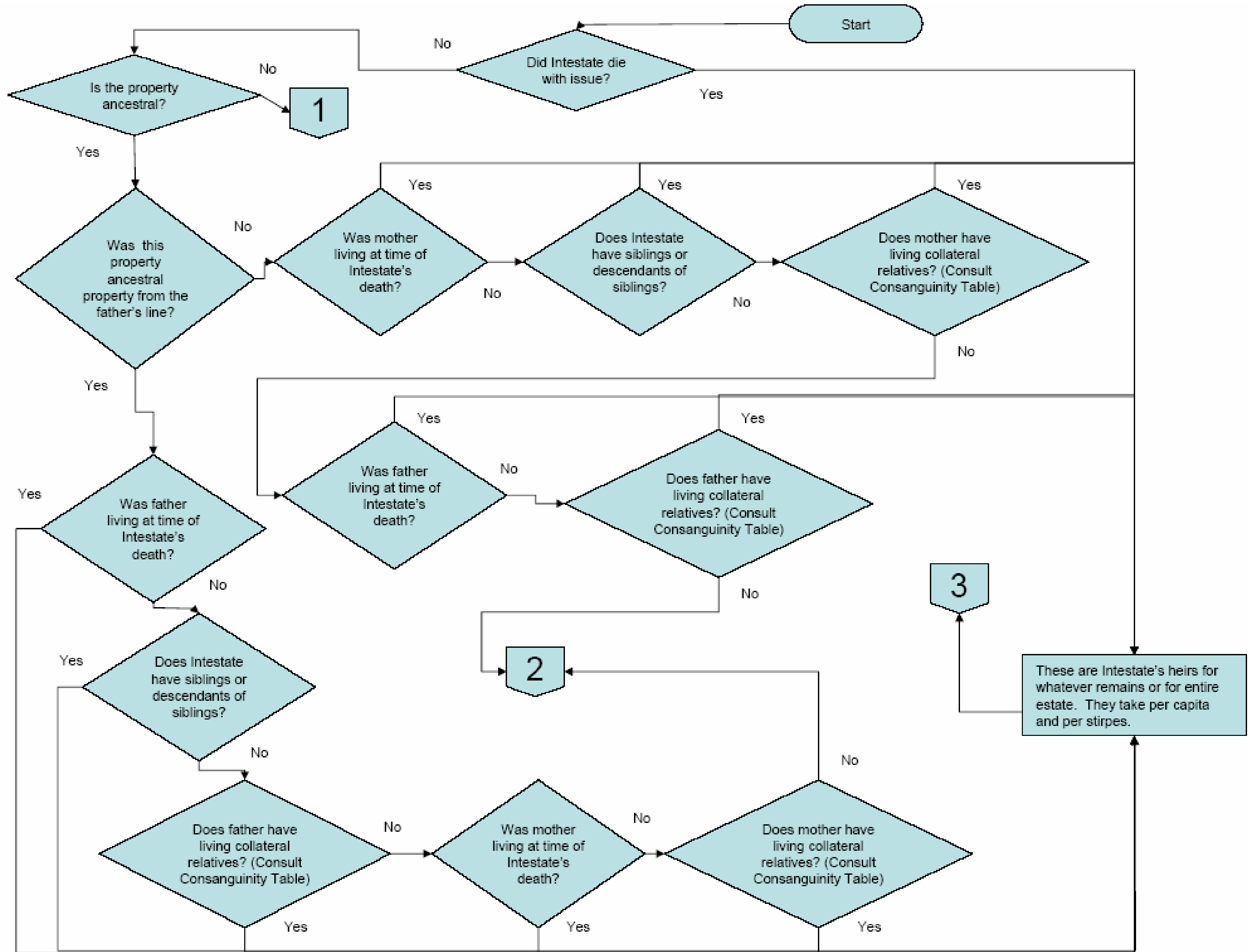


Exhibit C: Table of Descent 1933-1959 (cont)

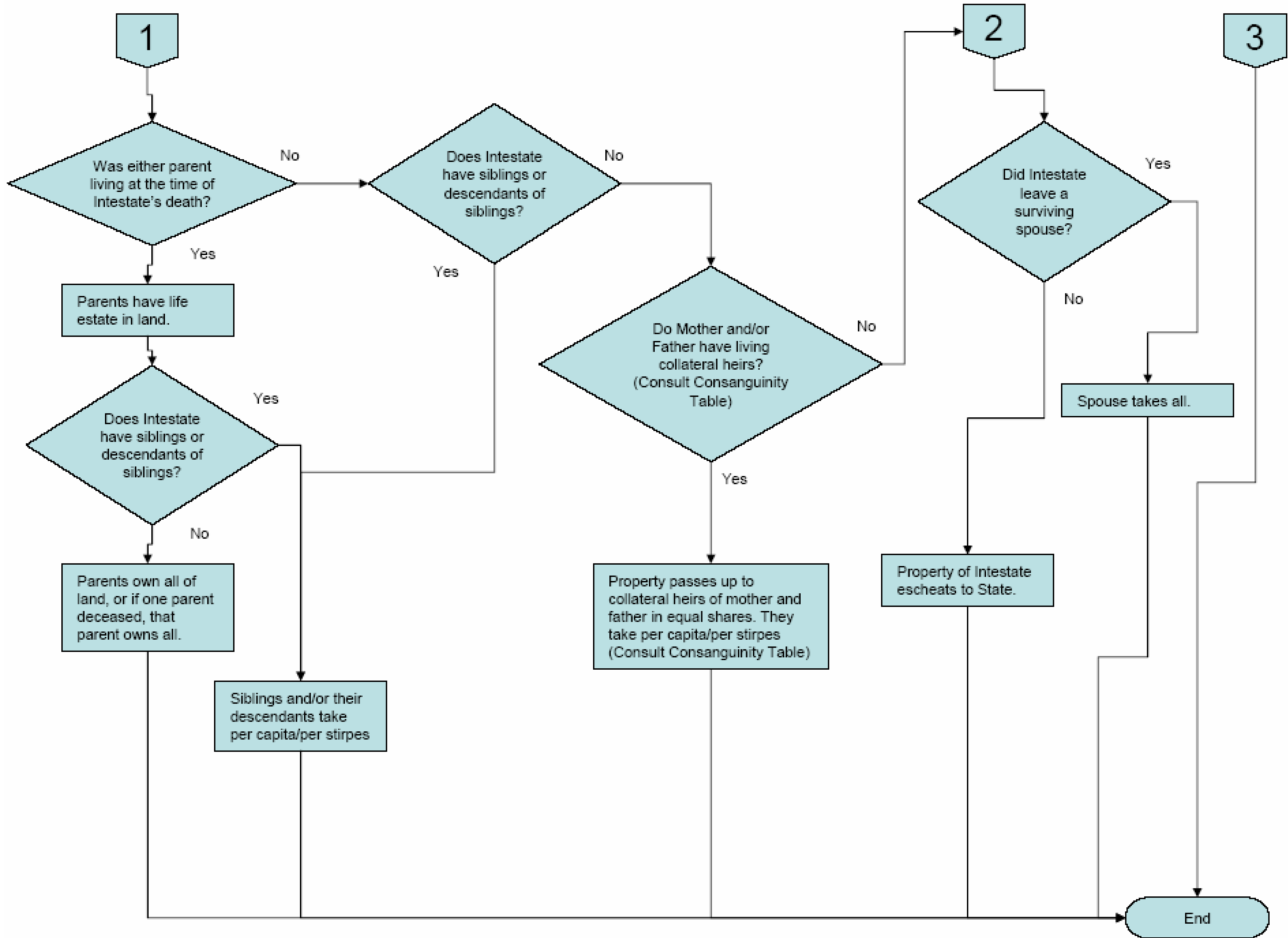


Exhibit D: Table of Descent 1848-1933

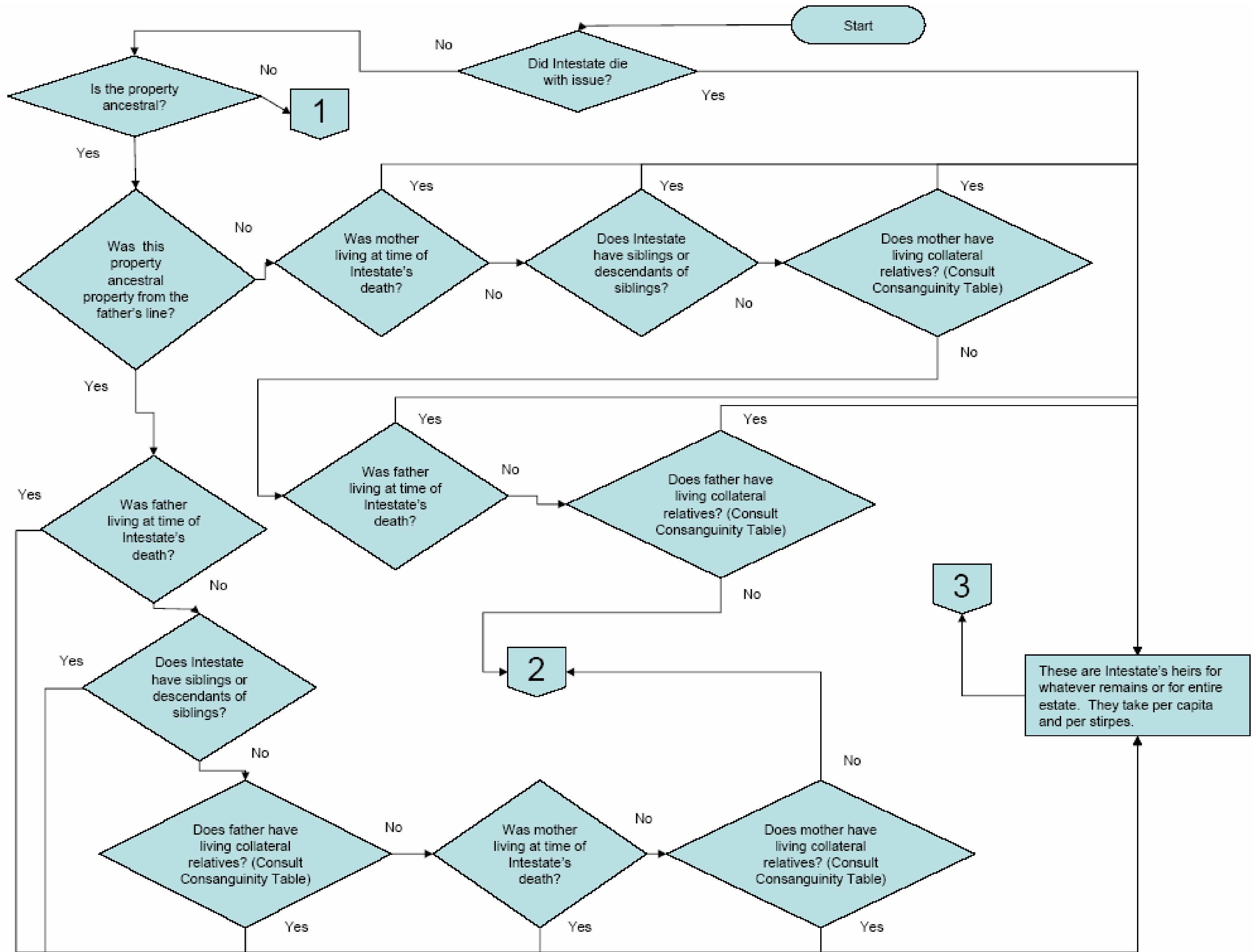
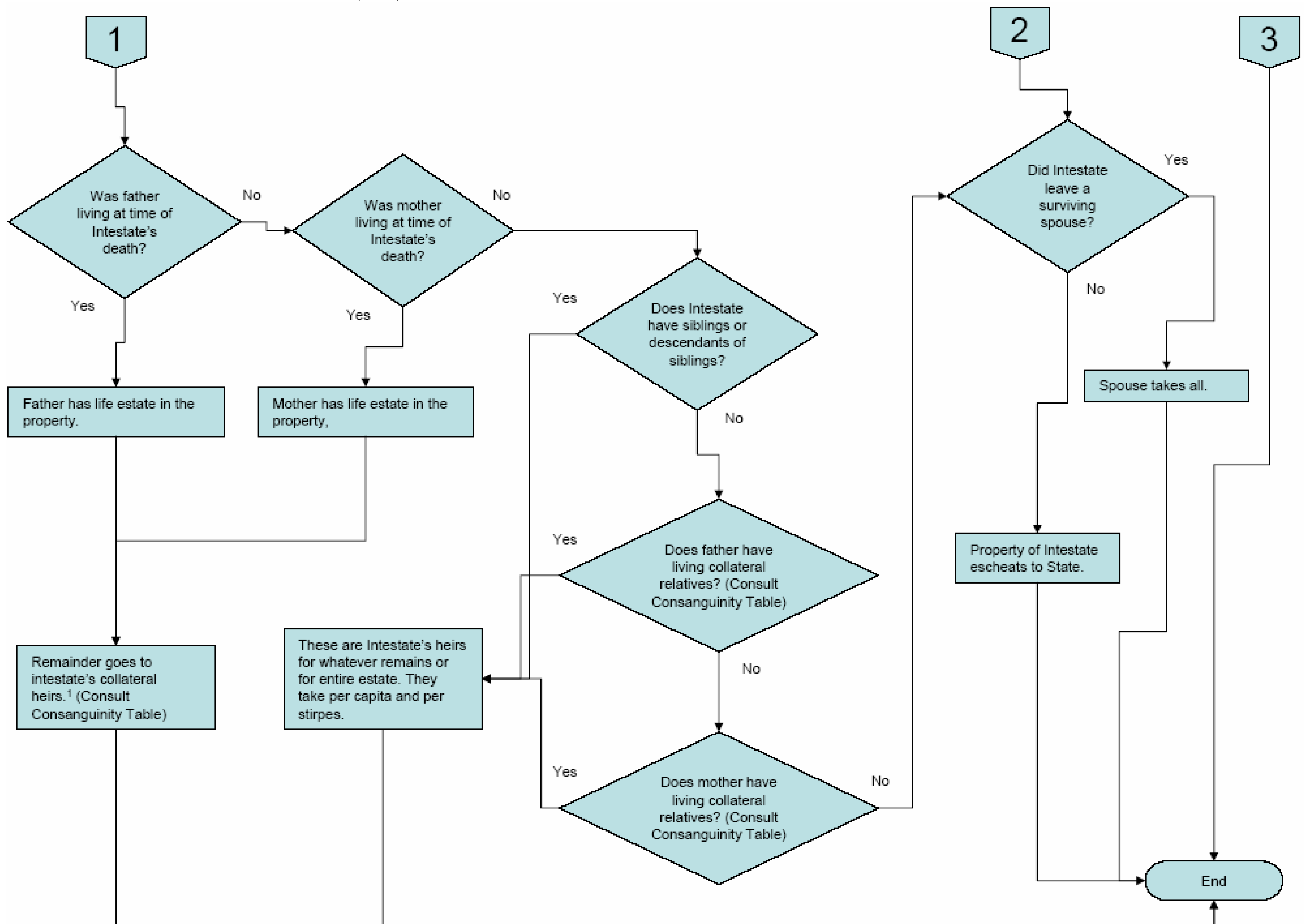


Exhibit D: Table of Descent 1848-1933 (cont)



[1]This is the language of the statute in force. Presumably, the property would skip the Intestate's parents in favor of the Intestate's siblings due to the legislature's providing for a life estate to the parents.