INTRODUCTION

In 1973, the Nebraska Legislature introduced Legislative Bill 354 ("L.B. 354"), which proposed to adopt the Uniform Probate Code ("UPC"), with certain variations, into law.\(^1\) The law in Nebraska at the time of L.B. 354's introduction was similar to the UPC, yet there was heated debate over the bill in the Nebraska Legislature.\(^2\) After publishing a study comparing L.B. 354 and prior Nebraska law, the Legislature passed the bill, which became effective January 1, 1977.\(^3\) Other states have also adopted the UPC, or — like Nebraska — the UPC with slight variations.\(^4\)

Although the UPC has governed probate law in the nation's courts for over twenty years, the debate concerning whether the family protection provisions protect a spouse and children from being disinherited is relatively new and has not been addressed by many jurisdictions.\(^5\) However, the Supreme Court of Nebraska, in *In re Estate of Peterson*,\(^6\) addressed the issue, holding that the exempt property allowance was an indefeasibly vested right in an adult emancipated child which may not be defeated by the testator's intent and a testator must devise the minimum amount as required by the statute.\(^7\) The court reasoned that because these rights were indefeasibly vested in a spouse, a child should also be granted this statutory right.\(^8\)

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1. Introduction to Nebraska Probate Code, at 1; Letter from Roland A. Luedtke, Chairman, Judiciary Committee, to Members of the Nebraska Legislative Counsel (Aug. 30, 1973).
2. See infra notes 308-09 and accompanying text.
3. Introduction to Nebraska Probate Code, at 1.
4. Id.
This Note will first review the facts and holding of Peterson.\textsuperscript{9} Next, this Note will examine legislative history and case law from Nebraska and other jurisdictions, concerning the UPC.\textsuperscript{10} Finally, this Note will criticize the Nebraska Supreme Court's holding in Peterson because: (1) the court misapplied the holding in In re Estate of Carmen to the facts of Peterson; (2) the court ignored the intent of the UPC drafters; (3) the court disregarded the phrase "unless otherwise provided" in Nebraska Revised Statute section 30-2323; (4) the court did not correctly apply the holding in In re Estate of Dunlap and other jurisdictions; and (5) the ruling is in direct conflict with Nebraska Revised Statute section 30-2321 and established Nebraska rules of law.\textsuperscript{11}

**FACTS AND HOLDING**

On April 20, 1996, Ervin W. Peterson, a resident of Sarpy County, Nebraska, died testate.\textsuperscript{12} Peterson's will was admitted to informal probate in the County Court of Sarpy County, Nebraska.\textsuperscript{13} Because no spouse survived Peterson, his only heir-at-law was Norman Peterson, his adult emancipated son.\textsuperscript{14} Peterson's last will and testament was dated May 21, 1982, and attached was a codicil dated October 19, 1993.\textsuperscript{15} After providing for payment of debts and expenses, the will

\textsuperscript{9} See infra notes 12-51 and accompanying text.

\textsuperscript{10} See infra notes 52-256 and accompanying text.

\textsuperscript{11} See infra notes 257-393 and accompanying text.


\textsuperscript{13} Id.

\textsuperscript{14} Id.

\textsuperscript{15} Id. The will of Ervin Peterson provides:

I, ERVIN W. PETERSON, of 706 South Adams, Papillion, in the County of Sarpy, State of Nebraska, being of sound mind and disposing memory, do hereby make, publish and declare this to be my Last Will and Testament, and I do hereby revoke any former wills, codicils or any other form of testamentary disposition heretofore made by me.

Article First:

I order and direct that my Personal Representative hereinafter named pay all of my just debts and funeral expenses as soon after my decease as conveniently may be.

Article Second:

I give, devise and bequeath any balance remaining unpaid at the time of my death on that certain Land Contract wherein I have sold on contract the real estate described as the South 46.7 Acres of the East Three-Fourths of the Northwest Quarter of Section 32, Township 14, North, Range 12, East of the 6th P.M., in Sarpy County, Nebraska, together with the unpaid balance of any Land Contracts which I may enter into in the future to my sister, ELLA CATHERINE GLASSHOFF, to be hers absolutely and forever. In the event of the death of my sister, ELLA CATHERINE GLASSHOFF, prior to my decease, I give, devise and bequeath the unpaid balance of any Land Contracts to JOLENE ANN GLASSHOFF STICE, the daughter of my sister, ELLA CATHERINE GLASSHOFF.
directed his entire estate to his sister.16 If Peterson’s sister predeceased him, the codicil bequeathed to his niece and a cousin the entire estate, and confirmed all other aspects of the 1982 will.17 Article five of the will contained the following provision:

I have intentionally omitted to provide for, and specifically direct and will that under no circumstances shall any part, share or interest in my estate go to, vest in, or be taken by my son, NORMAN LEWIS PETERSON, or any of his descendants, and I hereby generally and specifically disinherit each and any and all persons whomsoever claiming to be or who may lawfully be determined to be my heirs at law except as otherwise mentioned in this Will. Should this son, NORMAN

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Ervin W. Peterson, Last Will and Testament, at 1-3 (May 21, 1982).

17. Id.
LEWIS PETERSON, or any of his heirs or any one else seek to set aside this Will, or to change the intent I have designated, or endeavor to change or set aside the provisions of this Will in any manner whatsoever, then in any or all of the above-mentioned cases and events I hereby give and bequeath to such person or persons the sum of ONE DOLLAR and NO MORE, in lieu of any other share or interest in my estate.\textsuperscript{1}

The personal representative of Peterson's estate, Elaine Moore, promptly filed an application for "Informal Probate" of the will and "Informal Appointment of Personal Representative" in the County Court of Sarpy County, Nebraska.\textsuperscript{19} Subsequently, Peterson's son filed an "application for authorizing exempt property allowance" and an order directing payment of $5000.\textsuperscript{20} The exempt property statute, Nebraska Revised Statute section 30-2323, provides the following:

In addition to the homestead allowance, the surviving spouse of a decedent who was domiciled in this state is entitled from the estate to value not exceeding five thousand dollars in excess of any security interests therein in household furniture, automobiles, furnishings, appliances, and personal effects. If there is no surviving spouse, children of the decedent are entitled jointly to the same value. If encumbered chattels are selected and if the value in excess of security interests, plus that of other exempt property, is less than five thousand dollars, or if there is not five thousand dollars worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the five thousand dollars value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate except for costs and expenses of administration, and except that the right to any assets to make up a deficiency of exempt property shall abate as necessary to permit prior payment of homestead allowance and family allowance. These rights are in addition to any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided therein, by intestate succession, or by way of elective share.\textsuperscript{21}

Moore, the personal representative, filed a "resistance to application for exempt property allowance," insisting that Peterson's son was specifically disinherited by the terms of the will and therefore was not

\textsuperscript{18.} Id. at 1-2.
\textsuperscript{19.} Id.
\textsuperscript{20.} Id.
entitled to the exempt property allowance. In a hearing before the County Court of Sarpy County, Nebraska, Judge Larry Fugit held that Peterson's son was not entitled to the exempt property allowance.

Peterson's son appealed to the Supreme Court of Nebraska pursuant to Nebraska Revised Statute section 30-1601, which the court accepted. Peterson's son argued that the county court erred by holding that he was not permitted to receive the exempt property allowance granted under section 30-2323. Peterson's son asserted "the disinheritance of a child by a testator does not affect the statutory right to property [and] this court should treat an exempt property allowance as an absolute right." Moore argued Nebraska Revised Statute section 30-2341 should control under these circumstances. Specifically, section 30-2341 provides "the intention of a testator as expressed in his will controls the legal effect of his dispositions. The rules of construction expressed in the succeeding sections of this part apply unless a contrary intention is indicated by the will." Additionally, Moore claimed the last sentence of section 30-2323, which states that the rights to exempt property are in addition to any benefit passing by will unless otherwise provided therein, refers to the testator's intent. Moore further claimed that article five of the will clearly provides Peterson's intent that Norman Peterson take nothing from his estate or, "in the alternative, that he would take only one dollar and no more in lieu of any other share or interest." The supreme court reversed the county court, holding that "the rights set forth in § 30-2323 cannot be defeated by a testator even though the testator may require a spouse or child to choose between the devise or the exempt property allowance."

The court began its analysis by stating that statutory interpretation presents questions of law, and that an appellate court must interpret the statutes independent of any conclusions that were reached by

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22. Peterson, 254 Neb. at 336, 576 N.W.2d at 769.
23. See Transcript at 5:3-9, In the Matter of the Estate of Peterson (No. 96-1285) (Sarpy County Ct. Nov. 26, 1996) (stating that "the exempt property, the homestead allowance... are there to exempt those amounts from the claims of creditors, to exempt those amounts from the payment of inheritance taxes, and not to benefit or in other words take the property out of an estate that [has] been set forth in by will, and make another disposition of that property").
25. Id.
26. Id. at 334, 337, 576 N.W.2d at 770, 767, 778.
27. Id. at 337, 576 N.W.2d at 770.
29. Peterson, 254 Neb. at 337, 576 N.W.2d at 770.
30. Id. at 335, 337, 576 N.W.2d at 769-70.
31. Id. at 341, 576 N.W.2d at 772.
the trial court. \textsuperscript{32} The court determined the "issue presented is whether this disinheriance affects Peterson's [son's] claim to an exempt property allowance pursuant to § 30-2323." \textsuperscript{33} The court stated that a reviewing court must look at the purpose of the statute and give a reasonable construction that best achieves its purpose. \textsuperscript{34} Additionally, the court stated:

[A] court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute. \textsuperscript{35}

Next, the court examined the last sentence of section 30-2323, which states "exempt property rights are in addition to any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided therein, by intestate succession, or by way of elective share." \textsuperscript{36} By analogy, the court looked at the case of \textit{In re Estate of Carmen}. \textsuperscript{37} In Carmen, the Nebraska Supreme Court held that "the family allowance was a specific, vested, and indefeasible statutory right accruing to the spouse upon the decedent's death." \textsuperscript{38} In ascertaining whether section 30-2323 creates an indefeasibly vested statutory right, the Peterson court noted that it will not resort to interpreting words within the statute that are plain, direct, and unambiguous. \textsuperscript{39} The court continued by stating that "the components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible." \textsuperscript{40} Therefore, the court concluded that the language of section 30-2323 is plain and unambiguous. \textsuperscript{41} Subsequently, the court stated that section 30-2323 created a statutory right which accrued to a surviving spouse, but if there was no surviving spouse, to the surviving children jointly at the time of the testator's death. \textsuperscript{42}

After determining that section 30-2323 created a statutory right, the court analyzed the statute to decide whether the statutory right

\begin{thebibliography}{99}
\bibitem{32} Id. at 337, 576 N.W.2d at 770.
\bibitem{33} Id. at 337-38, 576 N.W.2d at 770.
\bibitem{34} Id. at 338, 576 N.W.2d at 770 (citation omitted).
\bibitem{35} Id.
\bibitem{36} Id. at 338, 576 N.W.2d at 771 (quoting \textsc{Neb. Rev. Stat.} § 30-2323 (Reissue 1995) (citation omitted)).
\bibitem{37} Id. (citing \textit{In re Estate of Carmen}, 213 Neb. 98, 327 N.W.2d 611 (1982)).
\bibitem{38} Id.
\bibitem{39} Id.
\bibitem{40} Id. at 338-39, 576 N.W.2d at 771.
\bibitem{41} Id. at 339, 576 N.W.2d at 771.
\bibitem{42} Id.
\end{thebibliography}
was indefeasibly vested or if it could be defeated by a testator in the provisions of a will. 43 To assist in its analysis, the court examined the Montana case of In re Estate of Dunlap, where a similar issue was presented to the Montana Supreme Court. 44 The Peterson court noted:

The Montana Supreme Court held that [the relevant statute] did not use the term “exemption” or “exempt” in its colloquial form, but, rather, treated “exempt property” together with “homestead allowance” in the noun form to identify an absolute grant. The court held that these rights were in addition to any benefit or share passing to the surviving spouse or children “(1) by will of the decedent unless otherwise provided, (2) by intestate succession, or (3) by way of elective share.” 45 46

The court further noted that the Montana Supreme Court continued by stating that the family protection provisions were intended by the drafters of the Uniform Probate Code (“UPC”) to protect against the disinheritance of the surviving spouse and children. 46

Personal representative Moore argued that the statutory phrase “unless otherwise provided therein” refers to the ability of the testator to defeat an heir’s right to the exempt property allowance. 47 The Nebraska Supreme Court recognized that, in other states with similar family protection statutes, the testator does have the ability to abrogate an heir’s statutory right, but “this intent must be clear from the language of the will before the court will bar the statutory grant.” 48

Despite this assertion, the court concluded that the rights set forth in section 30-2323 are vested and indefeasible. 49 The court stated that the “clear intent of § 30-2323 is to provide an exempt property allowance, which benefit is ‘in addition to’ any benefits passing to the surviving spouse or surviving children by will, by intestate succession, or by way of elective share.” 50 In conclusion, the court stated that “the rights set forth in § 30-2323 cannot be defeated by a testator even though the testator may require a spouse or child to choose between the devise or the exempt property allowance.” 51

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43. Id. (citation omitted).
44. Id. (citing In re Estate of Dunlap, 649 P.2d 1303 (Mont. 1982)).
45. Id. at 339-40, 576 N.W.2d at 771 (citation omitted).
46. Id. at 340, 576 N.W.2d at 771-72.
47. Id. at 340, 576 N.W.2d at 772.
48. Id.
49. Id.
50. Id.
51. Id. at 341, 576 N.W.2d at 772.
BACKGROUND

FAMILY PROTECTION PROVISIONS IN NEBRASKA REGARDING A SPOUSE

In In re Estate of Carmen, the Supreme Court of Nebraska addressed the issue of how to compute the augmented estate of the decedent and how to determine if the surviving spouse established her need for the family allowance. In Carmen, grandnieces and a grandnephew of the decedent contested the calculation of Harry Carmen's augmented estate in the District Court of Buffalo County, Nebraska. All personal property of the decedent was left in trust to Robert Downy, who was to pay the income of the trust to the decedent's wife, and upon her death, the corpus was to be given to his grandnieces and grandnephew. The decedent's wife chose to elect against the will pursuant to Nebraska Revised Statute section 30-2313(a), which states that a surviving spouse has a right to an elective share of one-third of the augmented estate. The augmented estate, as defined in Nebraska Revised Statute section 30-2314, is comprised of:

[the] probate estate, less certain allowances, plus the value of property owned by the spouse at the decedent's death and which would have been includable in the surviving spouse's augmented estate if that spouse had predeceased the decedent, to the extent the owned property was derived by the surviving spouse from the decedent without a full consideration in money or money's worth.

The decedent's wife sought to have the court recognize her as a partner in the farm operation, or that half of all items were owned by her outright. The district court held a "spouse's labor does not become a contribution 'in money's worth' such as to take one-half the value of jointly produced and acquired assets out of the augmented estate computation."

Additionally, the personal representative granted a family allowance in the amount of $6000, payable in the amount of $500 per month. After approximately nine or ten payments, the monthly pay-

52. 213 Neb. 98, 327 N.W.2d 611 (1982).
54. Carmen, 213 Neb. at 98-99, 327 N.W.2d at 611, 613.
55. Id. at 99, 327 N.W.2d at 613.
56. Id.
57. Id.
58. Id. at 100, 327 N.W.2d at 613.
59. Id. at 101, 327 N.W.2d at 614.
60. Id. at 102, 327 N.W.2d at 614.
ments ceased due to a lack of cash in the estate.\textsuperscript{61} Hence, the personal representative filed a petition asking the county court’s permission to continue the payments.\textsuperscript{62} The county court ruled that a maximum of $175 would be allowed.\textsuperscript{63} The district court refused to allow the additional payments because of the decedent’s wife’s failure to prove the need for the additional money sought, and further stated that the full $6000 be paid in full when the assets of the estate permit.\textsuperscript{64}

On appeal to the Supreme Court of Nebraska, the grandnieces and grandnephew challenged the calculation of the testator’s augmented estate.\textsuperscript{65} Mrs. Carmen, the widow, cross-appealed the district court’s calculation of the testator’s augmented estate and the ruling that she failed to show adequate need for a supplemental family allowance.\textsuperscript{66} The supreme court affirmed the decision of the district court.\textsuperscript{67} The court stated that the purpose underlying the elective share and augmented estate is to protect a surviving spouse from transfers of \textit{inter vivos} gifts and to prevent a surviving spouse from receiving more than such share by taking into account certain transfers — such as insurance proceeds.\textsuperscript{68} The grandnieces and grandnephew argued that all real estate owned by the decedent and decedent’s wife as tenants in common should be included in the calculation of the augmented estate.\textsuperscript{69} The decedent’s wife contended that only one-half of the real estate held as tenancy in common, farm equipment, and other personal items should be included, with the other half being her own separate estate.\textsuperscript{70}

In support of her contention, the decedent’s wife argued she and the decedent were partners in the family farm operation.\textsuperscript{71} She claimed to have performed various jobs in her contribution to the farm operation, which included raising chickens, selling eggs, milking cows, welding machinery, etc.\textsuperscript{72} From these facts, the decedent’s wife claimed that she performed more duties than an ordinary housewife, many of which resembled duties of a hired hand.\textsuperscript{73} Therefore, she argued, one-half of all farm equipment and other personal items should

\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} Id. The maximum allowed by statute is $6000 over a 12 month period. Id.
\textsuperscript{65} Carmen, 213 Neb. at 99, 327 N.W.2d at 613.
\textsuperscript{66} Id.
\textsuperscript{67} Id. at 103, 327 N.W.2d at 615.
\textsuperscript{68} Id. at 100, 327 N.W.2d at 613.
\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} Id. at 101, 327 N.W.2d at 614.
\textsuperscript{72} Id. The decedent’s wife also fed cattle and hogs, scooped grain, and put up hay.
\textsuperscript{73} Carmen, 213 Neb. at 101, 327 N.W.2d at 614.
be treated as being hers outright. The court ruled that a “spouse’s labor does not become a contribution in money’s worth such as to take one-half the value of jointly produced and acquired assets out of the augmented estate computation.”

In reaching that conclusion, the court noted it would not deviate from the traditional view that there must be an express contract to compensate a spouse for extraordinary services and that such a contract would not be implied.

The decedent’s wife also contended that the land which she owned prior to marriage was relied on in securing a mortgage for real estate purchased by her and the decedent, and this “established [that] she contributed ‘in money’s worth’ to that commonly owned property.” The court disagreed with her argument, stating that separately owned property used to acquire a shared asset does not change the spouse’s contribution to the acquisition of a commonly held asset.

The remaining issue was whether the decedent’s wife proved her need for the family allowance. The supreme court affirmed the decision of the district court and further noted that, according to Nebraska Revised Statute sections 30-2324 and 30-2325 — which provide for an allowance of $6000, not to exceed monthly installments of $500 — “[the allowance is] a specific, vested, and indefeasible statutory right accruing to [the decedent’s wife] upon decedent’s death.”

In addition to the right to homestead allowance and exempt property, if the decedent was domiciled in this state, the surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported by him are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than one year if the estate is inadequate to discharge allowed claims. The allowance may be paid as a lump sum or in periodic installments. It is payable to the surviving spouse, if living, for the use of the surviving spouse and minor and dependent children; otherwise to the children, or persons having their care and custody; but in case any minor child or dependent child is not living with the surviving spouse, the allowance may be made partially to the child or his guardian or other person having his care and custody, and partially to the spouse, as their needs may appear. The family allowance is exempt from and has priority over all claims except for costs and expenses of administration and the homestead allowance. The family allowance is not chargeable against any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided therein, by intestate succession, or by way of elective share. The death of any person entitled to family allowance, other than the surviving spouse, terminates his right to allowances not yet paid.
Publications Interpreting The Nebraska Probate Code

The Nebraska Probate Code is based upon the version of the Uniform Probate Code ("UPC") introduced in 1969 by the National Conference of Commissioners on Uniform State Laws, and later approved by the American Bar Association. In 1973, the UPC was introduced in the Nebraska Legislature as Legislative Bill 354 ("L.B. 354"). To gather support for adoption of the UPC, the Legislature published the "Working Papers and Preliminary Interim Study Committee Report" on L.B. 354, which was distributed in 1973 prior to passage of the bill, to inform the legal community of how the present law at that time would differ if L.B. 354 was passed. The "Working Papers" contained the "text of L.B. 354, the comments of the draftsmen of the Uniform Probate Code as to its purposes and effects, and Nebraska Comments..." to the statutes. Two years later, the 1975 Legislature passed L.B. 354, which was virtually identical to the UPC — with the exception of a few changes made by the Legislature.

To assist attorneys and judges in interpreting the new Nebraska Probate Code, a printed manual was made available to help answer

If the estate is otherwise sufficient, property specifically devised is not used to satisfy rights to homestead and exempt property. Subject to this restriction, the surviving spouse, the guardians of the minor children, or children who are adults may select property of the estate as homestead allowance and exempt property. After giving such notice as the court may require in a proceeding initiated under the provisions of section 30-2405, the personal representative may make these selections if the surviving spouse, the children or the guardian of the minor children are unable or fail to do so within a reasonable time or if there are no guardians of the minor children. The personal representative may execute an instrument or deed or distribution to establish the ownership of property taken as homestead allowance or exempt property. He or she may determine the family allowance in a lump sum not exceeding nine thousand dollars or periodic installments not exceeding seven hundred fifty dollars per month for one year, and may disburse funds of the estate in payment of the family allowance and any part of the homestead allowance payable in cash. The personal representative or any interested person aggrieved by any selection, determination, payment, proposed payment, or failure to act under this section may petition to the court for appropriate relief, which relief may provide a family allowance larger or smaller than that which the personal representative determined or could have determined.

The homestead allowance, the exempt property, and the family allowance as finally determined by the personal representative or by the court, shall vest in the surviving spouse as of the date of decedent's death, as a vested indefeasible right of property, shall receive as an asset of the surviving spouse's estate if unpaid on the date of death of such surviving spouse, and shall not terminate upon the death or remarriage of the surviving spouse.


81. Introduction to Nebraska Probate Code, at 1.
82. Id.
84. Id.
85. Introduction to Nebraska Probate Code, at 2 (noting that the effective date of Legislative Bill 354 was January 1, 1977).
questions as to how the law had changed in Nebraska. The manual was titled "Nebraska Probate System I," and provided assistance in the conversion from the "old" probate code to the newly passed UPC version. In discussing the three family protection allowances, the manual stated that "if the will clearly provides that the provisions of the will is in lieu of these rights, then the provisions of the will would bar the allowances." The manual further stated:

The homestead allowance, exempt property right and family allowance should all qualify for the estate tax marital deduction because they vest in the surviving spouse at the date of death of the decedent. In addition they are vested indefeasible rights in property that survive as an asset of the surviving spouse's estate if they are unpaid on the date of the death of the surviving spouse.

The view taken by the manual is supported by one commentator who stated that "[i]n America . . . a parent can disinherit a child without giving any reason." The commentator further explained why such a view is taken and how the law has historically treated disinheritance in regard to a surviving spouse and child.

Furthermore, a subsequent edition of the manual, Nebraska Probate System IV, specifically provided that the exempt property, homestead and family allowance should be granted unless the right to the allowance is waived by the surviving spouse under Nebraska Revised Statute section 30-2316, or if the rights are renounced by the surviving spouse or children after the death of the decedent under Nebraska Revised Statute sections 30-2352. The subsequent edition continued by explaining that the allowances were instituted so that an estate could qualify for a marital deduction for the value of the property given to the surviving spouse. The fourth edition also stated that "[t]he surviving spouse is entitled to exempt property and allowances, even if an elective share is taken."

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86. See infra notes 87-94 and accompanying text.
87. See NEBRASKA PROBATE SYSTEM I vi (1976) (noting that the manual compares old Nebraska law with the UPC).
88. NEBRASKA PROBATE SYSTEM I, supra note 87, at 3-3.
89. Id.
91. See Batts, 41 Hastings L.J. at 1198-99, 1220 (discussing the elective share statutes and the reasons for testamentary freedom); see also Lawrence W. Waggoner, Marital Property Rights in Transition, 59 Mo. L. Rev. 21, 41-42 (1994) (discussing the wife's protection from disinheritance). For an explanation of why this view is taken in the United States, see infra notes 287-303 and accompanying text.
93. NEBRASKA PROBATE SYSTEM IV, supra note 92, at 300-08.
94. Id.
The Uniform Probate Code Practice Manual

The American Law Institute-American Bar Association Committee on Continuing Professional Education published The Uniform Probate Code Practice Manual to address how the family allowance rights should be treated in relation to the attempted disinherition of the spouse or children by the testator.\(^{95}\) The manual states that "these rights not only take preference over unsecured creditors but also may not be defeated by the decedent's will."\(^{96}\) The manual further explains that the right to the exempt property is in addition to any property passing to the surviving children or spouse by the will unless the will specifically provides otherwise.\(^{97}\) In addition, the manual declares that:

the testator may force the spouse or children to elect to take property under the will in lieu of the exempt property by an express provision in the will, e.g., "this provision for my wife is expressly in lieu of her right to homestead allowance and exempt property, and any family allowance to my wife shall be charged against this provision under my will."\(^{98}\)

A subsequent provision in the UPC addresses the issue of pretermitted children; those omitted from the will who were born after the execution of the will.\(^{99}\) This provision is designed to protect children from situations in which the omission from the decedent's will was unintentional.\(^{100}\) Hence, the code provides that if a "child born or adopted after execution of the testator's will claims a share by reason of these code sections, his claim may be defeated if it appears from the will that the omission was intentional. . . ."\(^{101}\) The general comment to this statute by the drafters of the UPC states:

To preclude operation of this section it is not necessary to make any provision, even nominal in amount, for a testator's present or future children; a simple recital in the will that the testator intends to make no provision for then living children or any the testator thereafter may have would meet the requirement of [this section].\(^{102}\)


\(^{96}\) Probate Manual, supra note 95, at 98.

\(^{97}\) Id. at 113.

\(^{98}\) Id.

\(^{99}\) Id. at 115. This statute is entitled "Pretermitted Children" under the Nebraska Probate Code. Neb. Rev. Stat. § 30-2321 (Reissue 1995).

\(^{100}\) Probate Manual, supra note 95, at 115.

\(^{101}\) Id.

The manual further provides that a testator may simply make a provision in his or her will that the testator intends not to make dispositions to any children then living or afterborn.\textsuperscript{103} Although not discussing the issue of disinheritance, the Supreme Court of Nebraska, in \textit{In re Estate of McClow},\textsuperscript{104} utilized the Uniform Probate Code Practice Manual to determine how to apply the Nebraska probate code.\textsuperscript{105}

In \textit{McClow}, the court held that under Reissued Revised Statutes of 1943, section 30-2346, where a testator, prior to death, sold specifically devised property and upon his death there remains an unpaid balance on that sale, the beneficiary of the specific devise is entitled to the unpaid balance.\textsuperscript{106} In addition, the court held that "[a]demption results only as to part of the sales price received by the testator in his lifetime."\textsuperscript{107} In \textit{McClow}, beneficiaries under the will sued the personal representative of the estate in the District Court of Madison County, Nebraska, claiming that proceeds from the sale of real estate owned by the decedent, prior to his death, were owed to them.\textsuperscript{108} The specific real estate was an eighty-acre tract of land that had been devised to the beneficiaries by a codicil executed July 1, 1969.\textsuperscript{109} On November 20, 1974, the decedent sold the real estate under an installment land contract for $42,000.\textsuperscript{110} As of the date of decedent's death, January 25, 1977, there remained an unpaid balance of $19,800.\textsuperscript{111} The district court was asked to decide whether the person who received the specific devise of real property should be entitled to the unpaid balance of the land where: (1) the testator devised the real property in his will; (2) the testator thereafter sold the land; and (3) the balance owed to the testator as a result of the sale is unpaid at the

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\textsuperscript{103} Probat\textit{e Manual}, \textit{supra} note 95, at 116.
\textsuperscript{104} 205 Neb. 739, 290 N.W.2d 186 (1980).
\textsuperscript{105} See \textit{In re Estate of McClow}, 205 Neb. 739, 744, 290 N.W.2d 186, 189-90 (1980) (using the \textit{Uniform Probate Code Practice Manual} to interpret section 2-608 of the \textit{UPC}).
\textsuperscript{106} \textit{McClow}, 205 Neb. at 745, 290 N.W.2d at 190.
\textsuperscript{107} Id.
\textsuperscript{108} Id. at 739-40, 290 N.W.2d at 187-88.
\textsuperscript{109} Id. at 739-40, 290 N.W.2d at 187.
\textsuperscript{110} Id. at 740, 290 N.W.2d at 187. Ademption is defined as:

\begin{quote}
Extinction or withdrawal of legacy by testator's act equivalent to revocation or indicating intention to revoke. Testator's giving to a legatee that which he has provided in his will, or his disposing of that part of his estate so bequeathed in such a manner as to make it impossible to carry out the will. Revocation, recalling, or cancellation of a legacy, according to the apparent intention of the testator, implied by the law from acts done by him in his life, though such acts do not amount to an express revocation of it.
\end{quote}
\textsuperscript{111} \textit{McClow}, 205 Neb. at 740, 290 N.W.2d at 187.
\end{flushleft}
testator’s death. The district court found that the recipients of the specific devise were entitled to the unpaid balance.

The personal representative of the estate appealed the decision of the district court to the Supreme Court of Nebraska, arguing that section 30-2346 did not apply to this case because it relates to sales by a conservator or guardian, not sales by a testator. The supreme court affirmed, reasoning that section 30-2346 was ambiguous, because “the circumstances under which there would be a right under subsection (b) at the same time the contingencies described in subsection (a) exist is not readily apparent.” In determining that the beneficiaries were entitled to the unpaid balance, the court referred to the Uniform Probate Code Practice Manual to solve the apparent ambiguity in section 30-2346.

THE DISINHERITANCE OF A SPOUSE IN OTHER JURISDICTIONS

The Supreme Court of Utah, in the case of In re Estate of Wagley, held that the exempt property allowance may be satisfied by invading multiple party accounts held by a decedent. In Wagley, the decedent’s wife petitioned for exempt property and family allowances in the Probate Court for the Second District of Davis County, Utah. Allan Wagley, the decedent, established several joint accounts with his daughter totaling approximately $18,000. Subsequently, the decedent married Susan Wagley and died five days later. The decedent’s wife was appointed personal representative of the estate. Thereafter, the decedent’s widow petitioned the court to grant her request for the exempt property and family allowance. The probate court reached into the multiple party accounts of the daughter and decedent to satisfy various administration costs, burial expenses, and the family allowance. The probate court, however,

113. McClow, 205 Neb. at 739, 290 N.W.2d at 187.
114. Id. at 740, 290 N.W.2d at 188.
115. Id. at 743, 290 N.W.2d at 189.
117. 760 P.2d 316 (Utah 1988).
119. Wagley, 760 P.2d at 316, 317.
120. Id. at 317.
121. Id.
122. Id.
123. Id.
124. Id. The decedent’s estate consisted mainly of $18,000, all contained in joint accounts. Id. The total expense incurred in administering the estate was $7314.93. Id. Thus, the estate was insufficient to pay all the debts and expenses incurred during the settling of the estate. Id.
did not permit the decedent’s wife to claim an exempt property allowance. An amended inventory worksheet filed by the decedent’s wife revealed the expenses of the estate exceeded the assets of the estate by a total of $2873.15. The probate court held that “to the extent there is value in the estate the widow is entitled to a claim of exempt property up to $3500, [but] only to the value of the property in the estate.”

On appeal to the Utah Supreme Court, the decedent’s wife challenged the probate court’s ruling denying the exempt property allowance from the multiple party accounts. In reaching its decision, the supreme court first addressed the issue of whether the exempt property allowance is an absolute right granted to a surviving spouse. The court stated:

The purpose of the allowances is to ensure that a surviving spouse is not left penniless and abandoned by the death of a spouse. . . . The family protection provisions of the Uniform Probate Code were intended by the drafters to protect a surviving spouse from disinheritance by a decedent, and the surviving spouse’s right to exempt property is absolute.

After deciding that the right to the exempt property is absolute, the supreme court examined whether the probate court erred by not fulfilling this allowance from the multiple party accounts. In deciphering the relevant statute, the court referred to the drafting committee’s report, which provided that:

[under this section a surviving spouse is automatically assured of some protection against a multiple-party account if the probate estate is insolvent; rights are limited, however, to sums needed for statutory allowances . . . [which] includes the homestead allowance . . . family allowance . . . and any [other] allowance needed to make up the deficiency in exempt property under section 75-2-402.]

Based on this comment, the Supreme Court of Utah ruled that the probate court had erred in not satisfying the exempt property allowance from the multiple-party accounts.

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126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 318.
130. *Id.* (citing *In re Estate of Dunlap*, 649 P.2d 1303, 1305 (Mont. 1982); *In re Estate of Merkel*, 618 P.2d 872 (Mont. 1980)).
131. *Id.*
132. *Id.* (quoting 1997 Utah Laws 75-6-107 cmt. (discussing the family exemption provision and multiple party accounts)).
133. *Id.*
In addition, the Ohio Court of Appeals — in *In re Estate of Reddick* — held that the decedent's wife is presupposed to have taken under the will and the devise in the will was in lieu of statutory support. In *Reddick*, the Hancock County Court of Common Pleas, Probate Division, ordered the executor of the decedent's estate to pay the decedent's wife an allowance for statutory support. The decedent's will provided in part: "I give and bequeath to my wife, E. Delores Reddick, the sum of One and 00/100 Dollars ($1.00) to be hers absolutely, said bequest to be in lieu of any statutory allowance for support, right to remain in the mansion house or other statutory provisions." The county court ruled a testator may not bar the family allowance.

The executor of the estate appealed to the Court of Appeals of Ohio, Third District, Hancock County, asserting the county court erred in holding that testamentary language by a decedent does not bar a surviving spouse from the allowance provided by Ohio Revised Code section 2106.13. The executor argued that the county court improperly disregarded the decedent's testamentary language. In support of that argument, the executor claimed the widow failed to elect against the will in a timely manner and therefore it should be presumed that she chose to take under the will. Additionally, the executor claimed that if the widow was found to have elected against the will, the decedent's will "expressly bar[red] the statutory allowance for support." The court stated that because the widow failed to request an extension of time in which to elect against the will, it is assumed that she elected to take under the will. Subsequently, the court of appeals reversed and remanded the judgment of the county court, stating "[t]his language is unambiguous and clearly meets the requirements of Ohio Revised Code section 2106.05." The court focused on section 2106.05, which reads, in pertinent part: "[u]nless the will expressly otherwise directs, an election to take under the will . . . does not bar the right of the surviving spouse to receive the allowance.

137. Id. at 532.
138. Id.
139. Id. at 531-32.
140. Id. at 532.
141. Id.
142. Id.
143. Id. A spouse may file an extension of time within a one-month period after the service of the citation to elect. Id.
for the support provided by section 2106.13 of the Revised Code." Therefore, the spouse was not entitled to the family allowance.146

EXEMPT PROPERTY ALLOWANCE AND THE DISINHERITANCE OF CHILDREN IN OTHER JURISDICTIONS

The Montana Supreme Court, in In re Estate of Dunlap,147 held that a child specifically disinherited by will may take under the pertinent exempt property allowance statute.148 In Dunlap, the decedent died testate and her will provided that her husband was to receive her entire estate.149 However, in the event the husband predeceased the decedent, the will provided that the Victor Cemetery Association should receive the estate.150 Paragraph 7 of her will stated, "I hereby declare that I have one child: J. Wayne Dunlap, a/k/a Joseph A. Dunlap. I specifically leave nothing to my said child."151 After the will was admitted to informal probate, decedent's son filed a petition in the District Court of the Fourth Judicial District of the State of Montana for an exempt property allowance pursuant to section 72-2-802 of the Montana Code Annotated.152 Section 72-2-802 provides:

(1) In addition to the homestead allowance, the surviving spouse of a decedent who was domiciled in this state is entitled from the estate to value not exceeding $3,500 in excess of any security interests therein in household furniture, automobiles, furnishings, appliances, and personal effects. If there is no surviving spouse, children of the decedent are entitled jointly to the same value. If encumbered chattels are selected and if the value is [in] excess of security interests, plus that of other exempt property, is less than $3,500 or if there is not $3,500 worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the $3,500 value.

(2) Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, except that the right to any assets to make up a deficiency of exempt property shall abate as necessary to permit prior payment of homestead allowance and family allowance.

145. Id. (citing OHIO REV. CODE ANN. § 2106.05 (Banks-Baldwin 1994) (discussing the effect of choosing to take under the will)).
146. Id.
147. 649 P.2d 1303 (Mont. 1982).
149. Id.
150. Id.
151. Id. The decedent's husband predeceased her. Id.
152. Dunlap, 649 P.2d at 1303-04.
These rights are in addition to any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share. The district court issued an order granting the decedent's son the $3500 exempt property allowance. The personal representative then moved to have the order amended, which was denied, and subsequently the estate appealed to the Montana Supreme Court. The personal representative argued: "(1) that testator's intent governs the above section, and (2) that the statutory language in subsection [three] above, 'unless otherwise provided,' includes the will of the testator by disinheriting the son and hence the son cannot be the recipient of exempt property."

The Montana Supreme Court affirmed the decision of the district court. The court agreed that the governing rule in construing a will is to fulfill the intent of the testator, but further stated that construction of the will was not at issue here. The court noted that one cannot analyze the phrase "unless otherwise provided" separately, but rather must analyze it in conjunction with the whole section. The court stated that the term "exemption" or "exempt" is not used in its "colloquial form," rather, the term is used "in the noun form to identify an absolute grant."

The court noted that in In re Estate of Merkel, the Supreme Court of Montana determined that the homestead and exempt property allowances were absolute rights, and "the estate's contention that a decedent's children are not entitled to the same rights as a surviving spouse is spurious." The court in Merkel also stated that even though the statute only refers to how the surviving spouse has priority over the children, it still grants to the surviving children an equal right to the exempt property allowance. In consideration of the court's decision in Merkel, the court in Dunlap reasoned that a child

153. Id. at 1304 (quoting MONT. CODE ANN. § 72-2-413 (1997) (originally enacted as section 72-2-802) (discussing the Montana exempt property allowance)).
154. Id.
155. Id.
156. Id.
157. Id. at 1306.
158. Id. at 1305.
159. Id. at 1304.
160. Id. at 1305.
161. 618 P.2d 872 (Mont. 1980).
162. Dunlap, 649 P.2d at 1305.
163. Id.
would receive the same rights under section 72-2-802 as a spouse would receive.\textsuperscript{164}

In opposition to this argument, the personal representative asserted that “the purpose of the exempt property statute is to protect the assets of the estate, especially family heirlooms from passing to creditors.”\textsuperscript{165} The court rejected this argument and affirmed the judgment of the district court, stating “the family protection provisions of the Uniform Probate Code were intended by the drafters to protect a surviving spouse and children from disinheritance by a decedent.”\textsuperscript{166} The court further stated that “the decedent’s will did no more than disinherit the child and expressed no intent as to statutory rights.”\textsuperscript{167}

In addition, the North Dakota Supreme Court — in the case of \textit{In re Estate of Herr}\textsuperscript{168} — held that a child who was left out of the will was entitled to an exempt property allowance.\textsuperscript{169} In \textit{Herr}, the daughter of the decedent contested and sought to void the will of her father in the County Court for McIntosh County, South Central Judicial District.\textsuperscript{170} She claimed that the decedent lacked testamentary capacity and therefore she should inherit the entire estate by intestacy, because (1) there was no surviving spouse, and (2) North Dakota Century Code 30.1-06-02 protected her right to inherit as a pretermitted child.\textsuperscript{171} The decedent’s daughter also claimed “she was entitled to family or exempt property allowances as provided by statute.”\textsuperscript{172} The decedent’s estate moved for summary judgment and the trial court granted the motion.\textsuperscript{173} The trial court reasoned that the factual issues raised “were ‘not contested, or [were] not material to the legal issues involved’ and that ‘reasonable minds could not differ in their conclusion that [the father] . . . never intended to include . . . [the daughter] in his Will.’”\textsuperscript{174}

The decedent’s daughter appealed to the Supreme Court of North Dakota, stating that the trial court erred in granting the motion for summary judgment, because “genuine issues of material fact existed.”\textsuperscript{175} Specifically, she argued that the trial court ignored the fol-

\textsuperscript{164} See id. (noting that a child would receive the same rights as did the spouse in \textit{Merkel} without first receiving any benefit under the will).

\textsuperscript{165} Id.

\textsuperscript{166} Id. at 1305-06.

\textsuperscript{167} Id. at 1306.

\textsuperscript{168} 460 N.W.2d 699 (N.D. 1990).

\textsuperscript{169} \textit{In re Estate of Herr}, 460 N.W.2d 699, 701, 703 (N.D. 1990).

\textsuperscript{170} \textit{Herr}, 460 N.W.2d at 699, 701.

\textsuperscript{171} Id. at 701.

\textsuperscript{172} Id. As the only child of the decedent, the daughter sought to void the will so she could take the entire estate in intestacy. \textit{Id.}

\textsuperscript{173} \textit{Herr}, 460 N.W.2d at 701.

\textsuperscript{174} Id.

\textsuperscript{175} Id.
Following material facts: "that [the decedent] did not recognize her as his only natural child and did not name her in his will; that [the decedent] believed he was sterile; and that [the decedent] did not realize that his stepchildren were 'merely stepchildren and not natural children' on an application for insurance."176 After viewing the facts in the light most favorable to the decedent's daughter, the supreme court concluded that the decedent did not suffer from undue influence or lack of testamentary capacity.177

The decedent's daughter also claimed that the decedent's will was made under a mistaken belief, which also created a genuine issue of material fact.178 The court noted: "She relie[d] upon her omission from the will, [the decedent's] statement to relatives that he was sterile, and his failure to remember [her] or the paternity judgment."179 The decedent's daughter argued that her omission from the will created a rebuttable presumption that the omission was from accident, misapprehension, or forgetfulness and "not from an intent to disinherit her."180

North Dakota's pretermitted child statute, section 30.1-06-02, states:

If a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the omitted child receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless . . . [i]t appears from the will that the omission was intentional. . . .181

The court noted that this statute is based on the presumption that the omission was intentional if the child was living at the time the will was executed.182 The court reasoned that because the decedent's daughter was born before the execution of the will, the pretermitted child statute did not apply.183 The court concluded that "a presumption exists that her omission was intentional, and the trial court properly granted summary judgment on that issue."184

In addressing the issue of whether decedent's daughter was entitled to the exempt property allowance, the court noted that the paternity suit finding that she was the daughter of the decedent was

176. Id. at 701-02.
177. Id. at 702-03.
178. Id. at 704.
179. Id.
180. Id.
181. Id. at 704-05 (quoting N.D. CENT. CODE § 30.1-06-02 (1996) (explaining the North Dakota pretermitted child rule)).
182. Id. at 705.
183. Id.
184. Id.
North Dakota's exempt property statute provides:

In addition to the homestead defined in section 47-18-01, the surviving spouse of a decedent who was domiciled in this state is entitled to receive from the estate, to a value not exceeding five thousand dollars in excess of any security interests therein, household furniture, automobiles, furnishings, appliances, and personal effects. If there is no surviving spouse, children of the decedent are entitled jointly to the same value. . . . These rights are in addition to any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share. 186

The court agreed with the rationale in Dunlap, which held that "the decedent's will did no more than disinherit the child and expressed no intent as to statutory rights." 187 Because the decedent left no surviving spouse, the court reasoned that the decedent's daughter was entitled to the exempt property allowance. 188 Therefore, the court concluded that the county court erred in refusing her request for the exempt property allowance. 189

RULES GOVERNING STATUTORY CONSTRUCTION IN NEBRASKA

In State ex rel. City of Elkhorn v. Haney, 190 the Supreme Court of Nebraska held that the district court was to issue a peremptory writ of mandamus ordering the County Treasurer to pay tax collections to the City of Elkhorn. 191 In Haney, the City of Elkhorn sought a writ of mandamus requiring the County Treasurer of Douglas County to conform with the City's request for the remittance of taxes levied by the City and collected by the County Treasurer. 192 The District Court of Douglas County was asked to determine whether the County Treasurer must, according to Nebraska Revised Statute section 77-1759, remit tax collections as demanded by the City of Elkhorn. 193 A letter from the Mayor of Elkhorn to the County Treasurer requested that all taxes and assessments owed to the City pursuant section 77-1759 be

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185. Id. at 701, 705-06.
186. Id. at 705-06 (citing N.D. CENT. CODE § 30.1-07-01 (1996) (explaining the North Dakota exempt property statute)).
187. Id. (citing Dunlap, which holds that a specifically disinherited child is entitled to the statutory allowance).
188. Id.
189. Id.
190. 252 Neb. 788, 566 N.W.2d 771 (1997).
192. Haney, 252 Neb. at 789, 566 N.W.2d at 772.
193. Id. at 792, 566 N.W.2d at 771, 774.
Section 77-1759 provides: “The county treasurer shall report and pay over the amount of tax and special assessments due to towns, districts, cities, villages, corporations and persons, collected by him, when demanded by the proper authorities or persons.” The County Treasurer responded to the demand by stating that her obligation to pay the monies owed to the City was controlled by Nebraska Revised Statute section 23-1601, which provides that the County Treasurer only has to pay by the fifteenth of every month. The City then requested the district court to issue a “peremptory writ or an alternative writ with an order to the Treasurer to show cause as to why the writ should not be issued.” The district court denied the request and further ruled that the Treasurer only had to remit taxes and assessments monthly as required by section 23-1601.

The City appealed to the Supreme Court of Nebraska, which reversed and remanded the decision of the district court and ordered that the peremptory writ of mandamus be issued. The court reasoned that:

[in the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. Inquiry into the legislative history requires that legislation be open for construction. A statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous.]

The court ruled that section 77-1759 would not be construed, because the language of the statute was direct, plain, and unambiguous. The court further articulated that if it were to follow the Treasurer's argument and allow section 23-1601 to control, the court would have to disregard section 77-1759, because “[i]t is not within the province of a court to read a meaning into a statute that is not there, or to read anything direct and plain out of a statute.” The court further held that section 77-1759 controlled and the Treasurer was required to pay the taxes to the City as demanded.

194. Id. at 790, 566 N.W.2d at 773.
195. Id. (quoting Neb. Rev. Stat. § 77-1759 (Reissue 1996)).
196. Id.
197. Id. at 791, 566 N.W.2d at 773.
198. Id.
199. Id. at 789-90, 566 N.W.2d at 772.
200. Id. at 792-93, 566 N.W.2d at 774.
201. Id. at 793, 566 N.W.2d at 774.
202. Id. at 795, 566 N.W.2d at 775.
203. Id. at 788, 566 N.W.2d at 775, 776.
In addition, in *In re Estate of Nelson*,204 the Supreme Court of Nebraska established that legislative history may be used to determine the intent of the Legislature when interpreting statutes.205 In the County Court of Adams County, Nebraska, the co-personal representatives of Arenda Nelson's estate filed an application for a refund of inheritance tax pursuant to Nebraska Revised Statute section 77-2018.206 The property subject to the action was income the decedent received from a trust set up by her late husband, who had died fifteen years earlier.207 The dispute was over whether inheritance tax, which was paid at the time of the decedent's death, should also be paid on the property specifically contained in Part I of the trust where the decedent held a general power of appointment over that property.208

After determining that the property in Part I of the trust was subject to tax at the time of the husband's death, the court entertained the question as to whether the property over which the wife had a general power of appointment should be subject to the identical tax.209 The court cited Nebraska Revised Statute section 77-2008.04, which states "that the exercise or nonexercise of the power of appointment by the donee is not a transfer subject to the taxation provisions of [sections 77-2001 to 77-2008.02]."210 The supreme court turned to the legislative history of sections 77-2008.03 and 77-2008.04 to determine whether the property in question should be subject to the inheritance tax of the state.211 The court stated: "To ascertain the intent of the Legislature, a court may examine the legislative history of the act in question."212 The court proceeded to examine the Revenue Committee hearings on Legislative Bill 276, the bill in which the statutes in question were introduced to the Legislature.213 Based upon its review of the committee hearings, the court concluded that the clear intent of the Legislature is that property which passed by general power of appointment between husband and wife should not be subject to the inheritance tax.214

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204. 253 Neb. 414, 571 N.W.2d 269 (1997).
207. *Id.* at 414-15, 571 N.W.2d at 271.
208. *Id.* at 415-16, 571 N.W.2d at 271.
209. *Id.* at 418, 571 N.W.2d at 273.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.* at 419, 571 N.W.2d at 273.
214. *Id.*
In *Lowry v. Murren*, the Nebraska Supreme Court reiterated a rule of law which states that in order to "disinherit the heirs-at-law a testator must dispose of his property by will." In *Lowry*, the testator's grandson brought an action in the District Court of Saunders County, Nebraska, to quiet title to certain farm land. The decedent's will provided in part that after the death of his wife, his grandson was to receive the farm land. The district court found that the decedent's will granted only a life estate to his grandson and that "[the decedent] died intestate as to the fee title." Subsequently, the court "quieted title to the land in the heirs-at-law of [the decedent], and directed partition accordingly.

The grandson appealed to the Supreme Court of Nebraska, claiming a presumption exists that the testator intended to dispense of his entire estate and did not in any way intend to die intestate to any part of his estate. He also contended that a construction which results in intestacy should be avoided where another reasonable construction exists. The grandson further stated that paragraph eight of the will, "under the Rule in Shelly's Case and the rule against perpetuities," should be construed as devising a life estate to him, and the remainder to the heirs-at-law, thus entitling him to a fee simple.

The Nebraska Supreme Court affirmed the ruling of the district court, reasoning that:

> "while there is a presumption that a testator intended to dispose of his entire estate, there is also a rule of law that in order to effectively disinherit the heirs-at-law a testator must dispose of his property by will... The presumption that a testator intended to fully dispose of his estate by will does not...

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218. Id. at 43, 236 N.W.2d at 629.
219. Id.
220. Id.
221. Id. at 42, 44, 236 N.W.2d at 629.
222. Id.
223. Id. at 44, 236 N.W.2d at 629. A simplified statement of the Rule in Shelly's Case states that if one instrument creates a life estate in land to A, and purports to create a remainder in persons described as A's heirs (or the heirs of A's body), and the life estate and remainder are both legal or both equitable, the remainder becomes a remainder in fee simple in A. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 292 (3d ed. 1993). The Rule against Perpetuities states: "[N]o interest in real or personal property is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 827 (5th ed. 1995) (quoting JOHN C. GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942)).
overcome the rule requiring an express provision or necessary implication to disinherit heirs.\textsuperscript{224}

The court further stated that the Rule in Shelly's Case does not apply, because the remainder is to the heir for life.\textsuperscript{225} The court further reasoned the rule against perpetuities is inapplicable due to the fact that paragraph eight of the will consists of vested interests and reversions, which are not subject to the rule.\textsuperscript{226}

\textbf{TESTAMENTARY FREEDOM AND CONSTRUING WILLS}

Nebraska Revised Statute section 30-2341 states that “[t]he intention of a testator as expressed in his will controls the legal effect of his dispositions. The rules of construction expressed in the succeeding sections of this part apply unless a contrary intention is indicated by the will.”\textsuperscript{227} In \textit{Gretchen Swanson Family Foundation, Inc. v. Johnson},\textsuperscript{228} Gilbert C. Swanson Foundation, Inc. (“Foundation”) brought an action for the construction of Gilbert Swanson’s will in the District Court of Douglas County, Nebraska.\textsuperscript{229} The two parts of the will that were construed by the court are as follows:

\textbf{FIRST:} I direct that all of my funeral expenses and just debts, except debts [sic] secured in whole or in part by mortgages on real estate, be paid as soon after my death as practicable. I direct that all estate, inheritance, transfer, succession, legacy, or other death taxes which may become payable upon or with respect to any property included as a part of my gross taxable estate shall be paid out of the corpus of my residuary estate.

\textbf{SECOND:} After making full provision for the payment of charges [sic] as stated in the FIRST part of my Will above, my Executors shall allocate two-thirds (2/3) of my Estate for the charitable uses which are contemplated by the Gilbert C. Swanson Foundation, Inc., a tax exempt status corporation founded by me to promote charitable, religious, educational and research objectives.\textsuperscript{230}

The District Court of Douglas County construed the word “charges” found in the second paragraph of the will as referring to “only funeral

\begin{footnotes}
\item[224.] \textit{Lowry}, 195 Neb. at 44, 46, 236 N.W.2d at 629-30.
\item[225.] \textit{Id.} at 45, 236 N.W.2d at 630.
\item[226.] \textit{Id.} at 45-46, 236 N.W.2d at 630.
\item[227.] NEB. REV. STAT. § 30-2341 (Reissue 1995).
\item[228.] \textit{Gretchen Swanson Family Found., Inc. v. Johnson}, 193 Neb. 641, 228 N.W.2d 608 (1975).
\item[229.] \textit{Johnson}, 193 Neb. at 642, 228 N.W.2d at 609-10.
\item[230.] \textit{Id.} at 642, 228 N.W.2d at 609-10.
\end{footnotes}
expenses and just debts . . . of the decedent and does not include death taxes." 231

Douglas County, intervener in the present action, appealed the decision of the district court to the Supreme Court of Nebraska, claiming the court erred by not concluding that the death taxes were to be paid out of the estate instead of the residuary. 232 The Foundation argued that Douglas County's construction was contrary to the will and not what a rational person would intend. 233 The supreme court affirmed, establishing several rules used in construing wills. 234 The court stated:

The court stated:

The cardinal rule of testamentary construction is to ascertain the intention of the testator as expressed in the will. In construing a will the court should give effect to the true intention of the testator as shown by the will itself in the light of the attendant circumstances under which it was made, if that intention is consistent with the applicable rules of law . . . . The intention of the testatrix is to be ascertained from a liberal interpretation and comprehensive view of all of the provisions of the will. 235

The court further stated that, in ascertaining the intention of the testator, a court must consider the entire will, examine each provision, apply the literal and grammatical meaning of all words and assume the testator understood each words' meaning. 236 After applying these rules to the case before it, the court concluded that Douglas County's interpretation of the will that the taxes were to be paid out of the estate was absurd, because that would "completely disregard the specific provision in the second sentence of Paragraph FIRST. . . ." 237

THE RIGHT TO INHERIT

In the case of In re Estate of Luckey, 238 the Nebraska Supreme Court established that "[t]here is no common law right of inheritance." 239 In Luckey, the decedent Charles Luckey married Ruth Lois in 1921, and several years later the couple adopted the appellant, La Verne Bailey, who was not the natural child of either Charles or

231. Id. at 642, 228 N.W.2d at 609.
232. Id. at 643, 228 N.W.2d at 609-10.
233. Id. at 643, 228 N.W.2d at 610.
234. See id. at 643, 646, 288 N.W.2d at 610, 612 (discussing several testamentary rules of construction).
235. Id. at 643, 288 N.W.2d at 610 (quotation omitted):
236. Id. at 643-44, 288 N.W.2d at 610.
237. Id. at 643, 646, 288 N.W.2d at 610, 612.
238. 206 Neb. 53, 291 N.W.2d 235 (1980).
Ruth. After a divorce between the decedent and Ruth, she was remarried to Richard Bailey. Ruth and Richard Bailey proceeded to adopt La Verne Bailey, who consented to the adoption. At the adoption hearing, the decedent made an appearance in which he voluntarily relinquished all rights pertaining to the custody of La Verne Bailey. The decedent died intestate on January 4, 1978, and soon after the decedent’s death, his brother, claiming to be the sole legal heir, petitioned to have the decedent’s nephew appointed personal representative of the estate. La Verne Bailey objected to the petition, stating that he was the sole heir of the decedent and should therefore have priority over all others and should be named personal representative of the estate. The county court ruled that a twice-adopted person may not inherit from the first adoptive parent and therefore has no priority to be named personal representative. Subsequently, the adopted son, La Verne Bailey, appealed the county court’s decision to the District Court of Platte County, which affirmed the ruling of the county court.

On appeal, the Supreme Court of Nebraska affirmed the decision of the district court. The supreme court stated that La Verne Bailey’s claim must fail for two reasons. First, the court reasoned that La Verne Bailey was not considered the child of the decedent. The court referred to Nebraska Revised Statute section 30-2309, which provides, in part, that for purposes of intestate succession once a decree of adoption has been entered the adopted child is the child of the adopting parents, not the natural parents. The court also referred

240. Luckey, 206 Neb. at 54, 291 N.W.2d at 237.
241. Id.
242. Id. at 54-55, 291 N.W.2d at 237.
243. Id. at 55, 291 N.W.2d at 237.
244. Id.
245. Id.
246. See id. at 54, 291 N.W.2d at 236-37 (stating that under Nebraska law, a twice-adopted child has no right to inherit from the first adoptive parent).
247. Id. at 55, 291 N.W.2d at 237.
248. Id. at 54, 58, 291 N.W.2d at 235, 238.
249. Id. at 54, 55, 291 N.W.2d at 236, 237.
250. Id. at 55, 291 N.W. 2d at 237.
251. Id. at 56, 291 N.W.2d at 237. Section 30-2309 reads:
If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person,
(1) an adopted person is the child of an adopting parent and not of the natural parents except that adoption of a child by a spouse of a natural parent has no effect on the relationship between the child and that natural parent.
(2) in cases not covered by (1), a person born out of wedlock is a child of the mother. That person is also a child of the father, if:
(i) the natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or
(ii) the paternity is established by an adjudication before the death of the father or is established thereafter by strict, clear and convincing proof. The
to Nebraska Revised Statute section 43-110, which provides that after a decree of adoption has been entered, the parent-child relationship and all the rights thereto exists between such adoptive child and the person or persons who adopt such child. The court reasoned that section 43-110, in conjunction with section 30-2309, would apply in the same manner to successive adoptions, where the second adoption would take the place of the first adoption, and for purposes of intestate succession the adopted child would then become the child of the second set of adopting parents.

Second, the court stated that there is no common law right to inheritance. The court noted:

The right of inheritance is purely a creature of statute and must be determined not as a matter of sentiment but as a matter of law. The right of inheritance is created by statute. It is within the power of the Legislature to determine what persons or whether any person shall inherit from one who dies intestate, and to determine what proportion of the decedent's estate shall descend to any particular person or class of persons. The Legislature creates and may take away the right to inherit.

Therefore, the court held that the twice adopted child may only inherit from his second set of adoptive parents, because even though the statute is silent on whether to include adoptive parents within the provisions of the statute, the Legislature could have easily included subsequent adoptive parents as an exception to the provisions of the statute.

ANALYSIS

In In re Estate of Peterson, the Supreme Court of Nebraska made an unprecedented ruling. The Nebraska Supreme Court ruled that an adult child has a statutory right to an exempt property
allowance.\textsuperscript{259} In addition, the court reasoned this statutory right is an indefeasibly vested right.\textsuperscript{260} Finally, the Nebraska Supreme Court ruled this indefeasibly vested right may not be abrogated by a will that specifically disinherits the adult child.\textsuperscript{261}

The Nebraska Supreme Court's ruling in Peterson poses some interesting ramifications for will drafting in Nebraska.\textsuperscript{262} First, the court has changed will drafting in Nebraska by holding that an adult child cannot be disinherited.\textsuperscript{263} The reason for the change is due to the court misinterpreting the court's holding in In re Estate of Carmen,\textsuperscript{264} then applying it to the facts of Peterson.\textsuperscript{265} Second, the court disregarded the intent of the UPC drafters.\textsuperscript{266} Third, the court ignored the language "unless otherwise provided therein" stated in section 30-2323.\textsuperscript{267} In ignoring this language, the court disregard the provision in the will that stated:

[s]hould this son, NORMAN LEWIS PETERSON, or any of his heirs or any one else seek to set aside this Will, or to change the intent I have designated, or endeavor to change or set aside the provisions of this Will in any manner whatsoever, then in any or all or the above-mentioned cases and events I hereby give and bequeath to such person or persons the sum of ONE DOLLAR and NO MORE, in lieu of any other share of interest in my estate.\textsuperscript{268}

As a result of this oversight, the court has made an unprecedented ruling regarding disinheriance of children, because no state has ever adopted a similar ruling.\textsuperscript{269} Fourth, the court misapplied the holding in In re Estate of Dunlap and other jurisdictions.\textsuperscript{270} Finally, the court's holding seems to be in direct conflict with several rules of law, including Nebraska Revised Statute section 30-2321, the pretermitted

\textsuperscript{259} In re Estate of Peterson, 254 Neb. 334, 339, 576 N.W.2d 761, 771 (1998).
\textsuperscript{260} Peterson, 254 Neb. at 340, 576 N.W.2d at 772.
\textsuperscript{261} Id. at 341, 576 N.W.2d at 772.
\textsuperscript{262} See infra notes 272-393 and accompanying text.
\textsuperscript{263} See Peterson, 254 Neb at 341, 576 N.W.2d at 772 (holding that a disinherited child is entitled to the exempt property allowance); infra notes 336-38, 375-81, 382-88 and accompanying text.
\textsuperscript{264} 213 Neb. 98, 327 N.W.2d 611 (1982).
\textsuperscript{265} See infra notes 272-315 and accompanying text.
\textsuperscript{266} See infra notes 316-28 and accompanying text.
\textsuperscript{267} See Peterson, 254 Neb. at 340-41, 576 N.W.2d at 772 (recognizing the personal representative's argument that the statute's language "unless otherwise provided herein" could allow an instrument to disinherit a child, yet holding that, regardless of the decedent's will's language, a child is entitled to the exempt property allowance); infra notes 329-38 and accompanying text.
\textsuperscript{268} Peterson, 254 Neb. at 335, 576 N.W.2d at 767.
\textsuperscript{269} See supra notes 31, 50-51 and accompanying text; infra notes 293, 339-45 and accompanying text.
\textsuperscript{270} Dunlap, 649 P.2d at 1303; see supra notes 339-50 and accompanying text.
child statute, which allows intentional disinheritance of children born after the execution of a will.\textsuperscript{271}

THE NEBRASKA SUPREME COURT MISSAPPLIED \textit{CARMEN} TO THE FACTS OF \textit{PETERSON}

The holding in \textit{Peterson} will likely force attorneys in Nebraska to reconsider how they draft wills with regard to adult children.\textsuperscript{272} Prior to \textit{Peterson}, adult children — in fact all children — were allowed to be disinherited by specific language of a testator's will.\textsuperscript{273} All states seem to allow disinheritance of children by not providing any protection for children via statutes.\textsuperscript{274}

Implicitly, if not expressly, the Supreme Court of Nebraska has provided protection for intentionally disinherited adult emancipated children via the exempt property allowance, Nebraska Revised Statute section 30-2323.\textsuperscript{275} The first issue addressed by the court in \textit{Peterson} was whether the adult emancipated child has a statutory right granted by the exempt property statute.\textsuperscript{276} In its analysis, the court relied on the holding in \textit{Carmen} in determining that there is a statutory right granted to adult children by the exempt property allowance statute.\textsuperscript{277} In \textit{Carmen}, a spouse elected against the will and also petitioned to receive a supplemental family allowance as prescribed by Nebraska Revised Statute section 30-2324.\textsuperscript{278} In concluding that this was an indefeasibly vested right, the court relied on the last paragraph of Nebraska Revised Statute section 30-2325, which provides in part that the family protection statutes are an indefeasibly vested right in the spouse.\textsuperscript{279} This section makes no reference to children.\textsuperscript{280} Thus, the case of \textit{Carmen} can be distinguished from \textit{Peterson} because the former is addressed to a spouse, whereas the latter is addressed to a child.\textsuperscript{281}

\begin{footnotes}
\footnotetext[271]{See supra notes 351-93 and accompanying text.}
\footnotetext[272]{Peterson, 254 Neb. at 341, 576 N.W.2d at 772; see supra notes 273-75 and accompanying text.}
\footnotetext[273]{Lowry v. Murren, 195 Neb. 42, 44, 236 N.W.2d 627, 629 (1975) (citation omitted).}
\footnotetext[274]{See supra notes 147-89 and accompanying text; infra notes 292-95 and accompanying text.}
\footnotetext[275]{See Peterson, 254 Neb. at 341, 576 N.W.2d at 772 (holding that disinherited children are entitled to the exempt property allowance).}
\footnotetext[276]{Id. at 339, 576 N.W.2d 771.}
\footnotetext[277]{Id. at 338-39, 576 N.W.2d at 771.}
\footnotetext[278]{\textit{In re} Estate of Carmen, 213 Neb. 98, 99, 102-03, 327 N.W.2d 611, 613-15 (1982).}
\footnotetext[279]{\textit{Carmen}, 213 Neb. at 103, 327 N.W.2d at 615; \textit{NEB. REV. STAT.} § 30-2325 (Reissue 1995).}
\footnotetext[280]{\textit{NEB. REV. STAT.} § 30-2325 (Reissue 1995).}
\footnotetext[281]{See supra notes 33, 53 and accompanying text.}
\end{footnotes}
By relying on *Carmen*, the court failed to recognize how the law has historically protected the spouse from disinheritance via the elective share, whereas in comparison to children, the law has provided no such protection.\(^{282}\) The underlying theory behind the protection of the spouse from disinheritance is the "fundamental nature of the economic rights of each spouse in a marital relationship [and] how society views the institution of marriage."\(^{283}\) Based upon the theory of economic partnership, society views marriage as a partnership where the financial element is deemed to be a profit sharing approach.\(^{284}\) This special partnership has also been supported by the idea that each spouse should be entitled to half of the economic production during the marriage.\(^{285}\) Along with the economic benefits, marriage also implies an agreement to the sharing of other things such as responsibilities, resources, and risks.\(^{286}\) The law, using these ideas and views, has taken steps to protect the disinheritance of the spouse.\(^{287}\) As one commentator noted, "[i]n the United States, the decedent's spouse is the only relative who is protected against intentional disinheritance."\(^{288}\) In those states that offer protection, the decedent's intent is trumped by an elective or forced share.\(^{289}\) The elective share allows the surviving spouse to take under the will or elect to take a one-third interest in the decedent's estate, as opposed to one half which would be suggested under the partnership theory of marriage.\(^{290}\) When viewing how the law has treated children and disinheritance compared to spousal disinheritance, a substantially different result occurs.\(^{291}\)

One commentator has stated that the law protects a spouse, but offers no similar protection to the children of the decedent.\(^{292}\) Although many countries do offer protection to the children through a forced share or family maintenance system, in the United States "a parent can disinherit a child without giving any reason."\(^{293}\) This difference in treatment results from two concerns: (1) the state's concern


\(^{284}\) Waggoner, 59 Mo. L. Rev. at 42.

\(^{285}\) Id. at 43.

\(^{286}\) Id. at 43-44 (quotation omitted).

\(^{287}\) Id. at 41-42, 47.

\(^{288}\) Id. at 41-42.

\(^{289}\) Id. at 47.

\(^{290}\) Id.

\(^{291}\) Batts, 41 HASTINGS L.J. at 1198-99.

\(^{292}\) Id.

\(^{293}\) Id. at 1198. Until July of 1989, only Louisiana had a statute which protected children from disinheritance. Id. at 1197.
that the spouse not become a ward of the state; and (2) the recognition
that the wife has contributed to the estate during the marriage.\textsuperscript{294} However, testamentary freedom seems to take precedence over the
right of a child to inherit from the decedent’s estate, and the only
infringement on testamentary freedom is the protection given to surviv-
ing spouses, creditors, and federal and state coffers.\textsuperscript{295}

Arguably, if public policy dictates that decedents should provide
for their spouse, minor children should also deserve similar protec-
tion.\textsuperscript{296} The same argument can be made for adult children who have
been financially successful, but by not allowing disinherition of those
children, encourages them not to strive to be successful.\textsuperscript{297} Though
there are some compelling arguments to protect children from disin-
heritance, the law today seems to provide no protection to children
and allows the testator’s freedom to rule.\textsuperscript{298}

The importance of this distinction of how the law has historically
treated disinheritance of the spouse and children relates to how the
Nebraska Legislature intended these family protection statutes to op-
erate.\textsuperscript{299} The last paragraph of section 30-2325, relied upon by the
Nebraska Supreme Court in \textit{Carmen}, states: “[t]he homestead allow-
ance, the exempt property, and the family allowance as finally deter-
mined by the personal representative or by the court, shall vest in the
surviving spouse as of the date of decedent’s death, as a vested inde-
feasible right of property. . . .”\textsuperscript{300} This paragraph was not included in
the UPC, but was implemented by the Nebraska Legislature when it
adopted the Nebraska Probate Code.\textsuperscript{301} The intent of the drafters of
the provisions is illustrated in the comments thereto.\textsuperscript{302}

Each Nebraska comment to the homestead and exempt property
allowance indicates that these rights are in addition to any provisions
in the will and “cannot be limited by the decedent’s will.”\textsuperscript{303} “A sur-
viving spouse is presently entitled to homestead, exempt property and

\begin{thebibliography}{10}
\bibitem{294} Batts, 41 \textit{HASTINGS L.J.} at 1199.
\bibitem{295} See \textit{id.} at 1198, 1221-22 (stating that “a parent can disinherit a child without
giving any reason”).
\bibitem{296} \textit{Id.} at 1200.
\bibitem{297} See \textit{id.} at 1266-67 (discussing reasons to protect adult children from
disinheritance).
\bibitem{298} See supra notes 292-97 and accompanying text.
\bibitem{299} See supra notes 282-95 and accompanying text; \textit{infra} notes 300-11 and accom-
panying text.
\bibitem{300} \textit{NEB. REV. STAT.} § 30-2325 (Reissue 1995); \textit{Carmen}, 213 Neb. at 102-03, 327
N.W.2d at 614-15.
\bibitem{301} \textit{NEB. REV. STAT. ANN.} § 30-2325 cmt. (Michie 1996).
\bibitem{302} See \textit{id.} (discussing the legislative intent in adding certain provisions to the
statute); \textit{infra} notes 303-07 and accompanying text.
\bibitem{303} \textit{WORKING PAPERS NEBRASKA-PROBATE CODE} 74, 76 (Neb. Judiciary Comm.
1973). The comment to the family allowance exemption indicates that the rights cannot
be limited by the decedents will. \textit{Id.} at 78.
\end{thebibliography}
family allowance regardless of the provisions of the decedent's will or of the spouse's election."\textsuperscript{304} However, the Nebraska Comment to section 30-2325 states that "[t]he last paragraph of this section was added to assure that the allowances and exempt property for a surviving spouse will secure the federal estate tax marital deduction."\textsuperscript{305} From this comment it seems that the Nebraska Legislature implemented this paragraph for tax purposes; note that there is no reference to children.\textsuperscript{306} Because this paragraph makes reference to all three family protection statutes and makes no reference to children, it can be inferred that the intention of the Nebraska Legislature in adopting the family protection statutes was for federal tax purposes, not to provide children protection from disinheretance.\textsuperscript{307}

Additionally, in reviewing the committee hearings pertaining to Legislative Bill 354 ("L.B. 354"), no specific mention is made of how children should be treated with respect to the exempt property allowance, but there is extensive debate on how much of the estate a surviving spouse would be entitled to when an elective share is being sought by that spouse.\textsuperscript{308} The only reference to the homestead allowance, exempt property allowance, or family allowance is a small debate emphasizing that these allowances have priority over creditors.\textsuperscript{309} In a subsequent Judiciary Committee Hearing on February 11, 1980, Senator Beutler stated "[t]he exemptions are designed to protect widows and orphans of deceased persons, basically from creditors, and [they are] also designed to reduce taxation somewhat and, of course, the basic idea is to avoid putting the burden of support of widows and orphans on the state in some circumstances."\textsuperscript{310} No mention was made that the exemptions were instituted to protect against disinheretance of the spouse or children.\textsuperscript{311}

\textsuperscript{304} Working Papers, supra note 303, at 66.
\textsuperscript{306} See id. (stating that the last paragraph was added to allow for the marital deduction in the federal income tax laws).
\textsuperscript{307} Compare Peterson, 254 Neb. at 340-41, 576 N.W.2d at 772 (stating that "the clear intent of § 30-2323 is to provide an exempt property allowance . . . which cannot be defeated by a testator . . ."), with Neb. Rev. Stat. Ann. § 30-2325 cmt. (Michie 1996) (stating that the intent of the exemption statutes were to secure the federal estate tax marital deduction).
\textsuperscript{308} See Hearings on L.B. 354 Before the Comm. on the Judiciary, 83rd Leg. 6110-11 (Mar. 7, 1974) (discussing the spouse's elective share, yet not mentioning the child's share).
\textsuperscript{309} Hearings on L.B. 354 Before the Comm. on the Judiciary, 83rd Leg. 30 (Jan. 15, 1974).
\textsuperscript{310} Hearings on L.B. 981 Before the Comm. on the Judiciary, 83rd Leg., 2d Sess. 6 (Feb. 11, 1980).
\textsuperscript{311} Hearings on L.B. 981, supra note 310, at 6 (discussing the increase in allowances, yet not mentioning any intent to protect the spouse or children from disinheretance).
The comments in the *Nebraska Probate System I Manual* also support the legislature's intention. In discussing the three family protection allowances, the manual states that "if the will clearly provides that the provisions of the will is [sic] in lieu of these rights, then the provisions of the will would bar the allowances." Therefore, based on the statutory comments, legislative history, and interpretations of the family protection provisions, the court misapplied section 30-2325 to the language in decedent's will. Consequently, the court falsely relied on *Carmen* and the language of section 30-2325 to establish that an adult child has a statutory right that cannot be defeated by the testator's will.

**INTENT OF THE UNIFORM PROBATE CODE DRAFTERS**

The Nebraska Supreme Court mentioned that the intent of the UPC drafters in implementing the family protection provisions was to protect the spouse and child from intentional disinheription. However, the comment of the UPC drafters never mentions that the intent of these provisions is to protect from disinheription, yet the court may be implicitly supporting their statement by their holding in *Peterson*. In comments specifically addressing the exempt property and allowances, the UPC drafters stated that these are "certain rights and values to which a surviving spouse and certain children of a deceased domiciliary are entitled in preference over unsecured creditors of the estate and persons to whom the estate may be devised by will." The drafters' comment to the family protection provisions provides no language regarding disinheription as stated in the court's opinion. The comment provides that these provisions are intended to protect the spouse and children from unsecured creditors. The drafters did not specifically state that these provisions were for protection from disinheription. Therefore, the court incorrectly relied on the statement that the drafters' intention was to protect children from disinheription.

312. *See supra* note 88 and accompanying text.
313. *See supra* note 88 and accompanying text.
314. *See supra* notes 282-313 and accompanying text.
315. *See supra* notes 272-314 and accompanying text; *Peterson*, 254 Neb. at 335-41, 576 N.W.2d at 771-72.
317. *See infra* notes 318-20 and accompanying text.
319. *See id.* (making no mention of protection from disinheription).
320. *Id.*
321. *See supra* notes 318-20 and accompanying text.
322. *See supra* notes 46, 316-21 and accompanying text; *Peterson*, 254 Neb. at 340, 576 N.W.2d at 771-72.
The Uniform Probate Code Practice Manual states that the family protection provisions take precedence over creditors and cannot be abrogated by a decedent's will. However, the manual further states that a testator may force the spouse or children to elect to take property under the will in lieu of the family protection provisions. These two positions seem to be contradictory in that the family protection provisions may not be defeated by the will, and yet a testator may force an election to take property, no matter what amount. The court should have looked to the comments by the UPC drafters and the Uniform Probate Code Practice Manual Vol. 1 — as the court did in In re Estate of McClow — to establish the intent of the family protection provisions. Consequently, the court's holding in Peterson is contradictory to the intent of the UPC drafters regarding implementation of these family protection provisions.

The Court Ignored the Phrase "Unless Otherwise Provided" in Section 30-2323

In finding that section 30-2323 creates a statutory right in an adult child, the court addressed the issue of whether this right was indefeasibly vested or whether a testator may nullify this right by his or her will. The court referred to Dunlap, where a similar issue was presented to the Montana Supreme Court. Montana has adopted substantially the same exempt property allowance statute as Nebraska. In discussing Dunlap, the Nebraska Supreme Court identified that the Montana Supreme Court discussed the language "unless otherwise provided" in the statute and concluded that the language in the testator's will disinherited the son, but because the will failed to express any intention regarding statutory rights, the disinherited son was entitled to the exempt property allowance. In addi

324. Id. at 113.
325. See supra notes 323-24 and accompanying text.
326. In re Estate of McClow, 205 Neb. 739, 290 N.W.2d 186 (1980).
327. See supra note 105 and accompanying text.
328. See supra notes 323-25 and accompanying text.
329. Peterson, 254 Neb. at 339, 576 N.W.2d at 771.
330. Id. (citing In re Estate of Dunlap, 649 P.2d 1303, 1304 (Mont. 1982) (stating that the issue is whether a specifically disinherited child may be entitled to the exempt property allowance)).
332. Peterson, 254 Neb. at 339-40, 576 N.W.2d at 771-72 (citing Dunlap, 649 P.2d at 1306 (discussing the effect of the decedent's will and the exemption provisions upon the child)).
tion, the Supreme Court of Nebraska cited several cases from other jurisdictions which allowed similar family allowance and exempt property statutes to abrogate the decedent’s will. In concluding that the language of section 30-2323 clearly establishes a vested and indefeasible right in the adult child, the Nebraska Supreme Court did not specifically construe the language “unless otherwise provided” contained in section 30-2323.

The Nebraska Supreme Court addressed section 30-2323 by stating “[u]nless a testator clearly provides in the will that the devises and bequests are in lieu of exempt property, then the spouse or children are entitled to both.” However, the court further stated “[r]egardless, the rights set forth in [section] 30-2323 cannot be defeated by a testator even though the testator may require a spouse or child to choose between the devise or the exempt property allowance.” In these two statements the court contradicted itself, stating that in a will a testator can limit the child to a specific devise, yet require the testator to comply with section 30-2323. The court’s second statement indicates that a testator must provide a spouse or child with at least the minimum amount of $5000 – as provided in section 30-2323 — regardless of what the will provides, thereby eliminating the phrase “unless otherwise provided” from the statute.

RULINGS OF OTHER JURISDICTIONS ON SIMILAR ISSUES

Other jurisdictions have addressed virtually the same issue of whether the testator may prevent a child or spouse from receiving a statutory allowance and have concluded to the contrary of the decision in Peterson. In those jurisdictions, courts have held that there

333. Id. at 340, 576 N.W.2d at 772 (citing In re Estate of Reddick, 657 N.E.2d 531 (Ohio Ct. App. 1995) (finding that bequest in will was in lieu of statutory allowance for support because it was expressed in clear and unambiguous language); Rush v. Rush, 360 So. 2d 1240 (Miss. 1978) (noting that widow is entitled to allowance unless it clearly appears that provisions in will are in lieu of statutory support); In re Estate of Davis, 220 A.2d 726 (Vt. 1966) (noting that statutory support may be waived by clear and unequivocal language in will that bequest be in lieu of all statutory rights)).

334. See id. at 340-41, 576 N.W.2d at 772 (holding that the language of section 30-2323 creates an indefeasible right and acknowledging the personal representative's argument that the language “unless otherwise provided” allows a decedent to abrogate the exemptions, yet not specifically addressing the argument).

335. Id. at 340, 576 N.W.2d at 772.

336. Id. at 341, 576 N.W.2d at 772.

337. See supra notes 335-36 and accompanying text; infra note 338 and accompanying text.

338. See id. at 341-42, 576 N.W.2d at 772 (stating that where the testator clearly provides that the devises are in lieu of the exempt property, the testator can limit the devise to the devise, yet stating that the exempt property statute cannot be defeated by the testator’s will).

339. See infra notes 341-45 and accompanying text.
must be clear intent from the testator that the provision in the will was in lieu of statutory rights. In Dunlap, the Montana Supreme Court case in which a child was specifically disinherited by the decedent’s will, the court implied that had the testator made specific reference to the child’s statutory rights, the disinherited child may not have been entitled to the exempt property allowance. The Ohio Court of Appeals, in In re Estate of Reddick, a case where a surviving spouse was not allowed statutory support, took the same position that if the language of a will specifically states “in lieu of any statutory allowance for support,” the spouse is to receive that amount instead of the amount provided by the exempt property allowance statute. Also, the Supreme Court of North Dakota, in In re Estate of Herr, a case where the child was left out of the will, agreed with the rationale of Dunlap in that there must be clear intent from the testator that the child is to receive an amount “in lieu of these statutory rights.”

By relying upon Dunlap, the court in Peterson failed to discuss the provision in the will of Peterson which stated that if his son or any heir seeks to set aside his intent, “I hereby give and bequeath to such person or persons the sum of ONE DOLLAR and NO MORE, in lieu of any other share or interest in my estate.” In Gretchen Swanson Family Foundation, Inc. v. Johnson, the supreme court stated the intention of the testator “is to be ascertained from a liberal interpretation and comprehensive view of all of the provisions of the will.” Utilizing the rule stated in Johnson, a liberal interpretation of the last phrase of the provision, “in lieu of any other share or interest,” appears to meet the requirement that there must be evidence of clear intent from the testator that the provision in the will was in lieu of statutory rights.

340. See, e.g., In re Estate of Reddick, 657 N.E.2d 531 (Ohio Ct. App. 1995) (finding that bequest in will was in lieu of statutory allowance for support because it was expressed in clear and unambiguous language); Rush v. Rush, 360 So. 2d 1240 (Miss. 1978) (noting that widow is entitled to allowance unless it clearly appears that provisions in will are in lieu of statutory support); In re Estate of Davis, 220 A.2d 726 (Vt. 1966) (noting that statutory support may be waived by clear and unequivocal language in will that bequest be in lieu of all statutory rights).

341. See Dunlap, 649 P.2d at 1304, 1306 (“In the present case, the decedent’s will did no more than disinherit the child and expressed no intent as to statutory rights.”).


343. See In re Estate of Reddick, 657 N.E.2d 531, 532 (1995) (reversing a trial court ruling that held that a decedent may not bar a surviving spouse from receiving her family allowance through the language of a will).


345. In re Estate of Herr, 460 N.W.2d 699, 701, 706 (N.D. 1990); see supra note 187 and accompanying text.

346. See Peterson, 254 Neb. at 335, 339-40, 576 N.W.2d at 769, 771-72 (acknowledging the holding in Dunlap, yet not acknowledging Dunlap for its statement that a testator may abrogate the exemption statute by clear testimonial language).

347. 193 Neb. 641, 228 N.W.2d 608 (1975).

intent by the testator as to statutory rights.\textsuperscript{349} If so, then the Nebraska Supreme Court's total disregard of this provision undermines its reliance on Dunlap and the court's holding requiring a testator must devise his child the minimum amount required by section 30-2323.\textsuperscript{350}

**Peterson Ruling in Conflict with an Established Nebraska Statute and Rules of Law**

In ruling that a testator cannot disinherit his adult child, the Nebraska Supreme Court created a conflict of interpretations between statutes and established rules of law in Nebraska.\textsuperscript{351} When constructing a statute, the Nebraska Supreme Court in Peterson cited several rules of law.\textsuperscript{352} First, the court stated that if nothing indicates otherwise, it will give statutory language its plain and ordinary meaning, and "a court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless."\textsuperscript{353} Second, the court stated that construction of a statute should only take place when the "language used requires interpretation or may reasonably be considered ambiguous."\textsuperscript{354} The court finished this string of construction rules by stating that "[t]he components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible."\textsuperscript{355} However, after specifically stating these rules, the court appeared to ignore them — as well as other established rules of law in Nebraska — in reaching its decision.\textsuperscript{356}

To begin, the court violated its first rule of statutory construction when it interpreted Nebraska Revised Statute section 30-2323 without considering the language "unless otherwise provided."\textsuperscript{357} Nebraska Revised Statute section 30-2323 provides, in part, that "[t]hese rights are in addition to any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise pro-

\textsuperscript{349} See supra notes 346-48 and accompanying text.
\textsuperscript{350} See supra notes 45, 346-49 and accompanying text; Peterson, 254 Neb. at 340, 576 N.W.2d at 772 (discussing the holding in Dunlap).
\textsuperscript{351} See supra notes 47-51 and accompanying text; infra notes 352-93 and accompanying text.
\textsuperscript{352} See infra notes 353-55 and accompanying text.
\textsuperscript{353} Peterson, 254 Neb. at 338, 576 N.W.2d at 771.
\textsuperscript{354} Id.
\textsuperscript{355} Id. at 338-39, 576 N.W.2d at 771.
\textsuperscript{356} See infra notes 357-93 and accompanying text.
\textsuperscript{357} See infra notes 358-62 and accompanying text.
vided therein, by intestate succession, or by way of elective share.\textsuperscript{358} The court's holding in Peterson specifically requires that a testator with any adult children devise to those children the minimum amount as provided in section 30-2323.\textsuperscript{359} Essentially, the court reasoned that the phrase "unless otherwise provided" is to be ignored and effectively read out of the statute.\textsuperscript{360} A testator in Nebraska, according to the supreme court, cannot rely on this language to devise his or her children any amount below that of the statutory minimum.\textsuperscript{361} Therefore, it appears from the court's analysis it is violating the first rule of construction stated in the opinion of Peterson, to give the language of the statute its plain, ordinary meaning and attempt to give effect to all parts of a statute.\textsuperscript{362}

Second, the court also violated its third rule of statutory construction by failing to construe successive statutes together and to ascertain legislative intent.\textsuperscript{363} The court's holding in Peterson is directly in conflict with Nebraska Revised Statute Section 30-2321, the pretermitted child statute.\textsuperscript{364} The pretermitted child statute provides, in part, that:

if a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the omitted child receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless ... it appears from the will that the omission was intentional.\textsuperscript{365}

The UPC comments indicate that a child covered by this statute would be entitled to nothing if intentionally omitted from the decedent's will.\textsuperscript{366} The court's holding in Peterson states that all children are granted this indefeasibly vested right which cannot be abrogated by will, but the pretermitted child statute in Nebraska appears to have a contrary conclusion.\textsuperscript{367} Therefore, the court's holding in Peterson...

\textsuperscript{358} NEB. REV. STAT. § 30-2323 (Reissue 1995) (emphasis added).
\textsuperscript{359} See supra notes 47-51 and accompanying text.
\textsuperscript{360} See Peterson, 254 Neb. at 340-41, 576 N.W.2d at 772 (acknowledging the statute's language of "unless otherwise provided," yet holding that the rights in section 30-2323 cannot be abrogated by a testator).
\textsuperscript{361} See supra notes 47-51, 358-59 and accompanying text.
\textsuperscript{362} See supra notes 357-61 and accompanying text.
\textsuperscript{363} See infra notes 364-74 and accompanying text.
\textsuperscript{364} See infra notes 365-68 and accompanying text.
\textsuperscript{365} NEB. REV. STAT. § 30-2321 (Reissue 1995).
\textsuperscript{366} See NEB. REV. STAT. ANN. § 30-2321 cmt. (Michie 1996) (stating that it is not necessary for a testator to provide an amount of money to his children).
\textsuperscript{367} Compare id. (stating that if the omission was intentional, the child is not entitled to the statutory share), with Peterson, 254 Neb. at 340-41, 576 N.W.2d at 772 (stating that "[r]egardless, the rights set forth in § 30-2323 cannot be defeated by a testator even though the testator may require a spouse or child to choose between the devise or the exempt property allowance").
son does not comply with its third enumerated law of construction nor case precedent, which provide that a series of statutes on a certain subject matter be construed so that all provisions are consistent with the intent of the Legislature.\textsuperscript{368}

In \emph{State ex rel. City of Elkhorn v. Haney}\textsuperscript{369} and In \emph{re Estate of Nelson},\textsuperscript{370} the Supreme Court of Nebraska turned to legislative history to determine the intent of several statutes.\textsuperscript{371} If the court in Peterson would have turned to legislative history in deciding the Peterson case, a contrary result should have been reached.\textsuperscript{372} For example, the intent of the Nebraska Legislature, as indicated by the comments following the family protection statutes, clearly states that the exempt property allowance is to be used for tax purposes, not to protect against disinherition.\textsuperscript{373} Therefore, if this rule of construction would have been followed, Norman Peterson would not have received the $5000 provided by the exempt property allowance statute, because he was disinherited in his father's will.\textsuperscript{374}

Third, the court's holding is also in direct conflict with a judicially created rule of law in Nebraska.\textsuperscript{375} In \emph{Lowry v. Murren},\textsuperscript{376} the Supreme Court of Nebraska stated "there is also a rule of law that in order to effectively disinherit the heirs-at-law a testator must dispose of [all of] his property by will."\textsuperscript{377} The holding in Peterson contradicts this rule of law, because the court in Peterson ruled a child may not be disinherited, regardless of whether the testator disposed of all his property by will.\textsuperscript{378} This rule does not apply to the spouse because the spouse has been given statutory protection to this judicially made rule via the elective share provision.\textsuperscript{379} Children, however, do not share in this luxury of being protected by statute.\textsuperscript{380} Therefore, the rule of law which states that to disinherit an heir a decedent must dispose of all his or her property, conflicts with the court's holding Peterson that a child — an heir at law — may not be disinherited.\textsuperscript{381}

\textsuperscript{368} See supra notes 363-67 and accompanying text.
\textsuperscript{369} 252 Neb. 788, 566 N.W.2d 771 (1997).
\textsuperscript{370} 253 Neb. 414, 571 N.W.2d 269 (1997).
\textsuperscript{371} In re Estate of Nelson, 253 Neb. 414, 418, 571 N.W.2d 269, 273 (1997).
\textsuperscript{372} See infra notes 373-74 and accompanying text.
\textsuperscript{373} Neb. Rev. Stat. Ann. § 30-2325 cmt. (Michie 1996); see supra notes 305-07 and accompanying text.
\textsuperscript{374} See supra notes 355, 372-73 and accompanying text.
\textsuperscript{375} See infra notes 377-81 and accompanying text.
\textsuperscript{376} 195 Neb. 42, 236 N.W.2d 627 (1975).
\textsuperscript{377} Lowry v. Murren, 195 Neb. 42, 44, 236 N.W.2d 627, 629 (1975).
\textsuperscript{378} See supra note 377 and accompanying text; Peterson, 254 Neb. at 340-41, 576 N.W.2d at 772 (acknowledging the statute's language of "unless otherwise provided," yet holding that the rights in section 30-2323 cannot be abrogated by a testator).
\textsuperscript{379} Batts, 41 Hastings L.J. at 1198.
\textsuperscript{380} See supra notes 288, 293 and accompanying text.
\textsuperscript{381} See supra notes 377-80 and accompanying text.
Finally, the court's holding in *Peterson* — that a decedent's will may not defeat the exempt property allowance granted by section 30-2323 — contradicts the cardinal rule of construing wills, as stated in *Gretchen Swanson Family Foundation, Inc. v. Johnson*. In *Johnson*, the court stated that "[i]n construing a will the court should give effect to the true intention of the testator as shown by the will itself in the light of the attendant circumstances under which it was made, if that intention is consistent with the applicable rules of law." The supreme court in *Peterson* — ignoring Peterson's intent — determined that section 30-2323 was a rule of law that may not be abrogated by the testator's will. In making that determination, the court ignored the statutory language "unless otherwise provided" contained in section 30-2323. The Court of Appeals of Ohio, in *In re Estate of Reddick*, made a ruling to the contrary by holding that a testator's intent may override the exempt property allowance statute when specifically indicated by the language of the will. In that case, the exempt property allowance statute is a rule of construction which may be trumped by the intent of a testator. Nonetheless, the Supreme Court of Nebraska attempts to avoid this conflict by holding that the exempt property allowance statute is a rule of law rather than a rule of construction, thus ignoring the intent of the testator's will and violating the cardinal rule of construing wills.

The right to inherit is not a common law right, but a creature of statute. This was reiterated by the Nebraska Supreme Court in *In re Estate of Luckey*, where the court held that the Legislature determines who will inherit from a decedent's estate. Because the court in *Peterson* relied on *Carmen* to establish the right of inheritance, and assuming that the court erroneously relied on that holding, it can be said that there is no statutory right granted to an adult emancipated

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382. 193 Neb. 641, 228 N.W.2d 608 (1975); see infra notes 383-88 and accompanying text.
384. *See Peterson*, 254 Neb. at 341, 576 Neb. at 772 (stating that "[r]egardless, the rights set forth in § 30-2323 cannot be defeated by a testator even though the testator may require a spouse or child to choose between the devise or the exempt property allowance").
385. *See supra* notes 329-38 and accompanying text.
387. *See id.* (holding that clear testamentary language indicating that the spouse is to take under the will in lieu of statutory exemptions will be allowed).
388. *See supra* notes 382-87 and accompanying text; *Peterson*, 254 Neb. at 335, 576 N.W.2d at 769 (noting that in the will, his adult child was to receive a nominal devise).
child to inherit. Therefore, Norman Peterson should not have been entitled to the exempt property allowance as provided by Nebraska Revised Statute section 30-2323.

CONCLUSION

In In re Estate of Peterson, the Nebraska Supreme Court held a decedent may not disinherit his or her adult emancipated child and such child is entitled to the exempt property allowance in accordance with Nebraska Revised Statute section 30-2323. In holding that an adult emancipated child may not be disinherited, the Nebraska Supreme Court has made an unprecedented decision. Although the court did not discuss the ramifications of its holding on probate law in Nebraska, the holding may change how probate attorneys draft wills for clients who have adult emancipated children.

First, the court relied on the case of In re Estate of Carmen to establish that the exempt property and family allowance are statutory rights granted to children. The court stated that the language of section 30-2323 creates a statutory right in children, if no surviving spouse exists, at the death of the decedent. However, the court did not consider the difference in how the law has historically treated the spouse and children with regard to disinheritance. This history provides some explanation as to why the spouse has generally been protected from disinheritance, whereas children have not been afforded the same benefit. Additionally, the court failed to consider the Nebraska comment to section 30-2325, which states that the family protection provisions were implemented for tax purposes, not protection from disinheritance. By failing to consider the history associated with disinheritance and the Nebraska comment to section 30-2325, the court inappropriately relied on Carmen and wrongfully held that testators cannot disinherit their children.

Second, the court has disregarded the intent of the UPC drafters regarding the family protection statutes. The court mentioned that the intent of the UPC drafters in creating the family protection statutes was to protect the spouse and children from intentional disinherit-
tance. However, comments by the UPC drafters regarding the family protection statutes state that these provisions are to provide protection against unsecured creditors, not against disinheritance. Therefore, the court incorrectly relied on this statement.

Third, the court essentially read the phrase “unless otherwise provided” out of the statute by stating that a decedent must leave the minimum amount proscribed by Nebraska Revised Statute section 30-2323. Section 30-2323, according to the court in Peterson, is a rule of law because the statute cannot be defeated by the decedent’s will. However, taking into consideration the phrase “unless otherwise provided,” section 30-2323 becomes a rule of construction, which may be defeated by the decedent’s will. Other jurisdictions have taken the latter interpretation, which is seemingly supported by the Nebraska Legislature and drafters of the UPC.

Fourth, the court, in relying on the Montana Supreme Court case of In re Estate of Dunlap and the statutory language of section 30-2323, concluded the right granted by section 30-2323 is an indefeasibly vested right that may not be abrogated by the decedent’s will. In Dunlap, the Montana Supreme Court indicated that because the will of the decedent failed to make specific reference to the child’s statutory rights, the child was entitled to the exempt property allowance. The court in Peterson seemed to rely on the Dunlap holding, and actually went one step further by holding that a testator must devise an adult child the minimum amount under section 30-2323.

The Nebraska comment to section 30-2325 states that the passage of these family protection provisions was for tax purposes, not to protect from disinheritance by the decedent.

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404. See supra notes 318-20 and accompanying text.
405. See supra notes 317-28 and accompanying text.
406. See Peterson, 254 Neb. at 340-41, 576 N.W.2d at 772 (acknowledging the statute’s language of “unless otherwise provided,” yet holding that the rights in section 30-2323 cannot be abrogated by a testator).
407. See id. at 341, 576 Neb. at 772 (stating that “[r]egardless, the rights set forth in § 30-2323 cannot be defeated by a testator even though the testator may require a spouse or child to choose between the devise or the exempt property allowance”).
408. See supra notes 147-89, 303-11, 318-21 and accompanying text.
409. 649 P.2d 1303 (Mont. 1982).
410. See Peterson, 254 Neb. at 340-41, 576 N.W.2d at 772 (stating that the exempt property allowance is an indefeasible right and that it may not be defeated by the testator).
411. In re Estate of Dunlap, 649 P.2d 1303, 1306 (Mont. 1982) (“In the present case, the decedent’s will did no more than disinherit the child and expressed no intent as to statutory rights.”).
412. See NEB. REV. STAT. ANN. § 30-2325 cmt. (Michie 1996) (stating that section 30-2325 was enacted to ensure that the spouse would be able to claim the federal estate tax marital deduction).
Court did not consider any legislative history to determine the intent of the Legislature with regard to the family protection provisions, which the court has done in the past to determine the intent of statutes. The court did not take into account the prior law in Nebraska which provides that, to disinherit an heir-at-law, the decedent must devise his or her entire estate. By not considering the prior law, the court has created a conflict in Nebraska law as to what a decedent must do to effectively disinherit an heir-at-law.

Finally, the holding in Peterson has also created a conflict regarding the pretermitted child statute in the Nebraska Probate Code ("NPC"). The pretermitted child statute allows for disinheritance of a child born after the execution of the will from which he or she was omitted. However, the holding in Peterson states that an adult child cannot be disinherited. The rules of statutory construction, as stated in Peterson, were disregarded when the court failed to construe similar statutes in a harmonious manner. Thus, the holding in Peterson is in direct conflict with the pretermitted child statute.

The Nebraska Supreme Court made an important interpretation of the NPC that should change how attorneys draft wills in Nebraska. By making an unprecedented ruling, the court has taken a major step in protecting children from disinheritance. The court's holding is based more on public policy than on Nebraska law. By not considering legislative history, other provisions of the NPC, history of the law, and prior law in Nebraska, the court seems to have made a quick and rash decision. Maybe this decision will have enough impact to influence other jurisdictions to change their law on disinheritance of children. Regardless, the Legislature may need to explicitly declare the intent of the family protection provisions with regard to children to clarify the statute's effect on disinheritance of children. If it does not, the Nebraska Supreme Court has made a revolutionary decision utilizing suspect rationales which not only go against history, but affect history.

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413. See supra notes 12-51, 1205-14 and accompanying text.
416. See Peterson, 254 Neb. at 341, 576 N.W.2d at 772 (holding that a testator may not abrogate the family protection provisions by testamentary language to the contrary).