Memorandum 81-34

Subject: Study L-602 - Probate Code (Intestate Succession—Per
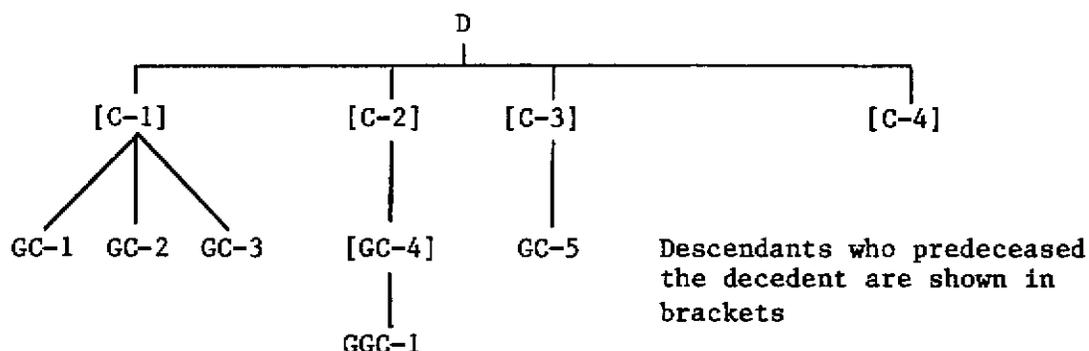   Stirpes or Per Capita Distribution)

This memorandum deals with whether intestate shares should be
distributed on a per stirpes or per capita basis. The memorandum
discusses the various alternatives that might be used. First the
English rule is discussed, then the California rule, then the Massachusetts
rule, then the Uniform Probate Code rule, and finally a suggested modifica-
tion of the UPC rule. The material is somewhat difficult to read, but
the staff believes that an understanding of the material is essential to
decision making in this area of the law.

English Rule (pure stirpital distribution)

Under all systems of intestate succession, persons in the first
degree of kinship to the decedent (i.e., the decedent's children and
parents) inherit in their own right as primary heirs, and not by repre-
senting other persons who would have taken had they survived the decedent.
This is called taking "per capita," meaning by the head or by the individual.
Under a pure stirpital distribution system (English rule), descendants
of a deceased child or parent of the decedent divide with siblings the
share that their deceased ancestor would have taken had the latter
survived. This is called "per stirpes," meaning by roots or stocks, or
by representation.

Thus, under a pure stirpital distribution system where the decedent
leaves issue, the primary division of the estate (or the determination
of the roots or stocks) is always made at the first generation (i.e.,
the decedent's children), whether or not there are any surviving members
of that generation. This may be illustrated by the following example in
which all of the decedent's children predeceased the decedent. (The
situation where all the children are deceased at the time of distribution
may arise with some frequency in the trust context where the ultimate
gift is made long after the settlor's (D's) death, and is to "heirs" as
determined under the laws of intestate succession. Niles, Probate
Reform in California, 31 Hast. L.J. 185, 202 (1979).

Example 1.

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                              D
                              |
        ┌─────────────┬───────┴───────┬──────────────────┐
        |             |               |                  |
      [C-1]         [C-2]           [C-3]              [C-4]
      ╱ | ╲           |               |
     ╱  |  ╲          |               |
  GC-1 GC-2 GC-3    [GC-4]          GC-5        Descendants who predeceased
                      |                         the decedent are shown in
                      |                         brackets
                    GGC-1
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Under the English rule (pure stirpital distribution), the stocks
are determined at the first generation (children), even though all are
predeceased. The estate is divided into three primary shares, determined
by the number of living children (0) plus the number of deceased children
who have living descendants (3). The distribution is per stirpes there-
after, so that GC-1, GC-2, and GC-3 divide their parent's one-third
share, or one-ninth apiece. C-2's one-third share passes through GC-4
to GGC-1. GC-5 takes C-3's one-third share.

The effect of a pure stirpital distribution system is that members
of the same generation may take unequal shares (GC-5 takes one-third
while GC-1, GC-2, and GC-3 each take one-ninth), and a member of a
generation more remote from the deceased ancestor may take a larger
share than one or more members of a nearer generation (GGC-1 takes one-
third while GC-1, GC-2, and GC-3 each take one-ninth). This result has
been criticized as not being consistent with empirical studies which
show the "strong popular preference for having all issue in the same
generation share equally." Niles, supra at 202 n.111.

As a result of the popular preference for equality among members of
the same generation, most U.S. jurisdictions have departed from a pure
stirpital system and have provided for per capita distribution in various
situations. See 23 Am. Jur.2d Descent and Distribution § 65, at 808
(1965). California makes a very limited departure from the stirpital
system, Massachusetts somewhat more, the UPC still more, and Professor
Waggoner's proposal makes the most complete embrace of the per capita
system. These are discussed in order.

California Rule (stirpital distribution, but per capita if all living descendants are of the same generation)

Distribution to descendants of the decedent in California is per stirpes unless all surviving descendants are of the same generation, in which case they take equally (per capita). See Prob. Code §§ 221, 222. Thus in example 1, the result is the same in California as under the English rule, since the surviving issue are not all of the same generation. See Maud v. Catherwood, 67 Cal. App.2d 636, 155 P.2d 111 (1945).

Massachusetts Rule (stirpital distribution, but if all decedent's children are predeceased then per capita at the next generation with any living members)

Massachusetts and a number of other U.S. jurisdictions have departed from pure stirpital distribution by requiring the primary division of the estate to be made at the generation nearest to the decedent having at least one living member. Thus in example 1, the estate would be divided at the grandchildren's generation, since all of the decedent's children are predeceased. The number of primary shares is therefore five (four living grandchildren plus one deceased grandchild with living issue), not three as under the English and California systems. The living grandchildren share equally (one-fifth each), and no great-grandchild can possibly take a larger share than any grandchild.

However, distribution is per stirpes thereafter, so both aspects of the inequality problem can occur in more remote generations under the Massachusetts rule, just as under a pure stirpital system. This may be illustrated by modifying example 1 to give C-4 several generations of descendants:

Example 2.
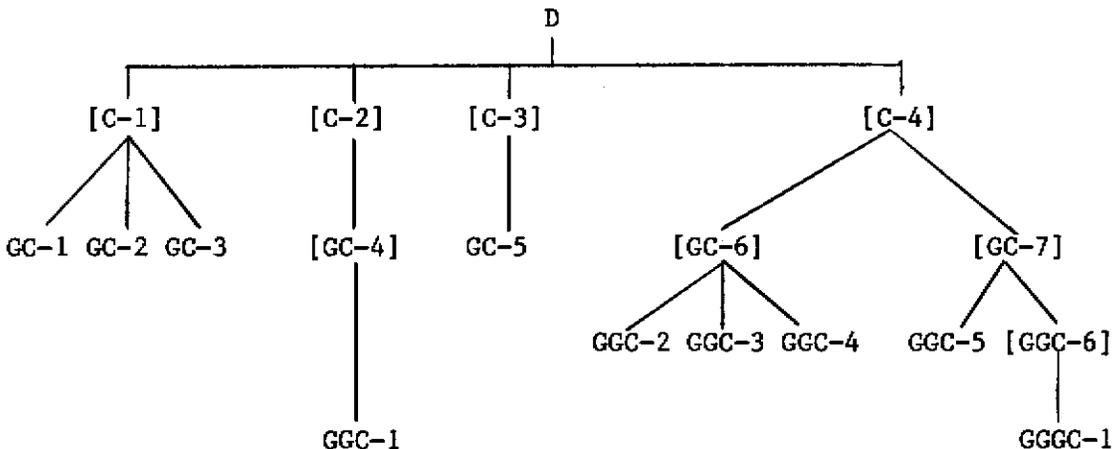
The primary division is made at the grandchildren's generation, the first generation with any living members. The number of shares is seven (four living grandchildren plus three predeceased grandchildren with surviving issue). However, since distribution is per stirpes after the estate is divided into primary shares, GC-6's one-seventh share is divided into three equal parts, with GGC-2, GGC-3, and GGC-4 each taking a 1/21 share. GC-7's one-seventh share is divided in half with GGC-5 taking 1/14 and GGGC-1 taking GGC-6's 1/14 share. Thus there are unequal shares at the great-great-grandchildren's generation, and the great-great-great-grandchild (GGGC-1) takes a larger share than three of the great-great-grandchildren.

UPC Rule (stirpital distribution with two exceptions: (1) If all decedent's children are predeceased then per capita at the next generation with any living members; (2) if any descendant of the decedent is predeceased and all children of that descendant are also predeceased, then per capita at next generation of that descendant's issue having living members)

Under the UPC, the primary division of the estate is made just as under the Massachusetts rule, namely, at the first generation having any living members. However, the UPC goes an additional step away from a pure stirpital system and toward per capita distribution: If any descendant of the decedent is predeceased and all of the children of that descendant are also predeceased, then the latter generation is skipped and the grandchildren of that descendant (or the next generation down from that descendant having any living members) take their deceased ancestor's share per capita and not by right of representation.

The operation of this rule may be illustrated by modifying example 2 so that GGC-2, GGC-3, and GGC-4 are all predeceased:

Example 3.
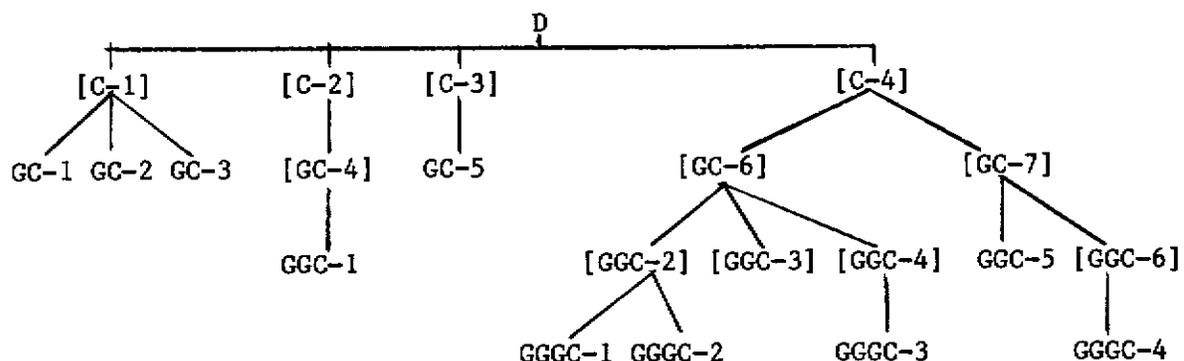
Under the UPC as under the Massachusetts rule, the primary division of the estate is made at the grandchildren's generation, since all the decedent's children are predeceased. Thus there are seven shares (four living grandchildren plus three deceased grandchildren having surviving issue), not four as under the English and California rules. However, the UPC departs from the Massachusetts rule in determining how GC-6's one-seventh share is to be apportioned among GGGC-1, GGGC-2, and GGGC-3. Recall that after the primary division is made, Massachusetts distributes per stirpes, with the result that GGGC-1 and GGGC-2 each take a 1/28 share, while GGGC-3 takes 1/14. Under the UPC, since all of GC-6's children (GGC-2, GGC-3, and GGC-4) are predeceased, that generation is skipped and GC-6's one-seventh share is divided among GGGC-1, GGGC-2, and GGGC-3 per capita so that each takes a 1/21 share.

Although GGGC-1, GGGC-2, and GGGC-3 each take equal 1/21 shares, GGGC-4 takes the 1/14 share of GGGC-4's deceased parent, GGC-6 (unequal shares in the same generation). If GGGC-4 were deceased leaving one child, that would present an example of a larger share for a more remote descendant than three nearer ones. These inequalities would be eliminated by the proposal discussed next.

Waggoner Modification of UPC Rule (per capita at each generation)

Professor Lawrence Waggoner has criticized the UPC for not going far enough to eliminate the inequalities caused by the stirpital system with its various modifications. See Waggoner, A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants, 66 Nw. U.L. Rev. 626 (1971). He has proposed an alternative to the UPC which he calls "per capita at each generation." Under the Waggoner proposal, the estate is divided into primary shares at the nearest generation which contains one or more living members, and the number of primary shares is the number of living members of that generation plus the number of deceased members having living descendants. So far, this is the same as the Massachusetts and UPC systems.

At this point, the Waggoner proposal departs from the others. After the living members of a generation are allocated their shares, the remaining estate as a whole drops to the next generation which contains any living members and is divided there per capita, instead of the share of each deceased member dropping to his or her own descendants.

Applying the Waggoner proposal to example 3 results in the estate being divided into seven primary shares at the grandchildren's generation (same as Massachusetts and UPC), with GC-1, GC-2, GC-3, and GC-5 each taking one-seventh. The remaining three-sevenths of the estate drops as a whole to the great-grandchildren's generation where it is redivided into five equal shares (two living great-grandchildren plus three pre-deceased great-grandchildren with surviving issue). Thus GGC-1 and GGC-5 each take an equal 3/35 share. The remaining 14/35 of the estate drops as a whole to the great-great-grandchildren's generation where it is redivided into four equal shares, so that GGGC-1, GGGC-2, GGGC-3, and GGGC-4 each take an equal 14/140 share. The entire estate is allocated, all members of the same generation share equally, and no more remote descendant takes a larger share than a nearer one.

The Waggoner proposal was carefully considered by the UPC's Joint Editorial Board. Although a majority of the board favored the Waggoner proposal, the board decided not to recommend a change in the UPC because several states had already enacted it and it was thought that to recommend a change would weaken the case for a nationally-uniform system. Instead, revised language to implement the Waggoner proposal was set forth in the Official Comment with the notation that it could be adopted by a state which decides that uniformity of intestate succession law is not vital. See Official Comment to UPC § 2-103.

The Commission should consider adoption of the Waggoner proposal of per capita at each generation. The Waggoner proposal is consistent with a strong popular preference for having all issue in the same generation share equally. See Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. Bar Foundation Research Journal 384 [Exhibit 3 of Memorandum 81-2⑨]. The Waggoner proposal has been endorsed by Professor Niles (Niles, supra at 202 n.111) and has been enacted by one state (North Carolina).

Respectfully submitted,

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