#L-602 6/17/81

Memorandum 81-36

Subject: Study L-602 - Probate Code (Intestate Succession - Succession Based on Source of Property)

INTRODUCTION

The feudal canons of descent limited the inheritance of land to those of the blood of the first purchaser--the ancestor who had brought the land into the family. This is referred to as the "ancestral property doctrine." Modern succession statutes, on the other hand, are based on the relationship to the decedent of possible successors, and not on the source of the property. Niles, Probate Reform in California, 31 Hast. L.J. 185, 203 (1979). This is true under the Uniform Probate Code: The source of the property is irrelevant to succession.

California has special rules of intestate succession based on the source of the property in four instances:

(1) Where an unmarried minor dies leaving property received by succession from a parent (Prob. Code § 227).

(2) Where a potential heir is a half-blood relative of the decedent (Prob. Code § 254).

(3) Where the decedent dies without spouse or issue and leaves property received from the separate property of a parent or a grandparent (Prob. Code § 229(c)).

(4) Where the decedent dies without spouse or issue and leaves property received from a predeceased spouse (Prob. Code § 229(a)).

These rules are discussed in order below. The staff has concluded that all four of these applications of the ancestral property doctrine should be eliminated.

PROPERTY OF UNMARRIED MINOR

Under Probate Code Section 227, if an unmarried minor dies leaving an estate some or all of which came by succession from a parent, that portion of the estate goes in equal shares to other children of the same parent and to the issue of deceased children of that parent. This is an exception to the usual rule that on the death of a person without spouse or issue, the estate passes to the person's parent or parents. Prob. Code § 225.

This application of the ancestral property doctrine has been criticized by Professor Niles and by Professor Perry Evans (the draftsman of the 1931 Probate Code). See Niles, supra at 204; Evans, Comments on the Probate Code of California, 19 Calif. L. Rev. 602, 614 (1931). In Professor Evans' view, the relationship of potential heirs to the decedent is more important than the source of the property. He thinks this provision will cause confusion and should be eliminated for the sake of simplicity. He saw no reason for the section, but had no authority to make substantive changes. Professor Niles points out that a minor sibling who inherits under Section 227 would need to have a guardian appointed, and concludes that the section is difficult to defend.

The staff agrees with the views of Professors Niles and Evans and favors the elimination of this aspect of the ancestral property doctrine.

EXCLUSION OF HALF-BLOODS

Probate Code Section 254 states the generally-accepted U.S. rule that "[k]indred of the half blood inherit equally with those of the whole blood in the same degree," but then adds a qualification to that rule where property came to the intestate from an ancestor, in which case half-blood relatives of the intestate who are not of the blood of the ancestor are excluded. The result is that whole blood relatives of the intestate who are not of the blood of the ancestor may inherit ancestral property from the intestate, while half-bloods not of the blood of the ancestor may not. The California Supreme Court has called this result illogical. Estate of Ryan, 21 Cal.2d 498, 512, 133 P.2d 626 (1943).

The Ryan case noted that the doctrine of ancestral property "is being looked on with increasing disfavor in the states where it still exists." Id. In light of this, the Ryan court construed Section 254 not to apply to personal property, but to be limited to real property consistent with the historical doctrine under the feudal canons of descent. The Ryan court further limited the section by rejecting tracing and requiring that the ancestral property be the identical piece of real property received from the ancestor. Id. at 513-14.

Professor Niles has noted that, even as restricted by the Ryan case, Section 254 is "anachronistic." Niles, supra at 204. The staff

agrees, and recommends that the rule that discriminates against half-bloods be eliminated and replaced by the UPC rule that "[r]elatives of the half blood inherit the same share they would inherit if they were of the whole blood." UPC § 2-107.

PROPERTY RECEIVED FROM A PARENT OR GRANDPARENT

Subdivision (c) of Probate Code Section 229 provides that if the decedent leaves neither issue nor spouse, that portion of the decedent's estate acquired by gift, descent, devise, or bequest from the separate property of a parent or grandparent shall go to the parent or grandparent, or if dead, "in equal shares to the heirs of such deceased parent or grandparent." Professor Niles calls this provision "extraordinary," "crudely drafted," and "obscure," and criticizes it as follows:

> [W]henever a person dies intestate, leaving neither spouse or issue, the estate must be sorted out so that all land, stocks, and bonds, and other personal property which came by gift, devise, or inheritance directly from the separate property of a parent or grandparent must pass by a special rule of succession based on the source of title and not on relationship. This rule exceeds even the feudal ancestral property doctrine which was limited to land.

Niles, supra at 205-06. Professor William Reppy supports Professor Niles' view. See Exhibit 1, p. 35.

Professor Niles concludes that the notion that ancestral property should be restored to the blood line is anachronistic, and that the revival of the ancestral property doctrine, as well as its extension to personal property, is contrary to all current scholarly opinion. Id. at 207.

The staff agrees with the views of Professors Niles and Reppy, and recommends elimination of this application of the ancestral property doctrine.

PROPERTY FORMERLY OWNED BY A PREDECEASED SPOUSE

Subdivisions (a) and (c) of Probate Code Section 229 provide that if the decedent is predeceased by a spouse and then dies without spouse or issue, then that portion of the decedent's estate which came from the predeceased spouse's separate property or share of the community property is distributed according to the following hierarchy:

(1) To children of the predeceased spouse and to their descendants by right of representation.

(2) If no issue of the predeceased spouse, to the parents of the predeceased spouse equally, or to the survivor.

(3) If neither issue nor parent of the predeceased spouse, to the brothers and sisters of the predeceased spouse equally and to their descendants by right of representation.

(4) If none of the foregoing, to blood relatives of the decedent.

(5) If none of the foregoing, to relatives of the predeceased spouse more remote than the issue of parents.

(6) If none of the foregoing, to the state by escheat.

Professor Reppy in the attached article traces the history of these provisions and points out the complexity and many defects in the provisions. You should read his attached article. He recommends that the provisions not be continued.

Niles points out that the provisions are based on three implicit premises: (1) Relatives of the predeceased spouse should be favored in preference to having the property escheat to the state; (2) to have the decedent's property acquired from a predeceased spouse pass to the decedent's parents or collateral kindred is unfair to relatives of the predeceased spouse, especially to issue of the predeceased spouse from a prior marriage; (3) ancestral property should be restored to the blood line. Professor Niles has said that the first two premises are rational, but the third is not. Niles, supra at 206-07.

Of course, the first premise (decedent's property acquired from a predeceased spouse should go to relatives of the latter rather than escheat) is not an argument for favoring relatives of the predeceased spouse over parents and collateral kindred of the decedent. The policy of avoiding escheat is best served by a general provision, applicable to all property of the decedent, that if there are no blood heirs to inherit from the decedent, the property shall go as a last resort to relatives of a predeceased spouse. This is existing California law, and is discussed in the Memorandum 81-37 where the staff recommends its continuance.

Rejecting the third premise as irrational, we are left with the second (unfairness, especially to stepchildren) as the only justification for favoring relatives of a predeceased spouse over relatives of the

decedent with respect to property attributable to the predeceased spouse. Professor Niles has suggested that the second premise might be better served by modifying the UPC provisions to give children of a prior marriage of the first spouse to die an intestate share of community property at the time of the first spouse's death. Niles, supra at 207. This suggestion is discussed in Memorandum 81-35. Arguably, it may be desirable both to give stepchildren a share at the time of the first spouse's death (as Professor Niles recommends) and also gives give such children the decedent's property acquired from their parent in preference to giving it to the decedent's parents and collateral heirs. However, practical considerations militate against such a scheme: As Professor Reppy says, the need to distinguish between the decedent's property which is subject to ancestral property rules and that which is not "introduces enormous complexities into administration. Difficult problems of tracing, commingling, and apportionment often arise." See Exhibit 1, p. 33. Accord, Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. Bar Foundation Research J. 344 [Exhibit 3 to Memorandum 81-27].

Professor Reppy concludes that "[a]ncestral property inheritance should be abolished in California." Since the decedent "has testamentary power over the property at issue," the intestate succession rules with respect to such property should correspond to the manner in which the average decedent would dispose of it by will. Exhibit 1, p. 35. Thus cast, the question becomes one of whether the average decedent would prefer his or her own relatives to relatives of the predeceased spouse, rather than what is "fair" to the latter. It seems likely that in most (though obviously not all) cases the decedent would in fact prefer his or her own relatives to those of the predeceased spouse. The clincher seems to be that "[e]liminating the distinction between ancestral and nonancestral property for inheritance purposes would obviously make administration of many estates much simpler, itself a goal of modern succession law." Id. The staff recommends the repeal of Section 229.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

Exhibit 1

CALIFORNIA PROBATE CODE SECTION 229: Making Sense of a Badly-Drafted Provision for Inheritance by Decedent's Former In-Laws

William A. Reppy, Jr.
Peter G. Wright*

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*Professor Reppy, a member of the California bar, is the author of Community Property in California (Michie Bobbs-Merrill 1980) and Reppy & de Funiak, Community Property in the United States (Michie Bobbs-Merrill 1975). He is a member of the editorial board of the Journal.

Mr. Wright, a 1981 graduate of Duke Law School, plans to practice law in Baton Rouge, Louisiana.

I. INTRODUCTION

A few years ago in California, Carl shot his wife Ann and then shot himself. Carl died a few minutes before she did. They both were intestate. There were no children of the marriage.[1/] Under the succession law then in effect Ann became the owner of all of the community property when Carl died,[2/] but when she died, because she was not survived by issue, all of the former community property passed to Carl's children by a prior marriage.[3/] Ann's relatives, parents and a sibling, inherited nothing from her, even though California law viewed her as half owner of the community property during her marriage and sole owner of those assets during the few minutes she survived her husband.

This form of succession by persons related to the deceased only through marriage was mandated by an inheritance scheme dating back to 1880 and founded on feudal principles of "ancestral property".[4/] The California legislature, apparently finding the lines of inheritance in the murder-suicide case unfair, in 1979 sought to amend the governing statute.[5/] However, instead of abandoning the feudal theory of ancestral property in favor of the more common American approach to intestate succession in which the decedent's <u>own</u> closest relatives are his heirs, the legislature apparently sought to make the California provision accord more closely to ancestral property principles. In the murder-suicide case, "pure" ancestral property theory would have Carl's children inheriting half the former community property and Ann's parents half.

Because of a drafting error, the 1979 reform did not achieve what was intended. This error was promptly corrected in 1980.[6/] However,

as this article points out, numerous problems remain with respect to California Probate Code section 229. In several instances, application of its literal language still causes results inconsistent with ancestral property theory, which is, in cases involving inheritance claims by an intestate's in-laws, that to the extent the first-to-die spouse brought to the marriage or is treated as having earned an asset, surviving claimants related by blood to that spouse should inherit to the exclusion of the intestate's own kin. The article will also point out many ambiguities in section 229 which, although capable of being resolved consistently with ancestral property theory, invite further legislative attention to this statute.

Our conclusion and recommendation is that all traces of ancestral property theory should be eliminated from California succession law. The problems arising under the one hundred year experiment with this archaic approach to succession reveal that whatever benefits are achieved are not worth the legal headaches. Repeal of section 229 would leave succession in California governed solely by Probate Code sections founded on the "will substitute" theory of intestate succession statutes. That is, the legislature is not concerned with the source of acquisition of an asset but instead simply strives for a succession scheme it believes would be adopted by the typical intestate himself if he wrote a will.

II. TERMINOLOGY

Section 229 and its predecessors provide for inheritance by an intestate's stepchildren and more remote issue of the intestate's pre-

deceased spouse; by the intestate's former mother-in-law and father-in-law ("former" here indicates the marriage between intestate and the child of such in-laws was terminated before the intestate's death); by former brothers-in-law and sisters-in-law of the intestate; and by nephews and nieces, grandnephews and grandnieces (and still more remote issue in their parentela) of the intestate's predeceased spouse. For convenience we term the statute under which these persons can inherit the "in-laws inheritance" statute. It is recognized that in popular usage the term "in-laws" may not be thought to include issue of one's spouse (stepchildren, etc.) but only ascendants and collaterals. However, we have found it necessary to create some relatively short phrase to refer to the succession scheme explored by this Article. "In-laws Inheritance" it shall be.

Also for convenience, the article will not further mention possible inheritance by collaterals related by marriage more remote than siblings of the decedent's spouse. It should be kept in mind, though, that Section 229 will allow a remote in-law such as a great-grandnephew -- who stands in the fifth degree to the predeceased spouse of intestate -- to inherit in some cases to the exclusion of intestate's own mother or father, a relative in the first degree.

To make this article more readable we will henceforth use the abbreviation S-1 to refer to the first spouse to die. S-2 refers to the second spouse to die, the intestate whose property must be distributed. Unless otherwise indicated in the text, it is assumed S-2 died without a surviving spouse (from a remarriage) and without surviving lineal issue of S-2. (As will be seen, today the in-laws

can inherit only if there are no such surviving claimants.) Finally, to avoid cumbersome "his or her" form we shall assume the husband died first, so that S-1 is a "he" and S-2 a "she."

Finally, the term "heir" is used to include both heirs (who succeed to realty) and next of kin (who succeed to personalty),[7] since California law makes no such distinction.

III. HISTORY OF CALIFORNIA'S IN-LAW INHERITANCE SCHEME[8]

A. Originally Operated Solely To Prevent Escheat

Prior to 1880, if no surviving spouse or blood kindred of S-2 could be found, all of the property she owned at her death intestate would escheat to the state. In that year, the legislature provided that one class of property of S-2 would, rather than escheat, pass to the parents or siblings of S-1 who survived the intestate. The class of property subject to this succession by former in-laws was the "common property of such decedent, and his or her deceased spouse, while such spouse was living."[9]

Although the 1880 statute applied only to prevent an escheat, it plainly had some roots in ancestral property theory. If providing a will substitute had been the theory, surely the legislature would have allowed the former in-laws of S-2 to inherit all of her property and not just former "common" (an early term for community) property.

But why, it may be asked, did the former in-laws take all rather than just a half interest in the former community property? Probably the answer is the legislature had in mind the fact situation -- surely the most common -- where S-2 was a surviving wife rather than a sur-

viving husband. Until 1927 the husband was viewed in California as the sole owner of what was improperly called community or common property.[10] Thus, where he died first, inheritance by his kin of all of the former community property did result in succession by the relatives of the "first purchaser" -- the English common law term to describe the first owner of an asset who did not acquire it by gift or succession.[11] (In civil law terms, the first purchaser was the first to make an onerous acquisition.)[12]

Perhaps the in-laws took to avoid escheat when S-1 was a wife, who had no ownership interest in common property, simply to avoid gender discrimination (unlikely in view of other provisions of the 1880 act)[13] or perhaps in recognition that the theory that a wife had no ownership interest in so-called community property was unfair. Maybe there is no reason. Certainly the 1880 act was not a model of sound drafting. It inexplicably failed to admit to heirship the children and grandchildren of S-1 and failed to include assets owned by S-2 that had been S-1's separate property and had come to S-2 by gift or succession.

B. Substantial Broadening of the In-Law Inheritance Scheme

The indefensible exclusion of S-1's issue from heirship was finally corrected in 1905 by legislation that made stepchildren of S-2 (and their issue by representation) the preferred heirs of property subject to in-law inheritance.[14] Under the new version of the statute, if any issue of S-1 survived S-2 they would take to the exclusion of S-1's parents and siblings all property subject to in-law inheritance. In a sense, this injected a bit of "will substitute"

theory into the in-laws inheritance statute. S-2 probably would be more closely acquainted with her stepchildren (and their issue) than in-laws likely to be older than such issue. Indeed, S-2 might have raised the stepchildren in her home as her own. But this preference for S-1's children over his parents was not at all inconsistent with ancestral property theory. Once it applies to exclude from heirship those not related by blood to the first purchaser of an asset and admits to heirship those who are, its function is completed. The lawmaker must then turn to some other body of law to determine which of the kin related by blood to the first purchaser shall inherit. (E.g., if claimants are S-1's grandchild and S-1's mother, a gradual system of inheritance within S-1's family tree would favor Mother; a parentelic system the grandchild.)[15/]

C. Exclusion of S-2's Blood Kin From Heirship

The most dramatic change made in 1905, however, was to greatly broaden the range of intestacies to which the in-laws inheritance statute would apply. Instead of applying only where the decedent had no blood relatives at all (i.e., simply to prevent escheat), it made stepchildren or former in-laws of S-2 her heirs whenever S-2 left no issue. Thus, it ceased to be a mere last resort, anti-escheat statute and, instead, gave S-2's former in-laws preference, with respect to former community property, over any of her own ancestors or collaterals, who would otherwise have taken the property. (As we shall[16/] see, the 1905 revision was ambiguous as to whether a surviving spouse of S-2's by remarriage was also excluded.)

Finally, the 1905 revision expanded the property subject to in-law inheritance to include intestate property of S-2 that had been the separate property of S-1.

The most extraordinary feature of the 1905 revision was its giving heirship preference to in-laws to the exclusion of S-2's very close blood relatives who were not her issue. For example, if the claimants were S-1's nephew and S-2's mother, all the former community property passed to S-1's nephew, none to Mother. That S-2 would have preferred this result is highly doubtful. Assuming most decedents would prefer that their own blood relatives inherit as their heirs, the 1905 revision caused a result contrary to the general principle "that when a man dies without a will the law should try to provide so far as possible for the distribution of his estate in the manner he would most likely have given effect to himself if he had made a will."[17/]

With respect to former community property and former separate property of S-1, the will substitute theory of succession had been displaced by ancestral property theory except insofar as issue of S-2 would take to the exclusion of S-2's in-laws. Rather than being confined to the rare anti-escheat situation, ancestral property succession would now be a not uncommon aspect of California intestate succession law.

At about the same time, traces of ancestral property theory were being steadily eliminated from the statutory schemes in other American states. The majority of states had never adopted any form of ancestral property inheritance.[18/] Those that did generally confined it to real property, as had common law England.[19/] It was par-

ticularly ironic that California would in 1905 give new life to a dying doctrine and actually broaden its scope (to personal property of the intestate) in that this involved engrafting a feudal, common law notion onto a civl law (Spanish-based) marital property regime, community property.

True, it was not until 1927 that California technically recognized a community of property in the civilian sense (with the wife having equal ownership rights). That was the year of legislation accepting the wife as a co-equal owner of a present interest along with the husband.[20/] Surely, however, even in 1905, the popular conception of community property was co-ownership. Thus, it was strange -- and inconsistent with ancestral property theory -- to have both halves of former community property inherited by S-2's stepchildren or former in-laws when S-2 was survived by kin as close as a parent. Perhaps this was just carried over without thought from the 1880 statute. Since the purpose of that initial act was simply to prevent escheat, it was reasonable to have it apply to all the community property. Ancestral property theory would support recognizing as heirs of S-1's half interest his issue, parents and siblings (S-2's stepchildren and in-laws); but to give them succession to S-2's own half as well was to give them a windfall to the extent the wife was popularly as a co-owner.

D. Correction of Some Errors Made in 1905

In 1907 the in-laws inheritance statute was revised again.[21/] At least with respect to inheritance by S-2's former mother-in-law, father-in-law, brother-in-law or sister-in-law, the 1907 legislature

appears to have been viewing the husband and wife as co-equal owners during marriage of a half interest in community property. Accordingly, the revised statutory scheme provided that when those claiming heirship under the ancestral property scheme were related in such manner to the intestate (S-2), they would only inherit half the former community property. The other half would pass to S-2's own ascendants or collaterals.[22/]

However, because of shoddy draftsmanship of the 1907 legislation, strange results not consistent with ancestral property theory would still occur in many situations. The 1907 legislature appears not to have taken into account the possibility that the half of the community the legislature treated S-1 as owning might have gone at S-1's death to someone other than S-2.

If a husband died first with a will leaving half the community property to a blood relative of his, his wife was his forced heir as to the other half. At her subsequent death intestate, succession by the husband's kindred of any further share of the former community property would give them more than they were entitled to under ancestral property theory combined with the notion of ownership by halves that explains why husband's (S-1's) parents or siblings were limited to half the former community property when the wife (S-2) had acquired all of it at S-1's death.

If S-1 had devised or bequeathed the half of the community property attributed to him by the legislation to a person not related to him by blood, his kindred still have no ancestral-property based claim to any share of the half owned by S-2 at her death intestate. The

will of S-1 simply caused his half of the property to pass out of the family.[23/] Testamentary power makes that possible; only if all persons involved die intestate can ancestral property succession theory keep property "in the blood of the first purchaser."

(The same result -- no inheritance by S-1's blood kin -- is dictated by ancestral property theory when S-1's devisee or legatee is related by blood to S-2. S-1's will has broken the claim by his blood kin to the half interest "purchased" by him and the fact S-2's kin may have acquired the S-1 half interest does not undercut their claim as blood relatives of S-2 so long as she is viewed as a "first purchaser" of the half interest she still owns at death.)

The 1907 revision of the in-laws inheritance statute either reverted to a "will substitute" theory of succession or did not consider the spouses co-owners of community property in situations where issue of S-1 survived S-2. As under the 1905 statute, such issue of S-1 would inherit to the exclusion of even the closest kin of S-2 if she herself left no issue. Perhaps the 1907 legislature did have in mind the situation where the issue of S-1 had been youngsters living in the home with S-2 or who had otherwise become to be viewed by S-2 as a "part of the family." That is, will substitute theory of succession may be the sole explanation why the half interest in former community property of which S-2 was deemed "first purchaser" -- when the surviving in-laws were parents or collaterals of S-1 rather than issue -- passed to S-2's stepchildren rather than S-2's blood kindred. If "will substitute" theory did not underlie this line of succession to stepchildren, the legislature in 1927 when it declared the wife a

co-equal owner of community property, would have had occasion to revise the in-law inheritance statute to divert the wife's half interest to her own kindred. But no such revision of the scheme was proposed in 1927, so far as we are aware.

E. Treatment of the Surviving Spouse of S-2

The extent to which "will substitute" theory diverted property from ancestral property lines of inheritance under the 1905-07 legislation came before the California Supreme Court in a 1930 case requiring resolution of an ambiguity traceable to the original 1880 statute, carried over into the 1905 revision, and not resolved in 1907. The in-laws inheritance statute was applicable, according to the statute, only "[i]f the decedent (S-2) is a widow or widower."[24/] In Estate of McArthur,[25/] the widowed S-2 remarried and was survived by her second husband when she died intestate. The Probate Court gave the statute a literal interpretation: the intestate was not a widow at her death, hence the in-law inheritance statute was inapplicable with the result that the suriving second husband inherited to the exclusion of all in-laws. This gave the quoted passage a construction that implemented "will substitute" theory of succession. That is, S-2 woiuld have wanted her survivign spouse, not her former in-laws, to inherit her assets, and, had she written a will, he likely would have been the devisee and legatee.

The Supreme Court reversed essentially on the theory that the statute was ambiguous and the ambiguity should be resolved according to its primary succession philosophy: ancestral property. The construction given was that "widow or widower" referred to the person of S-2

and not her "condition" at death. In effect: once a widow (of S-1) always his widow, despite remarriage.

The McArthur court repeatedly stressed the ancestral property theory underlying the statute, noting that it

> makes a rule of succession designed to benefit the objects of the bounty of the former owner -- the deceased (S-1). It seeks to turn the descent of such property back to the line from which it was diverted . . . . [It] makes the origin of the property and not the closenes of the relationship to [the intestate] the test of succession.[25/]

The next year, 1931, the legislature amended the in-laws inheritance provisions to eliminate the ambiguity and codify the McArthur holding.[26/]

The only other substantive change made at this time was to broaden the scope of S-1's separate property that was subject to the statutory scheme on S-2's death intestate. Previously, the statute covered only separate property that had come to S-2 by "descent, devise or bequest."[27/] The 1931 revision added separate property S-2 acquired by "gift" from S-1. The 1931 legislation also numbered the statutory provisions in the manner known to most California practitioners: Probate Code section 228 dealt with in-laws inheritance of former community property; Probate Code section 229 dealt with their inheritance of former separate property.

F. More Legislative Fine-Tuning of the Scheme

Legislation in 1939 added a new dose of will substitute theory to the in-laws inheritance scheme. It codified the trial court's holding in McArthur. That is, both sections 228 and 229 were specifically inapplicable if S-2 was survived by a spouse (of a remarriage).[28/]

The 1939 revision also, however, strengthened the ancestral property foundations of the statutory scheme by an amendment to section 228 that abrogated an exception to ancestral property succession. The problem before the amendment had been how to treat property that was separately owned by S-2 when S-1 died but which had previously been community property.

During the mid-1930's section 229 was specific in providing that the separate property it covered included that which came to S-2 by "gift, descent, devise or bequest." Section 228 was more vague: it covered any asset that "was community property of the decedent and a previously deceased spouse." How the asset became community was not mentioned, and section 228 was ambiguous as to when communtiy status had to exist. At any time? At S-1's death?

One line of authority represented by the 1937 holding in Estate of Miller[29/] held that section 228 was inapplicable unless the asset was community property when S-1 died. The court held S-1 had made an inter vivos gift to S-2 of community property (although there was no evidence of such gift)[30/] and hence its community status did not exist at the critical point for classification.

Contrary authority, Estate of Rattray,[31/] reached the opposite result, but on a most unusual theory: that the language "by gift, descent, devise or bequest" in section 229[32/] should be read into section 228. To decide the case on the basis of ancestral property theory it would have been sufficient to note that S-2, the donee, was not a "purchaser" of the asset; rather the community of S-1 and S-2 was the first purchaser (as to a half interest by each spouse). This

logical approach was apparently barred to the Court of Appeal in Rattray by a 1903 state Supreme Court decision[33/] to the effect that seemed to read into what became section 228 the pre-1931 language of what became section 229 the words "by descent, devise or bequest." This resulted in a holding, like Miller, that where S-2 obtained an asset by gift it would never be subject to in-law inheritance, notwithstanding S-2 was not a purchaser.

The 1939 revision made it unnecessary to imply into section 228 any language from section 229. The former statute was made applicable to property that "was community" (the original language) and which "belonged or went to the decedent by virtue of its community character on the death of such [predeceased] spouse or came to the decedent by gift, descent, devise, or bequest . . . ." Insertion of the "belonged to" clause in addition to the "by gift" clause allowed the issue of S-1 to inherit all the property that had been transmuted from community to S-2's separate property and parents and siblings of S-1 a half interest. Although the Rattray court[34/] apparently was unaware of it, merely implying the "by gift" clause from pre-1939 section 229 into section 228 would not support the result the Rattray court desired. When post-1927 community property was at issue (as it was in Rattray) S-1 could give S-2 only a half interet. The Rattray theory would allow S-1's brother and sister (the in-law claimants in that case) only one-fourth and not one-half the property. But the 1939 statutory language, because of the "belonged to" clause, made section 228 applicable to one hundred percent of the interest in the asset transmuted from community to separate property of S-2, not just the donor S-1's half.

G. Interpretation of Statutes on Basis of Ancestral Property Theory

The 1939 legislature's approval by amendment of Rattray and abrogation of Miller seemed to spark a new approach towards judicial interpretation of the in-laws inheritance provision. Literal and technical reading of each word in section 228 and 229 yielded (as it had in the earlier McArthur case) to an attempt to accommodate the language to the principles of ancestral property inheritance.

A very significant case is Estate of Abdale, decided in 1946.[35/] Shortly after their marriage S-2 (the husband) transmuted by way of gift some of his separate property into property co-owned by the spouses as joint tenants. S-1 died. Then S-2 died intestate. At this time section 229 specifically provided for in-laws inheritance of property S-2 had acquired from S-1 by right of survivorship. The court had to concede that S-1's son by a former marriage was technically correct in asserting that S-2 had acquired a half interest in the property that had been, when he got it via survivorship (not purchase), S-1's separate property. However, held the court, the theory of the statutory scheme was to trace back to the source or origin of the property. In other words, the wife was not a purchaser but a donee. As between the two spouses, the original source -- not altered by any purchase -- was in the husband's separate estate. S-1's son had no claim that ancestral property theory would recognize.

The extent to which the Abdale court would allow ancestral property theory to prevail over the literal language of sections 228 and 229 is arguable. As was noted above,[36/] the legislature never fully corrected the error that was made in 1905, when, apparently, the

legislature overlooked the fact that S-1 might devise or bequeath his half of the community property to someone other than S-2. The subsequent amendment to correct this oversight left the issue of S-1 in a preferred position vis a vis other kindred of S-1 that could not be jusitfied on ancestral property theory.

Thus it is not startling that in the murder-suicide case of Carl and Ann discussed at the outset of this Article, the Probate Court applied the literal language of section 228 to allow Carl's children to inherit the half of the community property of which, under community property theory, Ann (S-2) was the first purchaser. The statute plainly covered the half interest that "belonged to" S-2 during the marriage; ancestral property theory required excluding that interest from in-laws inheritance rather than specifically including it.

On other facts, ancestral property theory could have been invoked under Abdale to reach the proper result. Consider the case where S-1 made a revocable designation of S-2 as beneficiary of his half of community life insurance. S-1 dies and soon S-2 dies, with all the proceeds on hand. The half interest that "belonged" to S-2 plainly must go to the surviving children of S-1 by a prior marriage. Literally, S-1's half did not come to S-2 by "gift, descent, devise or bequest."[37/] It came to her as third party beneficiary under a contract, no completed inter vivos gift ever having been made by S-1.[38/] Thus the courts could permit S-2's blood kin to inherit S-1's half interest in the community proceeds. Each set of relatives gets the wrong half interest, but looking at the quantum received, the result is what ancestral property theory requires.

By way of another example, suppose the facts of Abdale with one change: S-1 (the wife) paid consideration out of her separate funds for S-2's transmuting his separate property into joint tenancy property. Clearly the courts would recognize S-1 as a "purchaser" of a half interest in the asset and the claim made by her son under section 229 would have been upheld.

III. 1979 REVISION: LITERAL LANGUAGE VS. ANCESTRAL PROPERTY THEORY

Although the 1979-1980 legislators substantially rewrote the in-laws inheritance statutes, most of the problems discussed above existing under the 1939-78 version of the statute remain. The Abdale approach to construction of this legislation continues to be very necessary if logical results are to be reached.

The 1979-1980 revisions should be viewed as seeking to strengthen the ancestral property aspects of the statutory scheme. The apparent intent was to see that the stepchildren and in-laws of S-2 would not succeed to any property interest as to which S-2 was the purchaser or source; only such interests as to which their relative, S-1, was the source (as between the two spouses).[39/] This was to be achieved by creating the concept of the "portion of the decedent's (S-2's) estate attributable to the decedent's predeceased spouse."[40/]

(Discussion of the ambiguities arising from the poorly-draften attempt to define this class of property is postponed.)[41/] Having defined the "portion" of the intestate property attributable to S-1, the legislature proceeded to neglect to change the pre-1979 scheme for disposition of ancestral property! Where the in-law claimants

included stepchildren of S-2, the correct result (if the "portion" consists of assets as to which S-1 was the source) was reached by continuing the pre-1979 language giving all the property subject to in-laws inheritance to them. That is, if the "portion" included S-1's half of the former community property, all of that half logically went to S-1's issue.

However, the 1979 revision of section 228 inexplicably carried forward the pre-1979 scheme whereby the parents or siblings of S-1 would inherit only half of what S-1's issue would have inherited, had there been such issue surviving S-2. If the portion consisted of S-1's half interest in former community property, his parents and siblings would take but half of this or but one-fourth of the total (former) community property.

Thus, in the murder-suicide case involving Ann and Carl, if Carl had not been survived by issue, Ann's parents would, under the 1979 revision, have ended up with three-fourths of the community property existing before the tragedy and Carl's one-fourth.

This departure from the pure ancestral property scheme the 1979 legislature was thought to have intended was at once pointed out by a California practitioner and legislation in 1980 cured the defect.[42/] All of the "portion" now is inherited, when there are no stepchildren, by S-2's former mother-in-law, father-in-law, brother-in-law, sister-in-law or issue of the latter.

The 1980 legislation also combined section 228 and 229 into one section, numbered 229, since the Legislature was seeking essentially the same ancestral property treatment of all assets of which S-1 was the "source."

A. Ambiguities in Defining the "Portion"

The "portion" is defined in section 229 as follows:

> (b) For the purposes of this section, the "portion of the decedent's estate attributable to the decedent's predeceased spouse" shall mean:
>
> (1) One-half of the community property in existence at the time of the death of the predeceased spouse.
>
> (2) One-half of any community property, in existence at the time of death of the predeceased spouse, which was given to the decedent by the predeceased spouse by way of gift, descent, devise, or bequest.
>
> (3) That portion of any community property in which the predeceased spouse had any incident of ownership and which vested in the decedent upon the death of the predeceased spouse by right of survivorship.
>
> (4) That portion of any property which, because of the death of the predeceased spouse, became vested in the decedent and was set aside as a probate homestead.
>
> (5) Any separate property of the predeceased spouse which came to the decedent by gift, descent, devise, or bequest of the predeceased spouse or which vested in the decedent upon the death of the predeceased spouse by right of survivorship.[43/]

Obviously, the "portion" consists of the sum of all assets described by each of the five subsections. That is, the in-laws or stepchildren can take cumulatively -- under any combination of the subsections -- and are not compelled to claim under just one.

However, if the claimants can get the probate court to classify an asset as falling under subsection (5), the in-laws or stepchildren will succeed to the entire interest; whereas if the asset passes under the other subsections they probably succeed to a half interest only.

Subsection (5) is true to ancestral property theory in passing the predeceased spouse's former separate property entirely to the blood kin of that former owner.[44/]

Subsection (4) operates in the same manner if the probate homestead set aside the intestate was the separate property of the first-to-die spouse at the time of his death, since the full title would have vested in the intestate because of such death. If the homestead had been community property, only the decedent's half interest "vests" at his death in the survivor, the intestate, and the in-laws apparently can obtain no more than ancestral property theory would accord them.

What subsection (3) refers to is a mystery. Literally, it is community property that passes by right of survivorship. The Supreme Court has repeatedly declared that the right of survivorship associated with joint tenancy cannot coexist with community ownership.[45/] In the 1939 revision, section 228 was written to include "community property . . . [that] vested in the decedent on the death of such [predeceased] spouse by right of survivorship . . . in a joint tenancy between such spouse and the decedent . . . ." Because of the specific mention of both community property and joint tenancy, the courts concluded this referred to property that had been transmuted from community status to joint tenancy status, a mere change in form not eliminating the community source.[46/] (The courts also read the word "vested" out of the statute so that section 228 applied to all such property, not just the half interest of S-1 that "vested" in S-2 in order to treat community property that had been transmuted the same as community property that had not been.)[47/]

In 1979, however, reference to joint tenancy was eliminated in the new subsection (3) and instead there is now reference to a right of

survivorship in some asset in which S-1 has an "incident of ownership."[48/] The term "incident of ownership" is associated in estate planning law with life insurance. Conceivably, then, subsection (3) is an attempt to provide for in-laws inheritance of life insurance proceeds traceable to a community policy. This requires straining the meaning of "right of survivorship" so that it refers instead to the intestate's having taken as beneficiary. Of course, S-1 under contemporary equal management of community personalty will have had an "incident of ownership" -- namely management and control -- over all the policy, not just a half interest. However, only the half interest of S-1 will have "vested" at his death in S-2. The other half was already owned by S-2 and will not pass to her in-laws or stepchildren as part of the "portion." Thus, whatever subsection (3) is ultimately held to refer to, the "vested" proviso will preclude subsection (3) from causing the in-laws to obtain more than they ought to under ancestral property theory.

Suppose, however, the life insurance policy was separately owned by S-1 and proceeds remain on hand at S-2's death. Her in-laws and stepchildren must claim under subsection (5) and will have a difficult case to make. Except where S-1 designated his estate as beneficiary, the proceeds certainly will not have come to S-2 by "descent" or "bequest." If S-1 did not make an irrevocable beneficiary designation of intestate, there will not have been an inter vivos "gift."[49/] Perhaps the Abdale theory of construction in view of ancestral property theory will support a broad meaning of "gift" that includes being a third party beneficiary under a life insurance contract. The concept

of "gift" as used in subsection (b)(5) should be stretched a bit simply because there is no reason for applying ancestral property theory to all of the assets owned by S-2 having a source in S-1 except those traceable to life insurance proceeds. The words "by gift, descent, devise or bequest" in subsection (5) are probably intended simply to exclude S-1's separate property purchased by S-2.

B. Statutory Redundancy

This leaves for discussion subsections (1) and (2). On a trial-and-error approach, let us start with (1) first. Let us guess -- since we know we are dealing with a succession scheme with ancestral property roots -- that subsection (1) refers to the "one-half" of the community property S-1 owned at his death. That is, after all, the portion that the kin of S-1 have a claim to under ancestral property theory.

Now we come to subsection (2). The only part of the community property S-1 could have passed to S-2 at the former's death by way of "descent, devise or bequest" would be S-1's half interest. The only portion of a community asset S-1 could have passed to S-2 by inter vivos "gift" would have been the half interest of S-1. S-2 already owned the other half interest. (Note that in order to have subsection (2) pick up such gifts, the term "in existence"[50/] must refer to the physical presence of the asset and not its status. That is, if a husband "gave" his wife his half interest in a community-owned automobile and then died, at his death the car would have been the surviving wife's separate property, not community property. But since the husband was a "first purchaser" as to a half interest, ancestral property

theory requires that his ownership at the time of the gift be recognized.)

Since we have concluded that subsection (2) necessarily refers to the half interest in community assets of the first-to-die spouse, let us re-evaluate our interpretation of subsection (1). It does not necessarily refer to the half owned by the first-to-die. Indeed, if subsection (1) refers to a half interest not embraced within subsection (2), it arguably must refer to the half interest S-2! Under this construction, all of the former community property is part of the "portion" to which S-2's in-laws succeed. But this is inconsistent with ancestral property theory and also, it seems clear, with the legislative intent in 1979-1980.

We think what may have happened is this: the draftsperson frist wrote subsection (1) -- intending "in existence" to refer to the asset's existing not only physically at death but also in the legal status of community property. Subsection (1) was intended to refer to S-1's half interest. The draftsperson then realized that ancestral property theory required another provision to pick up S-1's interest in former community property that he had transmuted for no consideration into S-2's separate property during their marriage. Such an asset did not exist at the death of S-1 in the status of community property. Perhaps, then, the draftsperson decided to add to "gift" in subsection (2) -- just to follow the word formulation of the pre-1979 section 228 -- the additional (but not needed) words "descent, devise or bequest." A problem with this theory is that the draftsperson included in subsection (2) the very phrase found in subsection (1) -- "in existence at the time of death of the predeceased spouse" -- which

we believe in subsection (1) was intended to mean "existed as community property." As noted above, in subsection (2), the inclusion of former community assets that had been the subject of inter vivos gift by S-1, compels an interpretation that only physical existence is referred to.

In any event, the Abdale approach[51/] to interpretation of these in-law inheritance statutes demands rejection of the technical argument that subsections (1) and (2) refer to different halves of the community property. Ancestral property theory requires that the "portion" be limited to interests once owned by S-1 and as to which he was the source or first purchaser. Moreover, the proposed interpretation of the two subsections does not necessarily render subsection (1) surplusage, referring to no property not within subsection (2). Unless the generous interpretation of "by gift" proposed above for subsection (5) to pick up in life insurance proceeds is not also applied to "by way of gift" in subsection (2), S-1's half interest at his death in a community-owned policy will be outside the scope of subsection (2) except where S-1 has made his beneficiary designation of S-2 irrevocable (made an inter vivos gift) or made his estate beneficiary so that S-2 took by "descent or bequest". Of course, S-1's interest in the community policy would plainly fall within subsection (1) under the interpretation proposed: the half interest referred to being his.

C. Returning Gifts to the Donor

The Abdale approach to construction of section 229 cannot help resolve all of the ambiguities found in subsection (c) of the statute. It provides,

> (c) Notwithstanding subdivision (a), if the decedent leaves neither issue nor spouse, that portion of the decedent's estate created by gift, descent, devise, or bequest from the separate property of a parent or grandparent shall go to the parent or grandparent who made such gift, devise, or bequest or from whom the property descended, or if such parent or grandparent is dead, such property shall go in equal shares to the heirs of such deceased parent or grandparent.

This was added to section 229 in 1970.[52/] At that time the introductory clause, "notwithstanding subdivision (a)," was not part of the subsection. That introductory clause first appeared in the 1979 revision of the statutes under discussion.[53/]

Let us postpone for the moment the difficult question whether subsection (c) has anything at all to do with in-law inheritance. One thing that is clear is that the theory of ancestral property is carried by subsection (c) to an extreme and degree of sophistication we have not encountered in tracing the history of in-law inheritance in California. For example, until subsection (c)'s enactment, to implement the in-laws inheritance scheme it was only necessary to determine if S-1 was the "source" of an asset owned by S-2 at his death intestate. Suppose S-1 had no issue surviving S-2 but a mother and issue of a deceased father. Mother would inherit all the property subject to in-law inheritance, even though S-1's father or paternal grandfather might have been the first purchaser. The common law rule was more complex. For example, paternal grandfather earned the money to buy Blackacre and devised it to his son, who devised it to S-1. Under common law ancestral property principles, those of the blood of Grandfather, the first purchaser, would inherit to the exclusion of S-1's mother.

Subsection (c) approaches this degree of ancestral property "fine tuning." Assuming for the moment that subsection (c) does not deal with in-law inheritance, consider a case where X dies intestate, survived by three grandparents (related to X in the second degree) and a first cousin once removed, the great-grandchild of a deceased grandparent (related to X in the fifth degree). An asset that X had received as an inter vivos gift or through the will of the deceased grandparent would be inherited by his first cousin once removed, none of the closer kindred being related by blood to the donor.

Still assuming that subsection (c) has nothing to do with in-law inheritance and applies whether or not the decedent was ever even married, construction problems are apparent. What is meant by "separate property" of the donor parent or grandparent? Obviously, an asset the donor inherited from blood kin or owned before marriage is such a separately owned asset. If the donor's marriage is dissolved by death or divorce, is an asset he thereafter owns separately but which used to be community property "separate" for purposes of subsection (c)? Certainly the theory of ancestral property would require such classification. Actually, on the basis of such theory, there is no reason for limiting subsection (c) to former separate property of the donor. Suppose, for example, an intestate's paternal grandparents had, acting together, given intestate inter vivos a farm that was community property of the donors.[54/] The ancestral property theory behind subsection (c) should require the heirs inheriting the farm be those closest in degree on the paternal side of the family tree, excluding kin related to the intestate through his mother.

One wonders also why the legislature confined ancestral property inheritance in subsection (c) to assets the intestate acquired from a parent or grandparent. If a half brother of intestate (son of her father) had devised land to her, does not the theory of subsection (c) require disqualification from heirship to the farm of intestate's kindred on the maternal side?

We finally now reach the question whether subsection (c) deals with in-law inheritance. Its placement by the legislature in 1970 as a subsection of Probate Code section 229 was strange if, as the language suggested, the new provision did not deal with in-law inheritance. The logical placement would seem to have been as a subsection to Probate Code sections 225 and 226, which provide for succession by her own blood kin of an intestate dying without spouse or issue surviving. Perhaps the theory of the legislature was that all provisions relating in any way to ancestral property theory -- whether blood kin or former in-laws would be the heirs -- should be found in sections 228 and 229.

Giving subsection (c) its literal interpretation as making ancestral property distinctions within the scheme of inheritance by blood kin was possible from 1970-1979. It may now be impossible because of the addition in 1979 of the introductory clause, "notwithstanding subdivision (a)." This seems rather clearly to mark subsection (c) as an exception to the scheme of in-law inheritance contained in subsection (a). Thus, the courts may be compelled to interpret the parents and grandparents mentioned in subsection (c) as being the parents and grandparents of intestate's predeceased spouse!

It is possible S-2 received directly from S-1's parents or grandparents an inter vivos gift, a devise or bequest. However, subsection (c) also envisions S-2 having acquired the property from the donor by "descent." If the donors referred to are in-laws, that would be impossible unless S-1 and S-2 were first cousins who married in a jurisdiction where such a union is not incestuous.

However, the wording of subsection (c) does not confine it to assets S-2 received directly from the donor. The property must have come from the separate property of the donor but not from the donor himself. The language of subsection (c) is not inconsistent with a holding that its ancestral property principles apply when the parent or grandparent of S-1 passes by gift or succession an item of separate property to S-1, who then passes it by gift or succesion to S-2. The Abdale approach of giving these statutes the broadest possible ancestral property theory effect would seem to require such a construction.

Would subsection (c) apply if S-2's parent gave or bequeathed property to S-1, who then passed it by gift or succession to S-2? No language of subsection (c) conclusively bars a construction that would cause it to be applied in such a case. It is only the introductory clause "notwithstanding subdivision (a)" that suggests the 1970 provision operates only to discriminate between an intestate's in-laws on ancestral property grounds. Abdale suggests the courts will -- to the extent its literal language permits -- construe subsection (c) to effectuate as much ancestral property theory as possible.

D. Other Problems Raised by Section 229

1. Divorced Spouses

If during marriage S-1 makes a gift to S-2 of an asset which has its source in S-1's separate property or community property of their marriage, when the couple are divorced, S-2 will keep the asset.[55/] When she later dies intestate do her former in-laws take all or half as heirs under section 229? Or not withstanding they are divorced, S-1 may devise or bequeath an asset having a separate property source (it could not be a community source because the equal division at divorce divides the community into halves).[56/] S-2 may own this asset when she dies. Again, the question arises, are her former in-laws her heirs?

Since ancestral property theory rather than will-substitute theory underlies section 229, it should be irrelevant that a divorce during S-2's life likely cut the relationship ties between her and these "heirs." Their claim to the property on ancestral property principles is as strong in the case of the inter vivos gift by S-1 when his marriage is dissolved by divorce as it is when it is dissolved by death. However, if S-1 after the divorce devised or bequeathed the asset to S-2, she was at the time of such succession legally a stranger to S-1. Such devise or bequest outside the family will break the ancestral property claim, most likely.[57/]

In any event, if California is to retain a scheme of in-law inheritance the legislature should specifically consider if it wishes a divorce to eliminate the inheritance claim of former in-laws in all cases, no cases, or particular cases (such as the bequest after divorce).

2. Putative Spouses

If S-1 and S-2 believed they were lawfully married but in fact were not, each has the status of putative spouse of the other.[58/] No statute specifically governs the succession rights created by such a relationship. At civil law such a marriage was valid for such purposes as determining relationships of parties.[59/] For no discernible reason, California cases have rejected this civil law principle despite the Spanish-Mexican roots of the state's marital property system. Inconsistently, the caselaw permits a surviving putative spouse to inherit the decedent's half of what would have been community property had the marriage been valid[60/] but dneies inheritance of any part of decedent's separate property (which would not have been community had the marriage been valid).[61/] That is, the putative surviving spouse is treated as a "spouse" under section 201 of the Probate Code dealing with community property but not as a "spouse" under sections 221, 223, and 224, which entitle the "spouse" to inherit one-third, one-half or all of intestate's separate property.

If the caselaw treating the putative spouse as "heir" of what would have been community property is based on civil law principles,[62/] it would recognize heirship claims against S-2[63/] by the kin of the deceased putative S-1 to so much of the putative community property of the marriage as had passed from S-1 to S-2 by any means. But the theory (whatever it is) underlying the cases refusing to admit a putative S-2 to heirship of "pure" separate property of S-1 would exclude separate property with such a source from the "portion" of S-2's estate to be made up by analogy to section 229(b) for the

beneift of the kin of S-1. That is, as to such pure separate property of S-1 that putative S-2 obtained by gift, devise or bequest (it could not have come by succession) S-2 is treated as being legally a stranger to S-1, and the transfer of such property to a nonrelative by S-1 should cut the ancestral property claims of his kin.

The legislature should resolve the uncertainties in this area of the law by statute giving the full civil effects of marriage to a good faith putative spouse and the children, parents, siblings, and issue of siblings claiming inheritance through the putative marriage of such spouse when he or she is S-1.

2. Marvinizers

One party to a Marvin relationship[64/] (once called a meretricious relationship) may make inter vivos gifts to the other of property separately owned by the donor or of the donor's half interest in assets the couple co-own under an express or implied agreement to "pool" proprietary acquisitions during their relationship. Or when one of the couple dies he may bequeath or devise such property to the survivor. (The survivor could not take by "descent." If the first to die is intestate and the survivor prevails as to any asset of the decedent over claims by the lawful heirs of decedent, it will be because of a contract right recognized by the Marvin decision rather than a form of succession.)

Present case law is narrowly confining the extent to which a Marvin union is treated like a lawful marriage.[65/] Under present law it is inconceivable that the kin of the first-to-die could ever make a successful inheritance claim under or by analogy to section 229 to

property owned by the second-to-die partner at his or her death intestate and traceable to a "source" in the first-to-die. At most, the claimants in such a situation would have to rely on an imporable theory that they were third party beneficiaries of a contract between the partners to live together pursuant to all of the law of California respecting marital property, even though they were not married.

3. Quasi-Community Property

Suppose S-1 acquires while married and domiciled in a non-community property jurisdiction property that his domicile at the time declares is his alone but which California would have classified as community had S-1 been domiciled in California at the time of acquisition. When S-1 and S-2 later change their domicile to California and are divorced, the law treats the asset for purposes of division at divorce as if S-2 had an interest in it.[66/] It is then called quasi-community property.[67/] At death of S-1 while married and domiciled in California, S-2 will usually get the same interest she would have if the couple had been domiciled in California at the time of S-1's acquisition.[68/]

The problem such property raises under section 229 of the Probate Code is this: when the "portion" subject to in-law inheritance is constituted under subsection (b), is such property "separate" and controlled by subsection (5) (all of it going into the portion) because the state of domicile at the time of acquisition conferred on S-1 one hundred percent ownership? Or is it to be treated as community under subsections (1) and (2) (only half going into the portion) because at dissolution by death or divorce California law attempts to the extent possible to recognize a half ownership by S-2?

The courts have said that the proper procedure is to reclassify the property as community for purposes of in-law inheritance.[69/]

The present state of the law is best understood as development by caselaw of the quasi-community property theory rater than an Abdale-based interpretation of the in-law inheritance statutory provisions intended to give fullest effect to ancestral property principles. For example, suppose husband and wife live in a common law state at a time S-1 by his labor earns money he invests in stock. The domicile treats him as sole owner of this asset, as first purchaser of all. When the couple moves to California, his ownership interest is not decreased by the California legislation giving S-2 claims on the asset at divorce or S-1's death.[69A/] Application of Abdale rather than the policies of quasi-community property theory would have made all of the asset subject to inheritance by S-1's parents and siblings.

Legislative attention to the ineraction of quasi-community property and ancestral property theory is needed.

4. Tracing Intestate Assets to the Source

The need to distinguish between property of S-2 that is subject to in-law inheritance under section 229 (going into the "portion" either entirely or as to one-half) and that which is not (but passes according to Probate Code sections 225 and 226) introduces enormous complexities into administration. Difficult problems of tracing, commingling, and apportionment often arise.

It is well settled by many cases that the burden of proof is on the in-laws to show that any asset has a source in S-1's separate property or S-1's half of the community property.[70/] This seems a proper holding. The bulk of the Probate Code sections dealing with succession are built on "will substitute" principles. Ancestral property was introduced in 1905 as a late-recognized exception to will-substitute-based lines of succession.

It is also settled that the in-laws of S-2 can trace assets she obtained that are subject to in-law inheritance through changes in form.[71/] For example, S-1 gives Blackacre, his separate property, to S-2. She trades it for Whiteacre. She sells Whiteacre and invests the proceeds in stock of XYZ Corporation. All of that stock will go into the "portion" that the kin of S-1 will inherit at S-2's death.

If money (or other fungible property) subject to be placed entirely or as to half in the section 229(b) portion is commingled by S-2 with money that is not subject to section 229, S-2's in-laws will have a very difficult time tracing assets if withdrawals are made from the commingled mass. Under present California case law,[72/] even if the withdrawals exceed the maximum amount of property in the mass not subject to section 229, S-2's in-laws will get nothing unless they can demonstrate which withdrawals S-2 intended to be of funds subject to section 229. Since S-2 probably had no intent one way or another, uncommingling becomes impossible under this approach. There is out of state authority on approaches to uncommingling in general that would be far more favorable to the in-laws, however.[73/]

If the asset subject to section 229 produces during S-2's ownership rents and profits (which can be identified as such at her death) they are subject to inclusion in the section 229(b) "portion" to the same extent the productive capital was[74/] -- provided no significant amount of labor was applied by S-2 to produce the profit. If there was such labor, a kind of Pereira-Van Camp[75/] apportionment seems to be called for, allocating some of the profit as a return on capital (and subject to section 229) and some of it as a return on labor, as to which S-2 is the source. If a subsequent spouse of S-2 applied the labor to the capital asset, for example, a farm, to generate profits, the portion applicable to it would be community property of S-2's remarriage and, of course, not part of subsection 229(b) portion constituted at S-2's death (after the death of the spouse by remarriage).

IV. CONCLUSION

Ancestral property inheritance should be abolished in California. Since S-2 has testamentary power over the property at issue, the proper theoretical approach to a succession scheme applicable to such property is the "will substitute" theory. Eliminating the distinction between ancestral and nonancestral property for inheritance purposes would obviously make administration of many estates much simpler, itself a goal of modern succession law.

If ancestral property succession is to be retained, section 229 should be entirely rewritten. First of all, attention should be given to the extent of ancestral property theory that is to be implemented.

The legislature could go "all the way" with the old feudal approach requiring identification of the first purchaser (who might be a great-great grandparent of the intestate or her predeceased spouse). Or the new scheme could cut off first purchaser identification at the grandparent level, as subsection 229(c) now does. Whatever the extent of ancestral property theory, it logically ought to apply equally to claimants who are in-laws of the intestate and to claimants who are related by blood. If subsection (c) is to be retained it should apply as a refinement to section 229(a) and sections 225 and 226. Nor should any property having a known "source" be arbitrarily exempted from the ancestral property scheme. If subsection (c) is to be redrafted, it should extend to community property given by grandparents of S-1 or S-2, by a brother and his wife, etc.

A revision of section 229 should result in elimination of subsections (b)(3) and (4); they are unnecessary if a broad definition of property having its source in S-1 is included in the statute. Subsesctions (b)(1) and (2) should be combined and redrafted to cover all of S-1's half of former community property that was onerously acquired (e.g., not created by gift transmutation initiated by S-2). So long as the method by which S-2 acquired this half interest (or any part thereof) was not itself onerous, the method of acquisition by S-2 is irrelevant. Thus the statute need not specify that S-2 had to have acquired the interest by gift or succession. The revision should simply exclude from in-law inheritance any portion of S-1's half of the community property as to which S-2 was a "purchaser."

A similar revision of subsection (b)(5) is needed. It should not be directed to S-1's separate property that came to S-2 by "gift, descent, devise, or bequest." Instead, it should embrace all such separate property as to which S-2 was not a "purchaser." This would bring in life insurance proceeds traceable to a policy separately owned by S-1; and it would exclude items S-2 obtained from S-1 which he himself received by gift from S-2.

We hope, however, this article convinces a majority of California legislators that outright repeal of section 229 is the better course.

FOOTNOTES

1. These facts are taken from exhibits to Assembly and Senate reports on A.B. 1750 (Hayden, 1979 California Legislature.

2. Calif. Prob. Code § 201.

3. Former Calif. Prob. Code § 228, 1931 Cal. Stats. ch. 281, § 228, p. 597, as amended by 1939 Cal. Stats. ch. 1065, § 1, p. 2992.

4. See generally, T. Atkinson, Law of Wills 39, 77-81 (2d ed. 1953); R. Powell, Real Property ¶ 1001 (Rohan rev. 1979). As explained in Atkinson, supra at p. 39, the theory derived from Blackstone's Fifth Canon of Descent: "On failure of lineal issue [of intestate] . . . the inheritance shall descend to his collateral relations being of the blood of the first purchaser . . . ." Under English law one was a "purchaser" if he obtained property in any manner other than intestate succession. In the United States, however, one who takes by gift, deed, or will is also not viewed as a purchaser. Atkinson, supra at p. 77. See also, Ferrier, Gifts to "Heirs" in California, 26 Cal. L. Rev. 413 (1938).

5. 1979 Cal. Stats. ch. 298, § 1, p. _____.

6. 1980 Cal. Stats. ch. 119, § 2, p. _____.

7. Atkinson, supra note 4, at p. 4.

8. See generally, Ferrier, Rules of Descent Under Probate Code Sections 228 and 229, and Proposed Amendments, 25 Cal. L. Rev. 261 (1937).

9. 1880 Acts Amendatory to Calif. Civ. Code ch. 115 § 1, p. 14. It enacted subsection 9 of Civil Code section 1386, which read:

> If the decedent be a widow or widower, and leave no kindred, and the estate, or any portion thereof, was common property of such decedent, and his or her deceased spouse, while such spouse was living, such common property shall go to the father of such deceased spouse, or if he be dead, to the mother. If there be no father nor mother, then such property shall go to the brothers and sisters of such deceased spouse, in equal shares, and to the lawful issue of any deceased brothers or sisters of such deceased spouse, by right of representation.

This avoided escheat under Cal. Stats. 1850, ch. 96, § 1, p. 220; as amended by Cal. Stats. 1862, ch. 448, § 1, p. 569. The anti-escheat aspects of this enactment are discussed in Ferrier, supra note 8, at 262, and Currie, Justice Traynor and the Conflict of Laws, 13 Stan. L. Rev. 719, 736 (1961).

10. See, e.g., Van Maren v. Johnson, 15 Cal. 308, 311 (1860); Prager, The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975, 24 U.C.L.A. L. Rev. 1, 34-39 (1976); Reppy, Retroactivity of the 1975 California Community property Reforms, 48 So. Cal. L. Rev. 977, 1055-1059 (1975).

11. See note 4, supra.

12. Generally, an "onerous" acquisition is one paid or earned by labor. See Reppy and de Funiak, Community Property in the United States 129 (1975).

13. Observe in the text of old Civil Code section 1386(9) how a living former father-in-law inherited to the exclusion of intestate's former mother-in-law.

14. 1905 Cal. Stats. ch. 449, § 2, p. 608. It amended the in-law inheritance provision in Civil Code section 1386 to read as follows:

> If the decedent is a widow or widower, and leaves no issue, and the estate or any portion thereof was common property of such decedent and his or her deceased spouse, while such spouse was living, or was separate property of his or her deceased spouse, while such spouse was living, such property goes to the children of such deceased spouse adn the descendants thereof, and if none, then to the father of such deceased spouse, or if he is dead, to the mother. If there is no father nor mother, then such property goes to the brothers and sisters of such deceased spouse, in equal shares, and to the lawful issue of any deceased brother or sister of such deceased spouse by right of representation.

15. See Atkinson, supra note 4, at pp. 44-49, 68-73.

16. See text accompanying notes 24-25A.

17. Dunham, The Method, Process and Frequency of Wealth Transmission at Death, 30 Chic. L. Rev. 241 (1963). Accord, Ferrier, supra note 8, at p. 281.

18. R. Powell, Real Property § 1001 (Rohan rev. 1979); Atkinson, supra note 4, at pp. 77-81; Ferrier, supra note 8, at p. 280. Each of the above authorities observes that not only was ancestral property a minority approach to succession in the United States but the early foothold it did gain has been shrinking.

19. Ferrier, Gifts to "Heirs" in California, 26 Cal. L. Rev. 413, 431 (1938); Atkinson, supra note 4, at pp. 37-40, 77, 79.

20. 1927 Cal. Stats. ch. 265, § 1, p. 484. The provision is now, as amended, Calif. Civ. Code § 5105.

21. 1907 Cal. Stats. ch. 297, § 1, p. 568. In-law inheritance provisions now appeared in two subsections of former Civil Code section 1386, as follows:

> (8) If the deceased is a widow, or widower, and leaves no issue, and the estate, or any portion thereof, was common property of such decedent and his or her deceased spouse, while such spouse was living, such property goes in equal shares to the children of such deceased spouse and to the descendants of such children by right of representation, and if none, then one-half of such common property goes to the father and mother of such decedent in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such decedent and to the descendants of any deceased brother or sister by right of representation, and the other half goes to the father and mother of such deceased spouse in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such deceased spouse and to the descendants of any deceased brother or sister by right of representation.
>
> (9) If the estate, or any portion thereof, was separate property of such deceased spouse, while living, and came to such decedent from such spouse by descent, devise, or bequest, such property goes in equal shares to the children of such spouse and to the descendants of any deceased child by right of representation, and if none, then to the father and mother of such spouse, in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such spouse and to the descendants of any deceased brother or sister by right of representation.

22. Under what are now Probate Code section 225 (exhausting the parentela headed by intestate's parents) and section 226 (reverting to a sytem of gradualism with preference for kin of equal degree in a nearer parentela).

23. Compare Estate of Westerman, 68 Cal. 2d 267, 66 Cal. Rptr. 29, 437 P.2d 517 (1968); Estate of Putnam, 219 Cal. 608, 28 P.2d 27 (1933); Estate of Flood , 55 Cal. App. 2d 410, 130 P.2d 811 (1934).

This firmly establishes that an inter vivos conveyance by S-2 to a third party who reconveys to S-2 creates a new "source" for the asset for in-laws inheritance purposes.

24. See footnotes 21 and 14. (The 1907 text used the term "deceased" rather than "decedent".)

25. 210 Cal. 439, 292 P. 469 (1930). See the criticism of McArthur in Feffier, supra note 8, at p. 265.

25A. [is the 2d number 25]: 210 Cal. at 444, 445.

26. Sections 228 and 229 of 1931 Cal. Stats. ch. 281, p. 597 (which enacted the Probate Code) provided:

> 228. If the decedent leaves no issue, and the estate or any portion thereof was community property of the decedent and a previously deceased spouse, such property goes in equal shares to the children of the deceased spouse and to their descendants by right of representation, and if none, then one-half of such community property goes to the parents of the decedent in equal shares or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of the decedent and to their descendants by right of representation, and the other half goes to the parents of the deceased spouse in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of such deceased spouse and to their descendants by right of representation.
>
> 229. If the decedent leaves no issue, and the estate or any portion thereof was separate property of a previously deceased spouse, and came to the decedent from such spouse by gift, descent, devise or bequest, such property goes in equal shares to the children of the deceased spouse and to their descendants by right of representation, and if none, then to the parents of the deceased spouse in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of the deceased spouse and to their descendants by right of representation.

27. See the final quoted paragraph of footnote 21.

28. 1939 Cal. Stats. ch. 1065, § 1, p. 2992. Probate Code § 228 was amended to read as follows:

> If the decedent leaves neither spouse nor issue, and the estate or any portion thereof was community property of the decedent and a previously deceased spouse, and belonged or went to the decedent by virtue of its community character on the death of such spouse, or came to the decedent from said spouse by gift, descent, devise or bequest, or became vested in the decedent on the death of such spouse by right of survivorship in a homestead, or in a joint tenancy between such spouse and the decedent or was set aside as a probate homestead, such property goes in equal shares to the children of the deceased spouse and their descendants by right of representation, and if none, then one-half of such community property goes to the parents of the decedent in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of the decedent and their descendants by right of representation, and the other half goes to the parents of the deceased spouse in equal shares, or if either is dead to the survivor, or if both are dead, in equal shares to the brothers and sisters of said deceased spouse and to their descendants by right of representation.

29. 23 Cal. App. 2d 16, 71 P.2d 1117 (1937).

30. The asset at issue in Miller was a community-owned life insurance policy. Husband (S-1) had named his wife the beneficiary but there was no suggestion this designation was irrevocable or that the husband had in any way given up management and control over the policy. Obviously no inter vivos gift occurred, as Estate of Castagnola, 68 Cal. App. 732, 230 P. 188 (1924), expressly recognized. There are, however, other erroneous decisions like Miller on the "gift" issue. E.g., Estate of Lissner, 27 Cal. App. 2d 570, 81 P.2d 448 (1938).

31. 82 P.2d 625 (Cal. App. 1938), superceded by 13 Cal. 2d 702, 91 P.2d 1042 (1939). The Supreme Court's decision rested on the same theory employed by the Court of Appeal described in the text. Based on the dates of the two decisions, however, it appears the Court of Appeal opinion is what the legislature relied on in drafting the "gift, descent, devise or bequest" language into Probate Code section 228.

The ratio decidendi of Rattray is criticized in Note, 13 So. Cal. L. Rev. 115 (1939).

32. See footnote 26, supra.

33. Estate of McCauley, 138 Cal. 546, 71 P. 458 (1903). Of course, the Supreme Court in Rattray could have overruled McCauley, which was inconsistent with the approach taken by the Court in Rattray: construing section 228 broadly to effectuate ancestral property principles.

34. Both the Court of Appeal and Supreme Court in Rattray seem to have overlooked this point.

35. 28 Cal. 2d 587, 170 P.2d 918 (1946). Also recognizing the ancestral property basis of the in-laws inheritance scheme are Estate of Rattray, 13 Cal. 2d 702, 91 P.2d 1042, 1049 (1939) (citing the "underlying fundamental princple that the origin or source of the property should determine its distribution); Estate of Sugino, 67 Cal. 2d 591, 73 Cal. Rptr. 150, 154 (1968); Estate of Hanson, 179 Cal. App. 2d 32, 3 Cal. Rptr. 482 (1960). See also Note, 34 Cal. L. Rev. 766 (1946); Note, 25 So. Cal. L. Rev. 464 (1952).

Currie, Justice Traynor and the Conflict of Laws, 13 Stan. L. Rev. 719, 738 (1961), raises an interesting point. What is the "source" for ancestral property purposes when husband and wife make an antenuptial agreement that each will live separate in property? Suppose the next year each earns $10,000. Are husband's earnings all his for ancestral property purposes or is there consideration given by the wife in that her contract gave up the legal ownership of a half interest? Compare Commissioner v. Harmon, 323 U.S. 44 (1944). (The problem would be no different, analytically, if wife had no earnings and husband $10,000.) Currie concluded each spouse, under a contract to live separate in property, should be viewed as one hundred percent the source of acquisitions which would have been community but were separate because of the agreement. We think he is correct. Such an agreement prevents community status from ever attaching to the assets at issue. Such assets are not "recharacterized" at divorace like quasi-communtiy property. Compare footnotes 66-69A and accompanying text, infra.

36. See text accompanying footnotes 21-23, supra.

37. See footnote 28, supra.

38. See footnote 30, supra.

39. Under the California statutes analyzed to this point in this Article, the in-laws of S-2 prevail on their inheritance claims merely by showing S-1 was the source, as opposed to S-2, of the asset. Usually, with respect to community property, S-1 will have been a

first purchaser as to a half interest, as money community acquisitions are onerous, resulting from labor. Of course, as Abdale established, it was possible that a former community asset was created by gift transmutation and had its source in separate property of S-1 or S-2.

With respect to separate property of S-1 subject to in-law inheritance, S-1 may or may not have been the first purchaser. If he earned the asset at issue by labor before marriage (or the money used to buy it) he was. If he received the asset by intestate succession at any time, he was not. (If he received it by gift or will he was a first-purchaser in the American view of the concept but not the English approach, see footnote 4, supra.) But even when S-1 acquired the asset by descent, he was the source of the asset insofar as it was viewed as part of the marital property of his marriage to S-2.

40. 1979 Cal. Stats. ch. 298, § 2, p. _____. Subsection (a) of the revised Probate Code section 228 read as follows:

> If the decedent leaves no living spouse or issue and there are issue of the decedent's predeceased spouse, the portion of the decedent's estate attributable to the decedent's predeceased spouse shall go in equal shares to the children of the predeceased spouse and their descendants by right of representation, and if none, then one-half of such portion goes to the parents of the decedent in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of the decedent and their descendants by right of representation, and the other half goes to the parents of the predeceased spouse in equal shares, or if either is dead to the survivor, or if both are dead, in equal shares to the brothers and sisters of the predeceased spouse and to their descendants by right of representation.

Subsection (b), defining the "portion", consisted of the first four subparagraphs of the present section 229(b), reproduced in text at footnote 43, infra.

It has been observed that, literally, subsection (a) makes ancestral property inheritance available only if there are issue of S-1 surviving S-2's death. California Continuing Education of the Bar, Estate Planning and California Probate Reporter, Feb. 1981, at p. 24. Obviously, the intent was that the first of the alternative schemes for inheritance by members of S-1's family was conditioned on the existence of such issue; the second scheme, providing for inheritance by parents, siblings and issue of siblings of S-1, is applicable when there are no issue of S-1 to inherit.

41. See text accompanying footnotes 45-51.

42. 1980 Cal. Stats. ch. 136, § 2, p. _____. Subsection (a) of Probate Code § 229 now reads:

> If the decedent leaves no living spouse or issue and there are issue of the decedent's predeceased spouse, the portion of the decedent's estate attributable to the decedent's predeceased spouse shall go in equal shares to the children of the predeceased spouse and to their descendants by right of representation, and if none, then to the parents of the predeceased spouse, in equal shares, or if either is dead to the survivor, or if both are dead, in equal shares to the brothers and sisters of the predeceased spouse and to their descendants by right of representation.

The attorney who pointed out the error in the 1979 legislation was David B. Flinn. See Memorandum of Sen. Petris to Legislative Counsel dated January 30, 1980.

43. Enacted by 1979 Cal. Stats. ch. 298 § 2, p. _____.

44. At least it is true to a "source" doctrine that is not concerned with such detail as who the "first purchaser" may be. See footnote 39, supra.

45. E.g., Siberell v. Siberell, 214 Cal. 767, 773, 7 P.2d 1003, 1005 (1932), stating "[F]rom the very nature of the estate . . . a community estate and a joint tenancy cannot exist at the same time in the same property." Tomaier v. Tomaier, 23 Cal. 2d 754, 757, 146 P.2d 905, 906-07 (1944); Watson v. Peyton, 10 Cal. 2d 156, 73 P.2d 906 (1937). Accord, Gloden v. Gloden, 240 Cal. App. 2d 465, 471, 49 Cal. Rptr. 659, 663 (1966); Walker v. Walker, 108 Cal. App. 2d 605, 239 P.2d 106 (1952).

46. Estate of Taitmeyer, 60 Cal. App. 2d 699, 141 P.2d 504 (1943). See also Estate of Abdale, 28 Cal. 2d 587, 170 P.2d 918, 921 (1946).

47. Estate of Taitmeyer, 60 Cal. App. 2d 699, 141 P.2d 504 (1943).

48. See text preceding footnote 43, supra.

If emphasis is placed not on "incident of ownership" but on "right of survivorship" subsection (3) may be found to refer to community funds placed in a pay-on-death bank account or in a Totten trust whereby a survivorship feature was created without formally transmuting the funds into joint tenancy property thereby taking them out of the scope of subsection (3) (and into subsection (5), which deals with S-1's interest in separate property).

49. Estate of Castagnola, 68 Cal. App. 732, 230 P. 188 (1924).

50. See text preceding footnote 43, supra.

51. The difficulty of meshing subsections (b)(1) and (2) have been noted in several legal journals. See Review of Selected 1980 California Legislation, 12 Pac. L.J. 235, 253 (1980); California Continuing Education of the Bar, Estate Planning & California Probate Reporter, Feb. 1981, at pp. 23-24; cf. Niles, Probate Reform in California, 31 Hastings L.J. 185, 206 (1980). None of the commentators have suggested that adoption of the interpretation based on literal language, rather than ancestral property theory, that the two subsections, read together, pick up both halves of former community property.

The strongest argument for total inclusion is that the 1979 revision attempted to "carry over" in a different word formula the then existing scope of section 228; that is, subsection (1) embraces that half of the community property that "belonged to" the intestate, S-2 (see footnote 28 for the location in the 1939 version of section 228 of "beonged to"), while subsection (2) rather clearly tracks the other prong of the pre-reform section 228 covering the half interest that "came to" S-2 by gift or succession.

This interpretation defeats the clear intent appearing in legislative history materials with respect to the 1979 revision. According to the Report of the Assembly Committee on Judiciary on A.B. 1750 (1979 legislature), the "children of the predeceased spouse would be limited to one-half the community property." The report of the Senate Committee on Judiciary on the same bill said legislative action was needed because the pre-1979 version of section 228 "unfairly deprive[d] the decedent's heirs [meaning in context blood kin] of

entitlement to portions of the decedent's estate attributable to the decedent's interest in the community property . . . . The decedent's share of community property would be reserved for distribution to the decedent's heirs, rather than to the predeceased spouse's children." The Senate Committee Report included the chart reproduced as an Appendix to this Article (based on the family relationships in the murder-suicide involving Carl and Ann). The chart shows an intent to pass only S-1's half interest in the community property to his kindred under the 1979 revision.

The intention to have the in-law inheritance statute operate only on S-1's half interest in former community property was restated in both Assembly and Senate reports on S.B. 1525, 1980 legislature, which corrected the oversight in 1979 under which it appeared only one fourth of former community property would be inherited by S-1's parents and siblings.

The wording of subsections (b)(1) and (2) are sufficiently muddied as to permit the courts to adopt an interpretation that efectuates legislative intent. See generally, Tyrone v. Kelley, 9 Cal. 3d 1, 106 Cal. Rptr. 761, 507 P.2d 65 (1973); Standard Fruit Co. v. Metropolitan Stevedore Co., 52 Cal. App. 3d 305, 125 Cal. Rptr. 111 (1975). Compare Anderson v. I.M. Jameson Corp., 7 Cal.2d 60, 59 P.2d 962 (1936) (literal language must be followed where no ambiguity). See also Estate of Simmons, 64 Cal. 2d 217, 49 Cal. Rptr. 369, 411 P.2d 97, 100 (1966), speaking of former Probate Code section 228: "when the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history."

52. 1970 Cal. Stats. ch. 345 § 1, p. 738.

See the analysis of subsection (c) in Niles, Probate Reform in California, 31 Hastings L.J. 185, 208 (1979).

53. 1979 Cal. Stats. ch. 298 § 2, p. _____.

53A. [new footnote 53A. It is located on the 19th line of text page 26, 4 lines above the line containing footnote 54. It is after the second word in that line, classification.] We obviously consider Estate of hoegler, 82 Cal. App. 3d 487, 147 Cal. rptr. 289 (1978), an erroneous decision in failing to give the broadest ancestral property effect to subsection (c). Note that Hoegler was decided before subsection (c) contained the introductory clause added in 1979. The Hoegler court reasonably concluded that the statute would govern a gift of what was originally separate property of the donor made by the intestate's own parent to the intestate.

54. California Civil Code section 5125(b) and section 5127 require a writing signed by both spouses to effectuate such a transfer.

55. A California divorce court has no power to divide separate property of one spouse between the two. Compare Robinson v. Robinson, 65 Cal. App. 2d 118, 150 P.2d 7 (1944), with California Civil Code section 4800(a).

56. Calif. Civ. Code § 4800(a). That is, at divorce when the community property is divided, each spouse becomes a "purchaser" of the half of the former community assets he or she retains by giving up

his or her interest in the other half of the assets. In a sense an asset kept, for example, by the former husband was formerly community property, but for ancestral property purposes he is the source of one hundred percent of it -- not the normal fifty percent in the case of community property -- because at divorce he "bought out" his former wife's interest.

57. See cases cited at footnote 23, supra.

58. Estate of Foy, 109 Cal. App. 2d 329, 240 P.2d 685 (1952); Estate of Vargas, k36 Cal. App. 3d 714, 111 Cal. Rptr. 779 (1974). If one "spouse" believes in good faith in the validity of the marriage but the other is aware of its invalidity, the former obtains the benefits of the putative marriage doctrine while the latter does not. See Kay & Amyx, Marvin v. Marvin, Preserving the Options, 65 Cal. L. Rev. 937, 947-52 (1977).

59. La. Civ. Code arts. 117, 118; Barkley v. Dunke, 99 Tex. 150, 87 S.W. 1147 (1905).

60. Estate of Krone, 83 Cal. App. 2d 766, 189 P.2d 741 (1948); Luther and Luther, Support and Property Rights of the Putative Spouse, 24 Hastings L.J. 311 (1973).

61. Estate of Levine, 50 Cal. app. 3d 572, 123 Cal. rptr. 445 (1975).

62. See note 58 supra and de Funiak & Vaughn, Principles of Community Property §§ 56, 56.2 (2d ed. 1971); Reppy, Community Property in California 280-287 (1980).

63. It is not necessary that S-2 be a putative spouse (i.e., have a good faith belief in the validity of the marriage previously dissolved by death). The in-laws claim through the status of S-1, who must be putative. See generally La. Civ. Code § 118. The cases closest in point we have found involve a situation where a decedent parent was not a putative spouse because of knowledge of impediment of the "marriage" but the other "spouse" did have putative status; a child of the union could rely on that parent's putative spouse status to inherit from the decedent parent who was aware of the invalidity of the "marriage." Succession of Barbier, 296 So. 2d 390 (La. App. 1974); see also Succession of Zinsel, 360 So. 2d 587 (La. App. 1978). Since the theory of putative marriage is that the spouse in good faith should have all the benefits of a lawful marriage, her parents and siblings as well as her issue logically should be able to rely, in a succession case, on her putative spouse status.

64. Marvin v. Marvin, 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 (1976).

65. See, e.g., Tong v. Jacson, 76 Cal. App. 3d 603, 142 Cal. Rptr. 726 (1978) (one Marvinizer cannot recover loss of consortium damages when other is injured); Aspinall v. McDonnell Douglas Corp., 625 F.2d 325 (9th Cir. 1980) (surviving Marvinizer not heir of deceased partner and thus could not sue for wrongful death of decedent); Drew v. Drake, 110 Cal. App. 3d 555, 168 Cal. Rptr. 65 (1980) (one Marvinizer legal stranger to other under doctrine only close relative can recover emotional distress damages based on viewing

negligent killing); Estate of Edgett, 111 Cal. App. 3d 230, 168 Cal. Rptr. 686 (1980) (surviving Marvinizer as legatee of deceased partner in class C (unrelated stranger) legatee for inheritance tax purposes, not class A (spouse)); see also People v. Delph, 94 Cal. App. 3d 411, 156 Cal. Rptr. 422 (1979); Planck v. Hartung, 98 Cal. App. 3d 83, 159 Cal. Rptr. 673 (1979).

66. See Calif. Civ. Code §§ 4803, 4800(a), calling for division of such property under the same 50-50 formula applied to true community property. The doctrine is applicable only if California has a more than "minimal" connection to the marriage. Marriage of Roesch, 93 Cal. App. 3d 96, 147 Cal. Rptr. 586 (1978) (quasi-community property law inapplicable where only California tie was husband moved there after he and wife separated). Compare Addison v. Addison, 62 Cal. 2d 558, 43 Cal. Rptr. 97, 399 P.2d 897 (1965); but cf. Marriage of Ben Yehoshua, 91 Cal. App. 3d 259, 154 Cal. Rptr. 80 (1979), which is hard to reconcile with Roesch.

67. Calif. Civ. Code § 4803.

68. See Calif. Prob. Code §§ 201.5 through 201.8. It is undecided whether the minimal connection in the Roesch case that precluded application of the quasi-community property theory at divorce there based simply on post-separation domicile of one spouse would also bar a nondomiciliary surviving spouse from asserting forced heirship rights under the above-quotaed Probate Code sections. We believe the mere fact the deceased spouse died domiciled in California would make

those statutes applicable. Distribution of decedent's estate certainly does not involve a "taking" from him of his property rights. Compare Paley v. Bank of America, 159 Cal. App. 2d 500, 324 P.2d 35 (1958).

69. Estate of Ball, 92 Cal. App. 2d 93, 206 P.2d 1111 (1949), relying on dictum in Estate of Perkins, 21 Cal. 2d 561, 134 P.2d 231 (1943); accord, Estate of Schnell, 67 Cal. App. 2d 268, 154 P.2d 437 (1945) (dictum). For criticism of this approach see Ferrier, Casenote, 31 Cal. L. Rev. 331 (1943); Abel, Estate Planning for the Non-Native Son, 41 Cal. L. Rev. 230, 235-236 n. 39 (1953); cf. Note, 28 Cal. L. Rev. 96 (1939). But Perkins is favorably analyzed in Curre, Justice Traynor and the Conflict of Laws, 13 Stan. L. Rev. 719, 733-742 (1961).

69A. See Addison v. Addison, 62 Cal. 2d 558, 43 Cal. Rptr. 97, 399 P.2d 897 (1965), distinguishing the present quasi-community property legislation from that invalidated on the grounds of a "taking" at the time of change of domicile by Estate of Thornton, 1 Cal. 2d 1, 33 P.2d 1 (1934).

70. Estate of Simonton, 183 Cal. 53, 190 P. 442 (1920); Estate of Abdale, 28 Cal. 2d 587, 170 P.2d 918 (1946); Estate of McGee, 168 Cal. App. 2d 670, 363 P.2d 622 (19); Estate of Halcort, 82 Cal. App. 2d 502, 187 P.2d 105 (1948). But see Estate of Bryant, 3 Cal. 2d 58, 43 P.2d 529 (1935), declaring that if S-2 dies shortly after S-1 it is "presumed" former community property is on hand. Surely this fact raises no more than an inference which is sufficient to overcome the ordinary presumption.

71. Estate of Brody, 171 Cal. 1, 151 P. 275 (19); Simonton v. Los Angeles Trust & Sav. Bank, 205 Cal. 252, 270 P. 672 (1928); Pickens v. Merriam, 274 F. 1 (9th CIr. 1921).

72. Estate of Adams, 132 Cal. App. 2d 190, 282 P.2d 190 (1955); see also Estate of Moore, 65 Cal. App. 29, 223 P. 73 (1923).

73. See Duncan v. United States, 247 F.2d 845 (5th Cir. 1957); Barrington v. Barrington, 290 S.W.2d 297 (Tex. Civ. App. 1956, no writ); Reppy, Community Property in California 131 (1980); Reppy & de Funiak, Community Property in the United States 153-167 (1975).

74. Estate of Brody, 171 Cal. 1, 151 P. 275 (1915); Estate of Wright, 185 Cal. App. 2d 440, 8 Cal. Rptr. 258 (1960).

75. Estate of Adams, 132 Cal. App. 2d 190, 282 P.2d 190 (1955). An apportionment formula patterned on Pereira v. Pereira, 156 Cal. 1, 103 P. 488 (1909), calculates a fair return for capital and classifies the balance of gain as the result of labor. A formula based on Van Camp v. Van Camp, 53 Cal. App. 17, 199 P. 885 (1921), fixes a fair return for labor and treats the remaining profit as rental or dividend returned exclusively by the capital.

76. [new footnote at very last word of article] Accord, 7 R. Powell, Real Property ¶ 1001 (Rohan rev. 1979).