#L-602 1/4/82

Memorandum 82-8

Subject: Study L-602 - Probate Code (Intestate Succession)

Attached is a staff draft of Tentative Revisions of Intestate Succession Provisions of Uniform Probate Code. This draft incorporates the decisions made at the July 1981 meeting and includes a few provisions not previously approved.

Provisions in Staff Draft Not Previously Approved by the Commission

The following provisions in the staff draft have not been previously approved by the Commission:

(1) Sections 2-001 (community property) and 2-002 (quasi-community property) have been added by the staff to preserve comparable provisions in existing California law.

(2) Section 2-101 is from the UPC.

(3) Subdivision (b) (quasi-community property) has been added to Section 2-102A to preserve existing intestate succession law regarding quasi-community property and to provide a complete intestate succession scheme in this staff draft.

Previous Commission Decisions for Possible Reconsideration

The staff recommends that the Commission reconsider two decisions made at the July 1981 meeting:

(1) Section 2-103 preserves the California scheme which provides that if no blood relatives of an unmarried decedent can be found, certain relatives of a predeceased spouse of the decedent take the decedent's property in preference to having the property escheat to the state. Section 2-103.5 defines "predeceased spouse" to mean the one most recently married to the decedent. This definition causes the following problem.

If the decedent dies having been predeceased by two or more former spouses, and the most recent spouse has no relatives who may take the decedent's property under Section 2-103 but an earlier spouse does, the effect of Sections 2-103 and 2-103.5 is to cause escheat despite the fact that the decedent probably would have preferred that the relatives of the earlier spouse take. Some of those relatives may have been stepchildren of the decedent with whom the decedent had a close and affectionate relationship.

The Commission's decision to limit in-law inheritance to relatives of the most recent predeceased spouse of the decedent was made in response to the argument that a broader succession rule would complicate the process of finding and giving notice to potential heirs. However, the staff is of the view that the notice problem is less troublesome than the problem of causing escheat when there are close relatives of an earlier predeceased spouse available to take the decedent's property. Such relatives should take in preference to the state.

Does the Commission wish to reconsider this decision?

(2) Earlier the staff recommended that the UPC provision abolishing dower and curtesy (UPC § 2-113) not be included in the new Probate Code provisions, since the matter is covered under the Family Law Act (Civil Code § 5129). On reconsideration, the staff is of the view that this provision should be located in the Probate Code, since it concerns rights at death. Accordingly, the staff would include the UPC provision in the staff draft, revised as follows:

> 2-113. The estates of dower and curtesy are ~~abolished~~ not recognized .
>
> Comment. Section 2-113 is the same in substance as Section 2-113 of the Uniform Probate Code and continues the substance of former Section 5129 of the Civil Code.

Approval of Staff Draft for General Distribution Requested

After the foregoing questions are resolved, the staff requests that the Commission approve the staff draft for general distribution for review and comment.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

L-602-30

January 15, 1982

STAFF DRAFT

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE REVISIONS OF THE INTESTATE SUCCESSION PROVISIONS OF THE UNIFORM PROBATE CODE

This publication is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission.

This publication does not necessarily represent the recommendations the Commission will submit to the Legislature. Those recommendations will take into account the comments we receive on our tentative conclusions.

SEND US YOUR COMMENTS NOT LATER THAN .

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COOPERATION WITH STATE BAR

The probate law study is being conducted in close cooperation with the Estate Planning, Trust and Probate Law Section of the State Bar. The following persons were designated by that Section to work with the Commission.

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LETTER OF TRANSMITTAL

The California Law Revision Commission was authorized by Resolution Chapter 37 of the Statutes of 1980 to make a study of the California Probate Code and to consider whether California should adopt the Uniform Probate Code in whole or in part.

The Commission has studied the California and Uniform Code provisions relating to intestate succession. This publication sets out the Commission's tentative conclusions. This publication is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. We need your comments not later than _____.

It is important that you send us your comments even if you agree with the tentative conclusions. This will permit us to take your views into account when we consider the comments of others who may not agree with the tentative conclusions.

The Commission will greatly appreciate your assistance in its effort to improve this aspect of California probate law.

CONTENTS

INTRODUCTION

The primary purpose of an intestate succession statute is to provide suitable rules for the distribution of the estate of a person who dies without a will. These statutory rules should be drawn with two primary objectives in mind. The rules should conform to what the average decedent would have provided had he or she made a will.[1] The rules should also be clear and simple to permit administration of an intestate estate with a minimum of delay and expense.

The Commission has concluded that the Uniform Probate Code (UPC) provisions relating to intestate succession generally are well designed to effectuate the intestate decedent's probable intent and to minimize delay and expense. Where the UPC provision states a different rule than the existing California rule, the UPC rule generally is preferable. There are, however, a few instances where the Commission has concluded that the UPC rule should be departed from or supplemented or clarified.

This publication first discusses the changes the UPC provisions (as revised by the Commission) would make in existing California law. Following this discussion, the primary UPC provisions relating to intestate succession--Sections 2-101 to 2-114--are set out, showing the revisions the Commission believes should be made in those provisions.

The last portion of this publication indicates the disposition of the existing California intestate succession provisions. The Comment to each section indicates the UPC provision or provisions that supersede the existing section or the reason why the existing section or a portion thereof is not continued.

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1. A 1978 American Bar Foundation empirical study indicates popular preferences with respect to distribution of property on death. Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. Bar Foundation Research J. 321. This study was conducted by a scientifically-designed telephone survey of 750 families in Alabama, California, Massachusetts, Ohio, and Texas. See id. at 321, 326-32. Earlier empirical studies are listed in Niles, Probate Reform in California, 31 Hastings L.J. 185, 192 n.47 (1979), and involved the patterns of distribution found in probated wills, the assumption being that intestate decedents would have had similar preferences. The popular preferences revealed in these studies have been taken into account in formulating the rules the Commission believes should govern intestate succession.

CHANGES THE REVISED UNIFORM CODE PROVISIONS WOULD MAKE IN EXISTING CALIFORNIA LAW

The following discussion indicates significant changes that the Uniform Probate Code provisions (as revised by the Commission) would make in existing California law. Significant deviations from the UPC provisions are also noted.

Intestate Share of Surviving Spouse in Separate Property

Under existing California law, all of the community property goes to the surviving spouse in the event of intestacy,[2] but the surviving spouse still takes the same share of the separate property that a surviving widow took under the Statute of Distributions in 1670.[3] The surviving spouse takes all of the decedent's separate property only if the decedent dies without leaving surviving issue, parent, brother, sister, or descendant of a deceased brother or sister.[4] In cases where the surviving spouse does not take all of the separate property, the share of the surviving spouse in the separate property of the decedent is one-half[5] or one-third,[6] depending upon the circumstances. For example, if the decedent is survived by a spouse and a grandnephew, the grandnephew takes as much of the separate property as the spouse.

The UPC rule with respect to community property is the same as the existing California rule, and the Commission recommends no change in this rule. The Commission recommends that the existing California rule with respect to separate property be changed to give all of the intestate decedent's separate property to the surviving spouse except where the decedent is survived by issue some of whom are not also issue of the

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2. Prob. Code § 201.

3. See Niles, supra note 1, at 192.

4. Prob. Code § 224.

5. The surviving spouse receives one-half of the intestate decedent's separate property if the decedent is survived by only one child or only the issue of one deceased child (Prob. Code § 221) or if the decedent dies without issue but is survived by one or both parents or the issue of one or both parents (Prob. Code § 223).

6. The surviving spouse receives one-third of the intestate decedent's separate property if the decedent is survived by two or more children, by one child and the issue of one or more deceased children, or by the issue of two or more deceased children. Prob. Code § 221.

surviving spouse. If the decedent is survived by issue some of whom are not also issue of the surviving spouse, one-half of the decedent's separate property should go to the surviving spouse and the other half should be divided among all of the decedent's children and issue of predeceased children--both those who are also issue of the surviving spouse and those who are not.

Giving all of the separate property in the decedent's estate to the surviving spouse (except where there are issue of the decedent who are not also issue of the surviving spouse) would be a significant improvement in California law for the following reasons:

(1) Empirical studies show that most persons want their entire estate to go to their surviving spouse in preference to their children (when they are also children of the surviving spouse), their parents, or their brothers or sisters.[7]

(2) Treating separate property the same as community property will avoid the delay and expense of litigation to determine claims as to the community or separate nature of property and disputes as to the value of separate property. Difficult problems of tracing, commingling, and apportionment often arise in litigation concerning the community or separate nature of property. In addition, the expense of establishing and administering court supervised guardianships for minors who otherwise would receive property of the decedent is avoided. The recommended rule also reduces the burden the existing rule imposes on the courts.

(3) Giving all of the separate property to the surviving spouse avoids depriving the surviving spouse of a portion of the decedent's estate which may be required to maintain the surviving spouse during that spouse's lifetime.[8] Under existing law, a portion of the separate property estate may go to adult children or other relatives of the decedent who may have little or no need for the property, leaving the

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7. See Fellows, Simon & Rau, supra note 1, at 348-64; Niles, supra note 1, at 192 n.47.

8. Professor Niles notes: "As the divorce rate rises the amount of separate property in decedents' estates increases, because the decedents' share of community property in prior marriages will be separate property in later marriages and at death. Decedents who lived solely on inherited capital, or capital acquired before marriage, will leave only separate property at death." Niles, supra note 1, at 191 (footnotes omitted).

surviving spouse destitute. A surviving spouse has a legal duty to support his or her minor children.[8a] And it is reasonable to expect that a surviving spouse will deal fairly with his or her adult children and with the grandchildren, both during the surviving spouse's lifetime and upon the surviving spouse's death.[9] This is especially true where the adult children devote attention to and show concern for the welfare of the surviving spouse after the death of the decedent. Where a spouse has concern that the other spouse may not deal fairly with the children or other relatives, the spouse most likely will make a provision for them by executing a will.

The Commission-recommended rule differs from the UPC rule which gives the first $50,000, plus one-half of the balance of the separate property to the surviving spouse where the decedent is survived by a parent or parents or by issue all of whom are issue of the surviving spouse also. This UPC provision is not consistent with the desires of most persons[10] and increases expense and delay. Even where the surviving spouse would take all of the separate property under the UPC provision because the value of the separate property is less than $50,000, the UPC provision does not avoid the need to hear and determine claims as to which property is community and which is separate or the need to determine the value of the separate property in order to establish that its value is less than $50,000.

Where there are surviving issue of the decedent one or more of whom are not issue of the surviving spouse, the Commission recommends the adoption of the UPC rule that gives one-half of the separate property to the surviving spouse and the remaining one-half of the separate property

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8a. Civil Code §§ 196-196a.

9. Empirical studies provide no evidence that surviving spouses who receive the decedent's property ultimately disinherit their own children. Fellows, Simon & Rau, supra note 1, at 355. Moreover, the expense of establishing and administering a court supervised guardianship for a minor child is avoided if the property goes to the parent rather than to the children. As a result, minors may be better protected and have more funds available if the spouse-parent receives the funds instead of the minor. Id. at 356.

10. See note 7 supra. Two states that have adopted the UPC provision have recently reconsidered the matter and have been more generous to the surviving spouse than the UPC. See Ariz. Rev. Stat. Ann. § 14-2102 (West 1975); Mont. Code Ann. § 72-2-202 (1979); Fellows, Simon & Rau, supra note 1, at 358; Niles, supra note 1, at 192.

to the issue of the decedent. This UPC provision is consistent with the findings of empirical studies which show that most persons want the children to receive a portion of the estate in this situation[11] and is designed to protect children by a prior marriage and their issue who might otherwise not be provided for by the surviving spouse.[12]

The following table shows the share of the surviving spouse in the separate property of the intestate decedent under existing California law, the UPC, and the Commission's recommendations.

Surviving Spouse's Intestate Share of Decedent's Separate Property

	Existing Law	UPC	Recommended
No issue or parent of the decedent survive, and no issue of either parent of the decedent survive	All	All	All
No issue or parent of the decedent survive, but issue of one or both parents of the decedent survive	Half	All	All
No issue of the decedent survive, but one or both parents of the decedent survive	Half	$50,000 plus half the balance	All
One child of the decedent and the surviving spouse, or the issue of such child, survives	Half	$50,000 plus half the balance	All
Two or more children, all of whom are children of the decedent and the surviving spouse, or the issue of such children, survive	One-third	$50,000 plus half the balance	All

11. Fellows, Simon & Rau, supra note 1, at 366.

12. Where the decedent's children are not also children of the surviving spouse, there is a greater risk that the children will ultimately be disinherited by the surviving spouse. Fellows, Simon & Rau, supra note 1, at 356.

One child of the decedent who is not the child of the surviving spouse, or the issue of such child, survives	Half	Half	Half
Two or more issue of the decedent, some of whom are not the issue of the surviving spouse, survive	One-third	Half	Half

Cutting Off the "Laughing Heir"

Inheritance by Blood Relatives of Decedent

Under existing California law, inheritance by blood relatives of the decedent by intestate succession is unlimited, no matter how remote the heir may be.[13] Thus, heirs may take who are so remotely related to the decedent as to feel no sense of bereavement at the decedent's death. Such an heir has been described as the "laughing heir."[14] Unlimited inheritance has been described as an "absurd anachronism" and has long been the subject of scholarly criticism.[15]

The Uniform Probate Code provides for inheritance by lineal descendants of the decedent, by parents and their descendants, and by grandparents and their descendants, but eliminates more remote relatives traced through great-grandparents and more remote ancestors.[16] This cuts off the "laughing heir" and limits inheritance to the relatives whom the decedent probably knew and had an interest in.

The Commission recommends enactment of the UPC provision in California to restrict intestate succession to the nearer relatives of the decedent for the following reasons:

(1) It will simplify the administration of estates, and of trusts where there is a final gift to "heirs," by avoiding the delay and expense of attempting to find remote missing heirs and by minimizing problems of service of notice.[17]

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13. See Prob. Code § 226.

14. See Cavers, Change in the American Family and the "Laughing Heir," 20 Iowa L. Rev. 203, 208 (1935).

15. Id. at 204 n.2.

16. Official Comment to Uniform Probate Code § 2-103.

17. Niles, supra note 1, at 200 n.98.

(2) It will eliminate the standing of remote heirs to bring will contests or trust litigation[18] and will thus minimize the opportunity for unmeritorious will contests brought for the sole purpose of coercing an unjust settlement.[19]

(3) It will remove an important source of uncertainty in land titles.[20]

(4) It will be consistent with the decedent's desires in a case where the decedent had a predeceased spouse. The Commission recommends below that the close relatives of the decedent's predeceased spouse be entitled to take the property in cases where no blood relative of the decedent is entitled to take the property under the limited inheritance provision of the UPC. Thus, under the Commission's recommendations,

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18. Id. at 200-01; see Breidenbach, Will Contests, in 2 California Decedent Estate Administration §§ 21.7, 21.10, at 897-98 (Cal. Cont. Ed. Bar 1975).

19. In the notorious case of In re Wendel, 143 Misc. 480, 257 N.Y.S. 87 (1932), some 2,300 persons sought to join in overturning a will leaving a large estate to charity. A two-million dollar settlement was made with four relatives in the fifth degree who may have agreed to share this sum with 60 or 70 relatives in the sixth, seventh, and eighth degrees. One claimant was ultimately convicted of having fabricated evidence of his consanguinity. Cavers, supra note 14, at 210 n.16.

    From time to time there is prolonged litigation in California, brought by remote heirs to establish their relationship to the decedent:

    > People whom the decedent did not know and who did not know the decedent appear to claim his estate. There have been several long and costly trials in the courts of San Francisco between groups of relatives none of whom claimed to be related more closely than in the fifth degree.
    >
    > There is, of course, the constant invitation to heir hunting and false testimony, as well as the burden placed upon the courts. This waste of time of the courts and of the taxpayers' money serves no useful public or private purpose.

    Evans, Comments on the Probate Code of California, 19 Calif. L. Rev. 602, 613 (1931). Professor Evans was the draftsman of the 1931 Probate Code, but lacked authority to make substantive changes. Id. at 602-03.

    Eliminating the standing of remote heirs to bring will contests will not result in the probate of invalid wills merely because there is no one with standing to contest the will, since the Attorney General may contest any will where the state stands to benefit by escheat. In re Peterson, 138 Cal. App. 443, 32 P.2d 423 (1934).

20. Cavers, supra note 14, at 211, 214.

remote relatives of the decedent traced through great-grandparents or even more remote ancestors will no longer take in preference to the predeceased spouse's child by a former marriage or the predeceased spouse's father, mother, brother, or sister. The result is that the property will go to persons for whom the decedent is likely to have had real affection rather than to extremely remote relatives who probably were not even acquainted with the decedent.

Inheritance by Relatives of Predeceased Spouse of Decedent

Under the UPC, property escheats to the state if it does not go to a relative of the decedent entitled to take the property.[21] California minimizes the possibility of escheat by giving the property to relatives of a predeceased spouse of the decedent (no matter how remote such a relationship may be) if no blood relatives of the decedent can be found.[22] The UPC has no comparable provision. The California provision avoids the shocking injustice that could occur, for example, if property were to escheat rather than go to the predeceased spouse's child, father, mother, brother, or sister who may have been held in great affection by the decedent. For this reason, the Commission has concluded that the policy expressed in the existing California provision is sound. In addition, the adoption of the limited inheritance provision of the UPC might significantly increase the incidence of escheat in California if no provision were made for inheritance by the relatives of the decedent's predeceased spouse.

Accordingly, the Commission recommends that property go to the issue of a predeceased spouse or to the parents or the issue of parents of the predeceased spouse if there is no blood relative or spouse of the decedent entitled to take the property.[23] This modifies the existing provision to eliminate inheritance by remote collaterals of the decedent's predeceased spouse. This modification is justified on the policy grounds stated above with respect to inheritance by remote collaterals of the decedent.

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21. Uniform Probate Code § 2-105.

22. See Prob. Code § 229(d)-(e).

23. Only the relatives of the predeceased spouse most recently married to the decedent would be entitled to take under this provision.

Elimination of Ancestral Property Doctrine

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.[24] This is true under the UPC: 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.[25]

(2) Where a potential heir is a half-blood relative of the decedent.[26]

(3) Where the decedent dies without spouse or issue and leaves property received from the separate property of a parent or a grandparent.[27]

(4) Where the decedent dies without spouse or issue and leaves property received from a predeceased spouse.[28]

All four of these applications of the ancestral property doctrine present both theoretical and practical difficulties. From a theoretical standpoint, although the decedent died intestate, the decedent did own and have testamentary power over the ancestral property. Therefore the proper approach to a succession scheme applicable to such property is the "will substitute" theory,[29] and the rules of succession should correspond to the manner in which the average decedent would dispose of it by will.[30] If the decedent were drawing a will, it seems likely that

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24. Niles, supra note 1, at 203.

25. Prob. Code § 227.

26. Prob. Code § 254.

27. Prob. Code § 229(c).

28. Prob. Code § 229(a).

29. Reppy & Wright, California Probate Code § 229: Making Sense of a Badly Drafted Provision for Inheritance by a Community Property Decedent's Former In-Laws, 8 Community Prop. J. 107, 135 (1981).

30. See Niles, supra note 1, at 200.

the relationship of possible beneficiaries to the decedent would be a far more important factor than the source of the property.[31]

From a practical standpoint, the ancestral property doctrine introduces enormous complexities into administration of intestate estates--difficult problems of tracing, commingling, and apportionment often arise.[32] The estate must be sorted out so that the ancestral property may pass by a special rule of succession.[33] When some portion of the decedent's estate must go to relatives of a predeceased spouse, the problems of tracing heirs and giving notice are greatly magnified. Delay and expense are the result.

For these reasons, a number of commentators have called for the elimination of the ancestral property doctrine.[34] The Commission has concluded that this view is well founded, and recommends that all four applications of the doctrine in California should be abolished. These four applications are discussed in order below.

Property of unmarried minor

Under California law, 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.[35] 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.[36]

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31. See Evans, supra note 19, at 614.

32. Reppy & Wright, supra note 38, at 134. Accord, Niles, supra note 1, at 206; Fellows, Simon & Rau, supra note 7, at 344. The ancestral property doctrine has also caused difficult problems when applied to property acquired in common law states. Niles, supra note 1, at 208.

33. Niles, supra note 1, at 206.

34. See Niles, supra note 1, at 207-08; Reppy & Wright, supra note 38, at 135; Evans, supra note 19, at 614; Turrentine, Introduction to the California Probate Code, in West's Annotated California Codes, Probate Code 35 (1956); Fellows, Simon & Rau, supra note 1, at 344. The majority of American states have never adopted any form of ancestral property inheritance. Those that have generally confined it to real property as under English common law. Reppy & Wright, supra at 112-13.

35. Prob. Code. § 227.

36. Prob. Code § 225.

This application of the ancestral property doctrine has been criticized for the theoretical and practical reasons discussed above.[37] In addition, since the property may go to minors under this provision, there is a likelihood that a guardian will have to be appointed with the attendant expense and inconvenience.[38]

The Commission agrees with the views expressed by commentators that this application of the ancestral property doctrine makes little sense,[39] accomplishes no needed purpose,[40] and should be eliminated.

Exclusion of half-bloods

California law states the generally accepted U.S. rule that kindred of the half-blood inherit equally with those of the whole blood in the same degree,[41] but then adds an undesirable qualification to that rule: If the property came to the intestate from an ancestor, half-blood relatives of the intestate who are not of the blood of the ancestor are excluded.[42] 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 but in the same degree of kindred as whole-blood relatives[43] may not inherit ancestral property. The California Supreme Court has called this result illogical, and has suggested that the provision is the result of accident or caprice rather than the dictate of principle.[44]

37. See Evans, supra note 19, at 614.

38. Niles, supra note 1, at 204.

39. Id.

40. Evans, supra note 19, at 614.

41. Prob. Code § 254.

42. Id.

43. It has been held that half-bloods are excluded only when there are kindred of the whole blood in the same degree. However, kindred of the half-blood inherit ancestral property in preference to those of the whole blood of more remote degree. In re Estate of Sayles, 215 Cal. 207, 8 P.2d 1009 (1932).

44. Estate of Ryan, 21 Cal.2d 498, 504, 512, 133 P.2d 626 (1943). The court further noted that the doctrine of ancestral property, whether applied to kindred of the whole or half blood, is being looked on with increasing disfavor in the states where it still exists. Id. at 512, 133 P.2d at 635.

Because of judicial hostility to the provision, the decisions have held that it does not apply to personal property, but is limited to real property consistent with the historical doctrine under the feudal canons of descent.[45] Moreover, the provision has been held to apply only when the ancestral property is the identical piece of real property received from the ancestor; real property acquired with the proceeds from sale of ancestral real property is not ancestral property within the meaning of this provision.[46]

A commentator has noted that, even as limited by the courts, this provision which discriminates against half-bloods is "anachronistic."[47] The UPC does not discriminate against half-bloods.[48] The California Supreme Court appears to have taken the view that it has gone as far as is linguistically permissible in limiting the undesirable effects of this provision, and has invited the Legislature to finish the job.[49] Accordingly, the Commission recommends that the California rule that discriminates against half-bloods with respect to ancestral property be eliminated and replaced by the UPC rule that permits half-bloods to inherit the same share they would inherit if they were of the whole blood.

Property received from a parent or grandparent

California law 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.[50] This provision has been criticized for the theoretical and practical reasons discussed above, and commentators have called for its repeal.[51] The

45. Id. at 512-13, 133 P.2d at 634-35.

46. Id. at 513-14, 133 P.2d at 635.

47. Niles, supra note 1, at 204.

48. See Uniform Probate Code § 2-107 ("[r]elatives of the half blood inherit the same share they would inherit if they were of the whole blood").

49. See Estate of Ryan, 21 Cal.2d 498, 505, 133 P.2d 626 (1943).

50. Prob. Code § 229(c).

51. See Niles, supra note 1, at 206-08; Reppy & Wright, supra note 38, at 135.

Commission recommends eliminating this aspect of the ancestral property doctrine.

Property formerly owned by a predeceased spouse

California law provides that if the decedent is predeceased by a spouse and then dies without spouse or issue, the portion of the decedent's estate which came from the predeceased spouse's separate property or share of community property goes to near relatives of the predeceased spouse.[52] By favoring relatives of the predeceased spouse over parents and brothers and sisters of the decedent, these provisions follow ancestral property theory rather than the will substitute theory.[53] The provisions are badly drafted, are complex, and are difficult to apply.[54] Several commentators have called for the repeal of these provisions.[55] The Commission agrees with this view and recommends that "in-law inheritance" be eliminated in California. The Commission, however, recommends retaining inheritance by near relatives of a predeceased spouse as a last resort to prevent escheat where there are no relatives of the decedent who may inherit.[56]

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52. See Prob. Code §§ 229, 296.4. First preference is given to children of the predeceased spouse and to their descendants by right of representation. Prob. Code § 229(a). If there are no issue of the predeceased spouse, the property goes to the parents of the predeceased spouse equally, or to the survivor. Id. If there is no surviving issue or parent of the predeceased spouse, the property goes to the brothers and sisters of the predeceased spouse equally and to their descendants by right of representation. Id. If none of the foregoing survive, the property goes to blood relatives of the decedent. Prob. Code § 230; Estate of McDill, 14 Cal.3d 831, 537 P.2d 874, 122 Cal. Rptr. 754 (1975). If none of the foregoing survive, the property goes to relatives of the predeceased spouse more remote than the issue of parents. Prob. Code §§ 229(e), 296.4; Estate of McDill, supra. If none of the foregoing survive, the property escheats to the state. Prob. Code § 231.

53. Reppy & Wright, supra note 38, at 108, 111-13, 115-22, 124-25, 128-30.

54. Niles, supra note 1, at 206-07; Reppy & Wright, supra note 38, at 108, 121, 123-29, 135.

55. See Niles, supra note 1, at 207-08, 217; Reppy & Wright, supra note 38, at 135.

56. See discussion in text accompanying notes 21-23 supra.

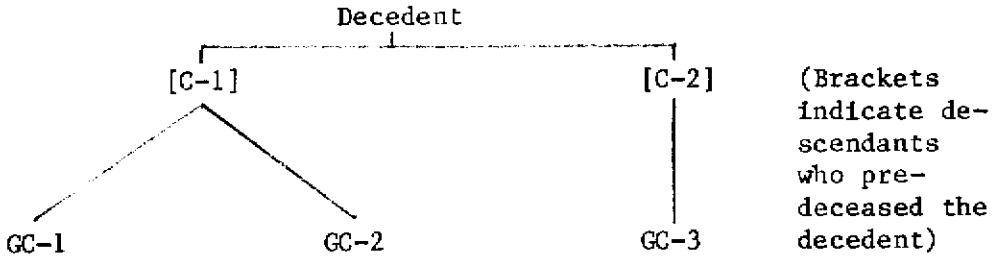
Toward Per Capita Distribution

Both under California law and the UPC, if all of the decedent's surviving issue are in the same generation (for example, if all are children or all are grandchildren), they all share the decedent's property equally (per capita).[57] This result is consistent with a strong popular preference for having all issue in the same generation share equally.[58]

However, under California law if the decedent's surviving descendants are not all of the same degree of kindred to the decedent, they take by right of representation--that is, they divide with other members of their generation the share that their deceased ancestor would have taken had the ancestor survived.[59] Because predeceased issue of the

57. Prob. Code §§ 221, 222; Uniform Probate Code § 2-106. Under this rule, if all of the decedent's surviving descendants are grandchildren, they share equally without reference to the share that their deceased parent would have taken if living. This may be illustrated by the following example:

Example 1.



In this example, each of the decedent's three grandchildren take a one-third share under California law and the UPC, since they are all of the same degree of kindred to the decedent. This rule does not apply to collateral kindred of the decedent. The stocks of the decedent's brothers and sisters are maintained through all generations, even though no brothers or sisters survive and all of their surviving offspring are of the same generation. Prob. Code § 225; Niles, supra note 1, at 202. If the decedent's nearest relatives are an aunt or uncle and cousins who are the children of a deceased aunt or uncle, there is no representation at all, since "the estate goes to the next of kin in equal degree." Prob. Code § 226; Niles, supra note 1, at 203.

58. See Fellows, Simon & Rau, supra note 1, at 383-84; Niles, supra note 1, at 202 n.111.

59. Prob. Code §§ 221, 222. This may be illustrated by the following example:

decedent may have had different numbers of children from each other, there is a likelihood that members of the same generation may take unequal shares, contrary to popular preference.[60]

Under the UPC, the primary division of the estate is made at the generation nearest to the decedent having at least one living member.[61] Once the estate is divided into primary shares, it descends thereafter by right of representation the same as under California law, with one important exception: If a descending share of the estate reaches a

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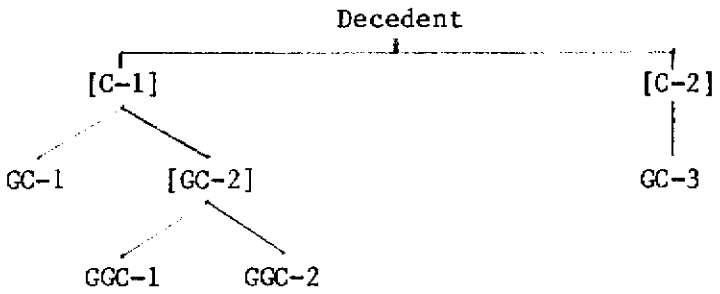
Example 2.



In this example, California makes the primary division of the estate at the children's generation, even though there are no living members of that generation. Maud v. Catherwood, 67 Cal. App.2d 636, 155 P.2d 111 (1945); Niles, supra note 1, at 202. Thus in this example, the shares would be one-fourth for GC-1, one-eighth each for GGC-1 and GGC-2, and one-half for GC-3. Although this situation occurs relatively infrequently in the context of intestate succession, it does occur in the trust context where the ultimate gift is made long after the death of the settlor to "heirs" as determined under the laws of intestate succession. See id.; Lombardi v. Blois, 230 Cal. App.2d 191, 40 Cal. Rptr. 899 (1964).

60. See note 58 supra.

61. See Uniform Probate Code § 2-106 and Official Comment thereto. In example 2 (note 59 supra), the UPC would, unlike California law, make the primary division of the estate at the grandchildren's generation, since all of the decedent's children are predeceased. Thus under the UPC, the shares in example 2 would be one-third for GC-1, one-sixth each for GGC-1, and one-third for GC-3. This is the preferred result, since it is consistent with popular preference. See note 58 supra.

The UPC follows the same rule of representation with respect to collateral heirs (descendants of the decedent's parents or grandparents) as it does with respect to descendants of the decedent, except that if both paternal and maternal grandparents survive the decedent, or leave descendants who do, one-half of the decedent's estate goes to each line. See Uniform Probate Code §§ 2-106, 2-103; Niles, supra note 1, at 201-02.

generation all of whose members have predeceased the decedent, the share is redivided per capita at the next generation having any living members.[62] The result is that with respect that descending share, the members of that generation share equally, consistent with popular preference.

The Commission recommends enactment of the UPC rule of representation in place of the California rules, since by moving closer to a per capita distribution scheme the UPC corresponds more closely to popular preference.[63]

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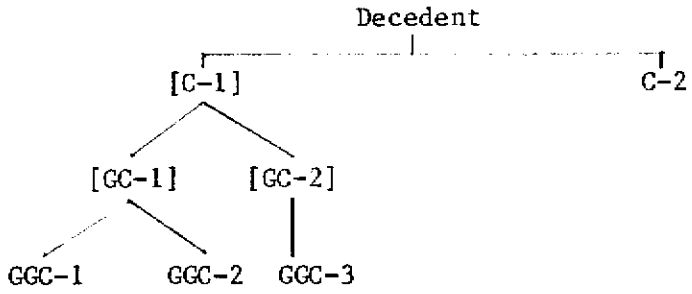
62. See Uniform Probate Code § 2-106; Waggoner, A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants, 66 Nw. U.L. Rev. 626, 630-31 (1971). This is illustrated by the following example:

Example 3.



Under the UPC the primary division of the estate is made at the children's generation in this example--the first generation having any living members. Therefore C-2 takes one-half, and C-1's half share descends to C-1's issue. However, since there are no living members of the next generation, under the UPC the descending share is redivided per capita at the next generation having any living members--in this example, at the great-grandchildren's generation. So C-1's half share is divided equally among GGC-1, GGC-2, and GGC-3, with each taking a one-sixth share.

Under California law, after the primary division of the estate is made, the estate descends by right of representation. See Prob. Code §§ 221, 222; Niles, supra note 1, at 202. Therefore, in example 3, California law would award one-eighth each to GGC-1 and GGC-2, and one-fourth to GGC-3. This result is not consistent with popular preference. See Fellows, Simon & Rau, supra note 1, at 383-84. If example 3 were modified to show C-2 as having predeceased the decedent, then all of the decedent's surviving descendants would be in the same degree of kindred and would therefore share equally, the same as under the UPC. See Prob. Code § 221.

63. The Commission also considered a system of "per capita at each generation" as recommended by Professor Lawrence Waggoner. See Waggoner, supra note 62. The Commission found Professor Waggoner's scheme theoretically appealing, but opted for the UPC rule in the interest of national uniformity of intestate succession law.

Requirement That Heir Must Survive Decedent by 120 Hours

Under California law, there is no requirement that a potential heir must survive the decedent by any minimum period of time in order to take property from the decedent.[64] In a common accident situation, if the heir dies a short but finite and determinable time after the decedent, the Uniform Simultaneous Death Act[65] does not apply.[66] The decedent's property will therefore pass into the estate of the deceased heir causing a double administration, and will ultimately pass to heirs of the deceased heir--a disposition probably contrary to what the decedent would have wanted.[67]

The UPC minimizes this problem by requiring that a potential heir survive the decedent by at least 120 hours in order to take by intestacy from the decedent.[68] This appears to be a clear improvement in California law.[69] Accordingly, the Commission recommends adoption of the UPC requirement that a potential heir survive the decedent by 120 hours in order to take by intestacy.

Inheritance In Case of Stepparent Adoption

Under California law, when a child is adopted the child is deemed to be a descendant of the adopting parent for all purposes of succession by, from, or through the adopting parent, and all inheritance by, from, or through blood relatives of the adopted child is cut off by the adoption.[70] The UPC follows a similar rule with one important exception: If the adoption is by the spouse of a natural parent (i.e., a stepparent adoption), the adopted child may inherit from or through the adoptive

64. For an extreme case in the wills context, see Estate of Rowley, 257 Cal. App.2d 324, 65 Cal. Rptr. 139 (1967).

65. Prob. Code §§ 296-296.8.

66. See Prob. Code § 296; Official Comment to Uniform Probate Code § 2-104.

67. See Official Comment to Uniform Probate Code § 2-104.

68. Uniform Probate Code § 2-104.

69. The UPC provision has been endorsed by the State Bar of California. See State Bar of California, The Uniform Probate Code: Analysis and Critique 30 (1973).

70. Prob. Code § 257; 7 B. Witkin, Summary of California Law Wills and Probate § 62, at 5585 (8th ed. 1974).

parent and also from or through the natural parent who gave up the child for adoption.[71] This situation may arise with some frequency where a natural grandparent of the adopted child dies intestate. If the grandparent had made a will, it seems unlikely that the grandparent would be disinherit the child simply because the child has been adopted by a stepparent.[72] Accordingly, the Commission recommends the UPC rule that a stepparent adoption does not cut off inheritance by, from, or through the natural parent who gave up the child for adoption.[73]

Advancements

If a person makes a gift during lifetime to a potential heir and later dies intestate, the gift is sometimes treated as an "advancement" to the donee and is therefore deducted from the donee's intestate share on the theory that that is what the donor intended.[74] Under both California law and the UPC, such a gift is not treated as an advancement unless the donor's intent that it be so treated is declared in writing or unless the donee acknowledges in writing that it is an advancement.[75]

However, the UPC differs from California law with respect to the effect of an advancement on the donee's issue if the donee predeceases the donor. Under California law, if the donee predeceases the donor the advancement is deducted from the shares the donee's heirs would other-

71. Uniform Probate Code § 2-109.

72. See Estate of Garrison, 122 Cal. App.3d 7, ___ Cal. Rptr. ___ (1981).

73. This UPC rule creates the possibility that the adopted child could inherit from the same person both as a natural and as an adopted child. For example, suppose that after the death of the child's father the child's mother marries the decedent's brother (the child's uncle) who then adopts the child as a stepparent. If the adopting uncle predeceases his parents (the child's paternal grandparents), the child could potentially inherit from the paternal grandparents both as a natural and as an adopted grandchild. See Official Comment to Uniform Probate Code § 2-114. The UPC precludes this by a provision that a person who is related to the decedent through two lines is entitled only to a single share. Uniform Probate Code § 2-114. The Commission recommends that this provision be enacted along with the provision that a stepparent adoption does not cut off inheritance from, by, or through the natural parent.

74. See 7 B. Witkin, Summary of California Law Wills and Probate § 35, at 5557-58 (8th ed. 1974).

75. Prob. Code § 1050; Uniform Probate Code § 2-110.

wise take from the estate of the intestate donor, just as if the advancement had been made directly to them.[76] Under the UPC if the donee predeceases the donor the advancement is not charged against the donee's issue[77] unless the declaration or acknowledgment provides otherwise.[78] The UPC rule is based on the assumption that most inter vivos transfers are either intended to be absolute gifts or are carefully integrated into a total estate plan.[79] Also the predeceased donee may have disposed of the property during lifetime; in such a case to charge the gift against the intestate share of the donee's issue would be unfair to them. Accordingly, the Commission recommends the UPC rule that an advancement is not deducted from the intestate shares of issue of a predeceased donee.

UNIFORM PROBATE CODE PROVISIONS AS REVISED

Set out below is Part 1 (Sections 2-101 to 2-114)[80] of Article II of the Uniform Probate Code as revised by the Commission and two additional sections the Commission recommends be added as a new part immediately preceding Part 1 of Article II. New sections and additions to the UPC sections are shown by underscore; deletions are shown by strikeout.

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76. Prob. Code § 1053.

77. There appears to have been little if any litigation nationally on the question of whether an advancement is charged against the share of heirs of a predeceased donee other than issue. See Official Comment to Uniform Probate Code § 2-110; 3 Am. Jur.2d Advancements § 50, at 32-33 (196_); T. Atkinson, Handbook of the Law of Wills § 129, at 722-23 (1953). However, since the doctrine of advancements is designed merely to secure equality between children and descendants (T. Atkinson, supra at 722), it would seem that an advancement would generally not be charged against heirs of a predeceased donee other than issue.

78. Uniform Probate Code § 2-110. The UPC also requires the donor's writing declaring the gift to be an advancement to be "contemporaneous" with the gift. Although there is no such express requirement in California law (see Prob. Code § 1050), the accepted rule appears to be that the writing must either be contemporaneous with the gift or be embodied in a subsequent testamentary instrument. See In re Estate of Hayne, 165 Cal. 568, 574-75, 133 P. 277 (1913).

79. See Official Comment to Uniform Probate Code § 2-110.

80. The final recommendation of the Commission will indicate the appropriate Probate Code section numbers to be assigned to the UPC provisions as revised by the Commission.

Each section is followed by a Commission Comment. The Comment indicates the change the new sections or revised UPC sections would make in existing California law. The Comment also includes an explanation why the Commission recommends substantive revisions in UPC language.

The significant substantive revisions in the UPC provisions are: (1) the substance of existing California provisions relating to succession of quasi-community property is continued, (2) the intestate share of the surviving spouse in separate property of the decedent is increased, and (3) provision is made for distribution of separate property, as a last resort to prevent escheat, to specified relatives of a predeceased spouse of the decedent. Two of the UPC sections are deleted. The deleted sections are unnecessary because they duplicate other provisions of existing California law which will be retained without change.[81]

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81. The Commission recommends that UPC Section 2-105, which provides for escheat when there is no other taker, not be adopted since the matter is covered in more detail in Probate Code Sections 231 to 236. See also Code Civ. Proc. §§ 1510-1528 (escheat of unclaimed personal property).

    The Commission recommends that UPC Section 2-113, which abolishes dower and curtesy, not be adopted since the matter is covered in the Family Law Act. See Civil Code § 5129 ("[n]o estate is allowed the husband as tenant by courtesy upon the death of his wife, nor is any estate in dower alloted to the wife upon the death of her husband").

ARTICLE II. INTESTATE SUCCESSION AND WILLS

PART 0.5. GENERAL PROVISIONS

Comment. This is a new part which is not contained in the Uniform Probate Code. To avoid renumbering the parts of the Uniform Probate Code, this new part is numbered as "Part 0.5."

405/465

§ 2-001. Portion of community property belonging to surviving spouse and portion belonging to decedent

2-001. Upon the death of a married person, one-half of the community property belongs to the surviving spouse and the other half belongs to the decedent.

Comment. Section 2-001 continues the substance of a portion of former Section 201. The one-half of the community property that belongs to the decedent is subject to the testamentary disposition of the decedent (Section [to be drafted]) and, in the absence of testamentary disposition, goes to the surviving spouse (Section 2-102A).

The Uniform Probate Code contains no provision comparable to Section 2-001, but Section 2-102A of the Uniform Probate Code recognizes by implication that one-half of the community property belongs to the surviving spouse.

405/476

§ 2-002. Portion of quasi-community property belonging to surviving spouse and portion belonging to decedent

2-002. Upon the death of a married person domiciled in this state, one-half of the quasi-community property belongs to the surviving spouse and the other half belongs to the decedent.

Comment. Section 2-002 continues the substance of a portion of former Section 201.5. See also Section [to be drafted] (defining "quasi-community property"). The one-half of the quasi-community property that belongs to the decedent is subject to the testamentary disposition of the decedent (Section [to be drafted]) and, in the absence of testamentary disposition, goes to the surviving spouse (Section 2-102A). The Uniform Probate Code does not recognize the concept of quasi-community property.

Note. The substance of existing Section 201.5 that defines "quasi-community property" will be retained by including in the new statute the following definition of quasi-community property continued from Section 201.5:

(a) "Quasi-community property" includes only the following property:

(1) All personal property wherever situated, and all real property situated in this state, heretofore or hereafter acquired by the decedent while domiciled elsewhere which would have been community property of the decedent and the surviving spouse if the decedent had been domiciled in this state at the time of its acquisition.

(2) All personal property wherever situated, and all real property situated in this state, heretofore or hereafter acquired in exchange for real or personal property, wherever situated, which would have been the community property of the decedent and the surviving spouse if the decedent had been domiciled in this state at the time the property so exchanged was acquired.

(b) As used in this section, personal property does not include, and real property does include, leasehold interests in real property.

405/485

PART I. INTESTATE SUCCESSION

§ 2-101. Intestate estate

2-101. Any part of the estate of a decedent not effectively disposed of by ~~his~~ will passes to ~~his~~ the decedent's heirs as prescribed in the following sections of this ~~Code~~ code .

Comment. Section 2-101 is the same in substance as Section 2-101 of the Uniform Probate Code and supersedes former Section 200.

404/129NZ

§ 2-102A. Intestate share of surviving spouse

~~[Section 2-102A. [Share of the Spouse.]~~

~~The intestate share of the surviving spouse is as follows:~~

~~(1) as to separate property~~

~~(i) if there is no surviving issue or parent of the deceedent, the entire intestate estate;~~

~~(ii) if there is no surviving issue but the deceedent is survived by a parent or parents, the first [$50,000], plus one-half of the balance of the intestate estate;~~

~~(iii) if there are surviving issue all of whom are issue of the surviving spouse also, the first [$50,000], plus one-half of the balance of the intestate estate;~~

~~(iv) if there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of the intestate estate.~~

~~(2) as to community property~~

~~(i) The one-half of community property which belongs to the decedent passes to the [surviving spouse].~~

2-102A. (a) As to community property, the intestate share of the surviving spouse is the one-half of the community property that belongs to the decedent.

(b) As to quasi-community property, the intestate share of the surviving spouse is the one-half of the quasi-community property that belongs to the decedent.

(c) As to separate property, the intestate share of the surviving spouse is as follows:

(1) The entire intestate estate if (A) there is no surviving issue of the decedent or (B) there are surviving issue of the decedent all of whom are issue of the surviving spouse also.

(2) One-half of the intestate estate if there are surviving issue of the decedent one or more of whom are not issue of the surviving spouse.

Comment. Section 2-102A replaces Section 2-102A of the Uniform Probate Code.

Subdivision (a) is the same in substance as a portion of former Section 201. See also Section 2-001 (one-half of community property belongs to decedent). Subdivision (a) is the same in substance as the Uniform Code provision. Community property which passes to the surviving spouse under subdivision (a) is subject to Sections 202 and 203 as it was under prior law.

Subdivision (b) is the same in substance as a portion of former Section 201.5. See also Sections [to be drafted] (defining "quasi-community property") and 2-002 (one-half of the quasi-community property belongs to decedent). No provision comparable to subdivision (b) is found in the Uniform Probate Code since that code does not recognize the concept of quasi-community property.

Subdivision (c) changes prior California law. Under prior law, the surviving spouse received all of the decedent's separate estate only if the decedent died without leaving surviving issue, parent, brother, sister, or decendant of a deceased brother or sister. See former Sections 221 and 223. Subdivision (c) is consistent with the findings of empirical studies which show that most persons want their entire estate to go to their surviving spouse in preference to their children (when they are also the children of the surviving spouse), their parents, or their brothers and sisters. See Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. Bar Foundation Research J. 321, 348-64; Niles, Probate Reform in California, 31 Hastings L.J. 185, 192 n.47

(1979). Giving all of the separate property to the surviving spouse in this situation avoids depriving the surviving spouse of a portion of the decedent's estate which may be required to maintain the surviving spouse during that spouse's lifetime. Administration is expedited and costs are reduced by avoiding the need to determine claims as to the community or separate nature of property and disputes as to the value of separate property. In addition, the expense of establishing and administering court-supervised guardianships for minors who otherwise would receive property of the decedent is avoided. The provision takes into account the legal duty of a parent to support his or her minor children and the reasonable expectation that the surviving spouse will deal fairly with his or her adult children and grandchildren, both during the surviving spouse's lifetime and upon the surviving spouse's death. This is especially true where the adult children devote attention to and show concern for the welfare of the surviving spouse after the death of the decedent.

Subdivision (c) differs from the Uniform Probate Code provision in that the Uniform Code provision gives the first $50,000, plus one-half of the balance, of the separate property to the surviving spouse where the decedent is survived by a parent or parents or by issue all of whom are issue of the surviving spouse also. The Uniform Code provision is not consistent with the desires of most persons and increases the expense and delay of administration because it does not avoid the need to determine whether property is community or separate or the need to value the separate property in order to make the division.

Where there are surviving issue of the decedent one or more of whom are not issue of the surviving spouse, subdivision (c) gives one-half of the separate property to the surviving spouse and Section 2-103 gives the remaining one-half of the separate property to the issue of the decedent (both those who are also the issue of the surviving spouse and those who are not). This provision is consistent with the Uniform Code provision and with the findings of empirical studies which show that most persons want the children to receive a portion of the estate in this situation. See Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. Bar Foundation Research J. 321, 366. The provision is designed to protect children by a prior marriage and their issue who might otherwise not be provided for by the surviving spouse.

Note. The Commission plans to consider in a separate recommendation the extent to which community, quasi-community, and separate property of the decedent should be subject after the decedent's death to support obligations of the decedent that existed during the decedent's lifetime.

31172

§ 2-103. Intestate share of heirs other than the surviving spouse

2-103. The part of the intestate estate not passing to the surviving spouse under Section 2-102A, or the entire intestate estate if there is no surviving spouse, passes as follows:

~~(1)~~ ~~to~~ (a) To the issue of the decedent; if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree, then those of more remote degree take by representation ~~;~~ .

~~(2) If~~ (b) If there is no surviving issue, to ~~his~~ the decedent's parent or parents equally ~~;~~ .

~~(3) If~~ (c) If there is no surviving issue or parent, to the issue of the parents or either of them by representation ~~;~~ .

~~(4) If~~ (d) If there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of the paternal grandparents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation; and the other half passes to the maternal relatives in the same manner; but if there be no surviving grandparent or issue of grandparent on either the paternal or the maternal side, the entire estate passes to the relatives on the other side in the same manner as the half.

(e) If there is no surviving issue, parent or issue of a parent, grandparent or issue of grandparents, but the decedent is survived by issue of a predeceased spouse or by a parent, parents, or issue of a parent of a predeceased spouse:

(1) To the issue of the predeceased spouse; if they are all of the same degree of kinship to the predeceased spouse they take equally, but if of unequal degree, then those of more remote degree take by representation.

(2) If there is no surviving issue of the predeceased spouse, to the predeceased spouse's parent or parents equally.

(3) If there is no surviving issue or parent of the predeceased spouse, to the issue of the parents or either of them by representation.

Comment. Section 2-103 is the same in substance as Section 2-103 of the Uniform Probate Code, except that subdivision (e) has been added.

Since under Section 2-102A all community property in the intestate estate passes to the surviving spouse, and all separate property passes to the surviving spouse unless the decedent leaves issue who are not also issue of the surviving spouse, Section 2-103 will apply only to the decedent's separate property, and only in those situations where the decedent leaves no surviving spouse or leaves a surviving spouse and issue who are not issue of the surviving spouse. See also the Comment to Section 2-102A.

Subdivision (a) is consistent with former Section 222 except that the rule of representation is changed. See Section 2-106 and Comment thereto. Subdivisions (b) and (c) are consistent with former Section

225 except for the new rule of representation. See id. Subdivision (d) supersedes former Section 226 and restricts collateral inheritance to the decedent's grandparents and issue of grandparents, the same as Section 2-103 of the Uniform Probate Code. Under former Section 226, inheritance by blood relatives of the decedent was unlimited, no matter how remote the heir may have been.

Subdivision (e) is not found in the Uniform Probate Code, and is drawn from subdivisions (d) and (e) of former Section 229. The purpose of subdivision (e) is to further the legislative policy against escheat. Cf. Estate of McDill, 14 Cal.3d 831, 836, 537 P.2d 874, 122 Cal. Rptr. 754 (1975) (purpose of former provision). If there is more than one predeceased spouse of the decedent, it is only the relatives of the predeceased spouse most recently married to the decedent who are entitled to take under subdivision (e). See Section 2-103.5.

31175

§ 2-103.5. Definition of "predeceased spouse"

2-103.5. As used in subdivision (e) of Section 2-103, "predeceased spouse" means the predeceased spouse who has been most recently married to the decedent.

Comment. Section 2-103.5 is new. It has no counterpart in the Uniform Probate Code or in prior California law. Section 2-103.5 is to cover the situation where the decedent has two or more predeceased spouses, and makes clear that only the relatives of the predeceased spouse most recently married to the decedent are entitled to take the decedent's intestate estate under subdivision (e) of Section 2-103.

405/602

§ 2-104. Requirement that heir survive decedent for 120 hours

2-104. Any person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for purposes of [homestead allowance, exempt property and] intestate succession, and the decedent's heirs are determined accordingly. If the time of death of the decedent or of the person who would otherwise be an heir, or the times of death of both, cannot be determined, and it cannot be established that the person who would otherwise be an heir has survived the decedent by 120 hours, it is deemed that the person failed to survive for the required period. This section is not to be applied where its application would result in a taking of intestate estate by the state ~~under Section 2-105~~ .

Comment. Section 2-104 is the same in substance as Section 2-104 of the Uniform Probate Code and is a new provision in California law.

Note. The language of Section 2-104 relating to homestead allowance and exempt property is in brackets since the Commission has not yet considered these provisions of the UPC.

405/760

§ 2-105. No taker

~~2-105. If there is no taker under the provisions of this Article, the intestate estate passes to the [state].~~

Comment. Section 2-105 of the Uniform Probate Code is omitted as unnecessary in view of the escheat provisions of Sections 231 to 236.

39296

§ 2-106. Representation

2-106. If representation is called for by this ~~Code~~ code , the estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survive the decedent, each surviving heir in the nearest degree receiving one share and the share of each deceased person in the same degree being divided among his issue in the same manner.

Comment. Section 2-106 is the same as Section 2-106 of the Uniform Probate Code. Section 2-106 changes the former California rule under which distribution was per stirpes unless all surviving descendants were of the same degree of kindred to the decedent. See former Sections 221, 222. Under Section 2-106 the primary division of the estate takes place at the first generation having any living members. This changes the rule of Maud v. Catherwood, 67 Cal. App.2d 636, 155 P.2d 111 (1945).

405/761

§ 2-107. Kindred of half blood

2-107. Relatives of the half blood inherit the same share they would inherit if they were of the whole blood.

Comment. Section 2-107 is the same as Section 2-107 of the Uniform Probate Code and supersedes former Section 254. Under former Section 254, half-blood relatives of the decedent who were not of the blood of an ancestor of the decedent were excluded from inheriting property of the decedent which had come to the decedent from such ancestor. Section 2-107 eliminates this rule and puts half bloods on the same footing as whole blood relatives of the decedent.

§ 2-108. Afterborn heirs

2-108. Relatives of the decedent conceived before ~~his~~ the decedent's death but born thereafter inherit as if they had been born in the lifetime of the decedent.

Comment. Section 2-108 is the same in substance as Section 2-108 of the Uniform Probate Code and supersedes the second sentence of former Section 250. Section 2-108 is consistent with Civil Code Section 29.

405/770

§ 2-109. Parent-child relationship

2-109. If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person ~~,~~ :

~~(1)~~ ~~an~~ (a) An adopted person is the child of an adopting parent and not of the natural parents except that adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and either natural parent.

~~(2)~~ (b) In cases not covered by ~~Paragraph (1)~~ subdivision (a) , a person is the child of its parents regardless of the marital status of its parents and the parent and child relationship may be established under ~~the [Uniform Parentage Act]~~ Part 7 (commencing with Section 7000) of Division 4 of the Civil Code .

Comment. Section 2-109 is the same in substance as Section 2-109 of the Uniform Probate Code and supersedes former Sections 255 and 257. The exception stated in subdivision (a) changes the rule of former Section 257 so that in the case of a stepparent adoption, the adopted child may inherit from or through the adoptive parent and also from or through the natural parent who gave up the child for adoption. The presumption set forth in Civil Code Section 7004 that a man is presumed to be the natural father of a child if he meets the conditions there set forth applies in the context of intestate succession. Cf. Estate of Peterson, 214 Cal. App.2d 258, 29 Cal. Rptr. 384 (1963).

405/771

§ 2-110. Advancements

2-110. If a person dies intestate as to all his or her estate, property which ~~he~~ the decedent gave in his or her lifetime to an heir is treated as an advancement against the latter's share of the estate only

if declared in a contemporaneous writing by the decedent or acknowledged in writing by the heir to be an advancement. For this purpose the property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of death of the decedent, whichever first occurs , unless the declaration or acknowledgment states the value of the property advanced. If the value of the property advanced is stated in the declaration or acknowledgment, that value is conclusive in the division and distribution of the estate . If the recipient of the property fails to survive the decedent, the property is not taken into account in computing the intestate share to be received by the recipient's issue, unless the declaration or acknowledgment provides otherwise.

Comment. Section 2-110 is the same in substance as Section 2-110 of the Uniform Probate Code except for the addition of the portion taken from former Section 1052 concerning the effect of a statement of value in the declaration or acknowledgment. Sections 2-110 and 2-612 supersede former Section 1050.

Section 2-110 is consistent with former law with one exception: Under former Section 1053, if the donee of an advancement predeceased the donor, the advancement was deducted from the shares the heirs of the donee would receive from the donor's estate, while under Section 2-110 the advancement is not charged against the donee's issue unless the declaration or acknowledgment provides otherwise.

405/772

§ 2-111. Debt owed to decedent

2-111. A debt owed to the decedent is not charged against the intestate share of any person except the debtor. If the debtor fails to survive the decedent, the debt is not taken into account in computing the intestate share of the debtor's issue.

Comment. Section 2-111 is the same as Section 2-111 of the Uniform Probate Code and is consistent with California case law. See Estate of Berk, 196 Cal. App.2d 278, 16 Cal. Rptr. 492 (1961).

405/774

§ 2-112. Alienage

2-112. No person is disqualified to take as an heir because ~~he~~ that person or a person through whom he or she claims is or has been an alien.

Comment. Section 2-112 is the same in substance as Section 2-112 of the Uniform Probate Code and is consistent with other provisions of California law. See Cal. Const. Art. 1, § 20; Civil Code § 671.

405/784

§ 2-113. Dower and curtesy abolished

~~2-113. The estates of dower and curtesy are abolished.~~

Comment. Section 2-113 of the Uniform Probate Code is omitted as unnecessary since it duplicates the substance of a provision of the Family Law Act. See Civil Code § 5129 ("[n]o estate is allowed the husband as tenant by courtesy upon the death of his wife, nor is any estate in dower allotted to the wife upon the death of her husband").

405/808

§ 2-114. Persons related to decedent through two lines

2-114. A person who is related to the decedent through ~~2~~ two lines of relationship is entitled to only a single share based on the relationship which would entitle him or her to the larger share.

Comment. Section 2-114 is the same in substance as Section 2-114 of the Uniform Probate Code. Section 2-114 is made necessary by Section 2-109 which creates a possibility that following a stepparent adoption the adopted child could inherit from the same person both as a natural and as an adopted child. See Official Comment to Uniform Probate Code § 2-114.

405/810

DISPOSITION OF EXISTING CALIFORNIA STATUTORY PROVISIONS

Set forth below is the text of the existing Probate Code sections which would be superseded by the Uniform Probate Code provisions on intestate succession. A Comment to each section indicates the UPC provision that would supersede existing language or the reason why the section or a portion thereof is not continued. The Comments are drafted as though the recommended legislation were already enacted. References to the UPC sections are references to the UPC sections as revised by the Commission.

Sections not set forth below have not yet been considered by the Commission. As this study progresses, the Commission will consider what disposition should be made of the remaining sections in Division 2 and elsewhere in the Probate Code relating to intestate succession.

Probate Code § 200 (repealed). Succession defined

200. Succession is the acquisition of title to the property of one who dies without disposing of it by will.

Comment. Former Section 200 is superseded by UPC Section 2-101.

405/827

Probate Code § 201 (repealed). Community property

201. Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of Sections 202 and 203 of this code.

Comment. The portion of former Section 201 that deals with intestate succession is superseded by Section 2-001 and subdivision (a) of UPC Section 2-102A. The portion of former Section 201 that provided that half of the community property "is subject to the testamentary disposition of the decedent" is continued in Section [not yet drafted] (wills). See also Section 20 (separate property disposable by will).

The last portion of former Section 201 relating to the applicability of Sections 202 and 203 is not continued. Sections 202 and 203 are self-executing, and this is made clear in the Comment to UPC Section 2-102A.

405/828

Probate Code § 201.5 (repealed). Quasi-community property

201.5. Upon the death of any married person domiciled in this state, one-half of the following property in his or her estate shall belong to the surviving spouse and the other one-half of such property is subject to the testamentary disposition of the decedent, and, in the absence thereof, goes to the surviving spouse subject to the provisions of Sections 202 and 203:

(a) All personal property wherever situated, and all real property situated in this state, heretofore or hereafter acquired by the decedent while domiciled elsewhere which would have been the community property of the decedent and the surviving spouse if the decedent had been domiciled in this state at the time of its acquisition.

(b) All personal property wherever situated, and all real property situated in this state, heretofore or hereafter acquired in exchange for

real or personal property, wherever situated, which would have been the community property of the decedent and the surviving spouse if the decedent had been domiciled in this state at the time the property so exchanged was acquired.

All such property is subject to the debts of the decedent as provided by law.

As used in this section, personal property does not include and real property does include, leasehold interests in real property.

For purposes of this chapter, and for purposes of Article 3 (commencing with Section 650) of Chapter 10 of Division 3, the property defined in this section shall be known as "quasi-community property."

Comment. Section 201.5 is superseded by Section 2-002 and Section [to be drafted] (defining "quasi-community property").

405/829

Probate Code § 220 (repealed). Succession to separate property

220. The separate property of a person who dies without disposing of it by will is succeeded to and must be distributed as hereinafter provided, subject to the limitation of any marriage or other contract, and to the provisions of Section 201.5 and Division 3 of this code.

Comment. The first portion of former Section 220 is superseded by UPC Section 2-101. [The remainder of this section, following the "subject to" clause, has not yet been considered by the Commission.]

405/831

Probate Code § 221 (repealed). Distribution to surviving spouse and issue

221. If the decedent leaves a surviving spouse, and only one child or the lawful issue of a deceased child, the estate goes one-half to the surviving spouse and one-half to the child or issue. If the decedent leaves a surviving spouse, and more than one child living or one child living and the lawful issue of one or more deceased children, the estate goes one-third to the surviving spouse and the remainder in equal shares to his children and to the lawful issue of any deceased child, by right of representation; but if there is no child of decedent living at his death, the remainder goes to all of his lineal descendants; and if all of the descendants are in the same degree of kindred to the decedent they share equally, otherwise they take by right of representation.

Comment. Former Section 221 is superseded by UPC Sections 2-102A, 2-103, and 2-106.

405/835

Probate Code § 222 (repealed). Distribution to issue where no surviving spouse

222. If the decedent leaves no surviving spouse, but leaves issue, the whole estate goes to such issue; and if all of the descendants are in the same degree of kindred to the decedent they share equally, otherwise they take by right of representation.

Comment. Former Section 222 is superseded by UPC Sections 2-103 and 2-106.

405/841

Probate Code § 223 (repealed). Distribution to surviving spouse and immediate family where no issue

223. If the decedent leaves a surviving spouse and no issue, the estate goes one-half to the surviving spouse and one-half to the decedent's parents in equal shares, or if either is dead to the survivor, or if both are dead to their issue and the issue of either of them, by right of representation.

Comment. Former Section 223 is superseded by UPC Sections 2-102A, 2-103, and 2-106.

405/844

Probate Code 224 (repealed). Distribution to surviving spouse where neither issue nor immediate family

224. If the decedent leaves a surviving spouse and neither issue, parent, brother, sister, nor descendant of a deceased brother or sister, the whole estate goes to the surviving spouse.

Comment. Former Section 224 is superseded by UPC Section 2-102A.

Probate Code § 225 (repealed). Distribution to immediate family where neither issue nor spouse

225. If the decedent leaves neither issue nor spouse, the estate goes to his parents in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to his brothers and sisters and to the descendants of deceased brothers and sisters by right of representation.

Comment. Former Section 225 is superseded by UPC Sections 2-103 and 2-106.

405/850

Probate Code § 226 (repealed). Distribution to next of kin where no spouse, issue, nor immediate family

226. If the decedent leaves neither issue, spouse, parent, brother, sister, nor descendant of a deceased brother or sister, the estate goes to the next of kin in equal degree, excepting that, when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote.

Comment. Former Section 226 is superseded by UPC Section 2-103.

405/852

Probate Code § 227 (repealed). Unmarried minor decedent

227. If the decedent dies under age without having been married, all the estate that came to the decedent by succession from a parent goes in equal shares to the other children of the same parent and to the issue of any other of such children who are dead, by right of representation; or if all the children of such parent are dead, and any of them has left issue, to such issue; and if all the issue are in the same degree of kindred to the decedent, they share equally, otherwise they take by right of representation.

Comment. Former Section 227, which stated one variant of the ancestral property doctrine, is not continued. The ancestral property doctrine is abolished in California. See generally Niles, Probate Reform in California, 31 Hastings L.J. 185, 204 (1979); Evans, Comments on the Probate Code of California, 19 Calif. L. Rev. 602, 614 (1931).

Probate Code § 229 (repealed). Distribution of property received from predeceased spouse; distribution to prevent escheat

229. (a) 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.

(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.

(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.

(d) That portion of the decedent's estate not otherwise subject to this section shall be distributed pursuant to the provisions of this

article, except that if a portion of the decedent's estate would otherwise escheat to the state because there is no relative, including next of kin, such portion of the estate shall be distributed as provided by subdivision (a) along with any portion of the decedent's estate attributable to the decedent's predeceased spouse.

(e) If any of the property subject to the provisions of this section would otherwise escheat to this state because there is no relative, including next of kin, of one of the spouses to succeed to such portion of the estate, such property shall be distributed in accordance with the provisions of Section 296.4.

Comment. Subdivisions (a), (b), and (c) of former Section 229, which stated two variants of the ancestral property doctrine, are not continued. The ancestral property doctrine is abolished in California. See generally Niles, Probate Reform in California, 31 Hastings L.J. 185, 206-08 (1979); Reppy & Wright, California Probate Code § 229: Making Sense of a Badly Drafted Provision For Inheritance by a Community Property Decedent's Former In-Laws, 8 Community Prop. J. 107, 135 (1981).

Subdivisions (d) and (e) are superseded by subdivision (e) of UPC Section 2-103.

405/857

Probate Code § 230 (repealed). Distribution of property received from predeceased spouse

230. If there is no one to succeed to any portion of the property in any of the contingencies provided for in the last two sections, according to the provisions of those sections, such portion goes to the next of kin of the decedent in the manner hereinabove provided for succession by next of kin.

Comment. Former Section 230 is superseded by UPC Sections 2-103 and 2-106.

405/858

Probate Code § 250 (repealed). Right of representation defined; posthumous child

250. Inheritance or succession "by right of representation" takes place when the descendants of a deceased person take the same share or right in the estate of another that such deceased person would have taken as an heir if living. A posthumous child is considered as living at the death of the parent.

Comment. The first sentence of former Section 250 is superseded by UPC Section 2-106. The second sentence is superseded by UPC Section 2-108.

405/859

Probate Code § 254 (repealed). Kindred of the half blood

254. Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance came to the intestate by descent, divise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor must be excluded from such inheritance in favor of those who are.

Comment. Former Section 254 is superseded by UPC Section 2-107.

405/860

Probate Code § 255 (repealed). Parent and child relationship

255. (a) The rights of succession by a child, as set forth in this division, are dependent upon the existence, prior to the death of the decedent, of a parent and child relationship between such child and the decedent.

(b) The rights of succession by issue through a deceased child of a decedent, as set forth in this division, are dependent upon the existence, prior to the death of the deceased child, of a parent and child relationship between such issue and a deceased child and upon the existence prior to the death of the decedent or the deceased child of a parent and child relationship between such deceased child and the decedent.

(c) The rights of succession to a child's estate by a parent and all persons who would take an intestate share of the decedent's estate through such parent, as set forth in this division, are dependent upon the existence, prior to the death of the decedent, of a parent and child relationship between the parent and the decedent child.

(d) For purposes of this division, a parent and child relationship exists where such relationship is (1) presumed and not rebutted pursuant to, or (2) established pursuant to, Part 7 (commencing with Section 7000) of Division 4 of the Civil Code.

Comment. Former Section 255 is superseded by UPC Section 2-109.

Probate Code § 257 (repealed). Adopted child

257. An adopted child shall be deemed a descendant of one who has adopted him, the same as a natural child, for all purposes of succession by, from or through the adopting parent the same as a natural parent. An adopted child does not succeed to the estate of a natural parent when the relationship between them has been severed by adoption, nor does such natural parent succeed to the estate of such adopted child, nor does such adopted child succeed to the estate of a relative of the natural parent, nor does any relative of the natural parent succeed to the estate of an adopted child.

Comment. Former Section 257 is superseded by UPC Section 2-109.

405/862

Probate Code § 1050 (repealed). Gift before death

1050. A gift before death shall be considered as an ademption of a bequest or devise of the property given; but such gift shall not be taken as an advancement to an heir or as an ademption of a general legacy unless such intention is expressed by the testator in the grant or otherwise in writing, or unless the donee acknowledges it in writing to be such.

Comment. Former Section 1050 is superseded by UPC Sections 2-110 (advancements) and [section comparable to UPC § 2-612, ademption by satisfaction, not included in this draft].