Study L-654 7/19/84

Memorandum 84-70

Subject: Study L-654 - Probate Law and Procedure (Inheritance of Property Attributable to Decedent's Predeceased Spouse)

Under former Section 229 of the Probate Code, if an intestate decedent died without spouse or issue, the portion of the decedent's estate attributable to the predeceased spouse passed back to relatives of the predeceased spouse. This rule was one of four variants of the ancestral property doctrine in California, pursuant to which inheritance was based on the source of the property rather than the relationship of possible successors to the decedent.

The Commission recommended abolishing all aspects of the ancestral property doctrine in its wills and intestate succession recommendation. The Commission was persuaded by the overwhelming weight of scholarly opinion that the ancestral property doctrine was undesirable both on theoretical and practical grounds. See, e.g., Niles, Probate Reform in California, 31 Hastings L.J. 185 (1979) (excerpt attached to this memorandum as Exhibit 2); 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 (1981) (attached to this memorandum as Exhibit 3); Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. B. Foundation Research J. 321 (excerpt attached to this memorandum as Exhibit 4). However, a firm that searches for hard-to-find heirs objected to the repeal of Section 229, so as a legislative compromise at the Senate hearing on Assembly Bill 25 the Executive Secretary agreed to restore a limited ancestral property doctrine in Section 6402.5 (attached as Exhibit 1).

At the April 1984 meeting, the Commission asked the staff to prepare a memorandum discussing whether the limited ancestral property rule of Section 6402.5 should be repealed, expanded, or otherwise revised. This question is discussed below.

Ancestral Property Doctrine Generally

The argument in favor of the ancestral property doctrine of former Section 229 is that it is fair to relatives of a predeceased spouse by permitting them to inherit former property of the predeceased spouse

ahead of all relatives of the decedent except a present spouse and issue of the decedent. The Commission thought the children of a predeceased spouse (the decedent's former stepchildren) had the most compelling claim, but the Commission decided to deal with this by giving issue of a predeceased spouse the right to inherit ahead of the decedent's relatives more remote than grandparents and the issue of grandparents, without regard to the source of the property. See Section 6402. If the decedent dies without blood relatives, the parents and issue of parents of a predeceased spouse may inherit as a last resort to prevent escheat. Also, it should be remembered that the issue of a predeceased spouse will have inherited a portion of the separate property of the predeceased spouse or, if the predeceased spouse left a will, will have likely been beneficiaries under the will.

The arguments against the ancestral property doctrine are that it introduces enormous complexity into administration of estates and is inconsistent with what the average person would do if making a will. The doctrine creates complexity by requiring that the property in the estate be sorted out so that ancestral property may be identified and passed by a special rule of succession. Niles, supra at 206. Difficult problems of tracing, commingling, and apportionment often arise. Reppy & Wright, supra at 134. See also Estate of Westerman, 68 Cal.2d 267, 437 P.2d 517, 66 Cal. Rptr. 29 (1968) (discussing tracing requirement). Considerable expense to the estate and court time may be required to resolve these issues. The doctrine also complicates land titles. It may fairly be concluded that whatever benefits are achieved by the ancestral property doctrine, they are not worth the legal headaches. See Reppy & Wright, supra at 108.

Modern intestate succession statutes pass the property according to the relationship of possible successors to the decedent without regard to the source of the property. Niles, supra at 203. This is because the intestate succession law is a kind of statutory will substitute, and should therefore correspond to the manner in which the average decedent would dispose of the property by will. The relationship of possible beneficiaries to the testator would likely be more important than the source of the property.

States that once had some part of the ancestral property doctrine have tended to limit or abandon it. Niles, supra at 203 n.114. The staff has examined the intestate succession law of all the other states,

and the only state other than California which has a special rule of succession for property received from a predeceased spouse is Washington. Under Washington law, the property of an intestate decedent that came from a predeceased spouse passes back to issue of the predeceased spouse who are not also issue of the decedent if all the following conditions are met: (1) The decedent took "all or substantially all" of the property of the predeceased spouse, (2) the property came to the decedent by will or inter vivos gift (but not by intestacy), (3) the decedent dies without heirs so that, but for the ancestral property provision, the property would escheat.

The special rule in California and Washington for property received from a predeceased spouse involve a type of "ancestral" property doctrine unknown at common law. Niles, supra at 204. This may be one reason why no other states have such a rule.

Limited Ancestral Property Rule of Section 6402.5

Section 6402.5 of the new law is more limited than was former Section 229. First, Section 6402.5 only applies to real property, while former Section 229 applied both to real and personal property. Second, Section 6402.5 applies only if the decedent's predeceased spouse died not more than 15 years before the decedent; there was no comparable limitation in former Section 229.

Although the limitations contained in Section 6402.5 will result in the ancestral property rule being applied less frequently than under former law, the rule has the same drawbacks as under former law (too complex to administer economically, and inconsistent with decedent's likely testamentary plan). Also, Section 6402.5 presents some unanswered questions, such as how to treat improvements on the property after the death of the predeceased spouse. Difficult valuation problems may arise, and the section may complicate land titles.

There is less need for an ancestral property rule under the new law than under the old law because the issue of a predeceased spouse have a higher priority to take by intestacy than they had under old law.

Policy Alternatives

Possible alternatives include the following:

(1) Abolish the ancestral property doctrine completely by repealing Section 6402.5 without changing the priority of issue of a predeceased spouse under the general intestate succession law.

(2) Abolish the ancestral property doctrine completely by repealing Section 6402.5, but move issue of a predeceased spouse up the priority ladder for inheritance of the decedent's property generally. Such issue could be given priority ahead of the decedent's grandparents and issue of grandparents but remain behind the decedent's parents and issue of parents. (The Commission has previously rejected giving a higher priority to issue of a predeceased spouse.)

(3) Keep Section 6402.5 in its present form while experience is gained under the new law.

The staff recommends alternative (1).

Respectfully submitted,

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EXHIBIT 1

PROBATE CODE § 6402.5

§ 6402.5. Predeceased spouse; portion of decedent's estate attributable to decedent's predeceased spouse

(a) If the decedent had a predeceased spouse who died not more than 15 years before the decedent and there is no surviving spouse or issue of the decedent, the portion of the decedent's estate attributable to the decedent's predeceased spouse passes as follows:

(1) If the decedent is survived by issue of the predeceased spouse, to the surviving 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 those of more remote degree take by representation.

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

(3) If there is no surviving issue or parent of the predeceased spouse but the decedent is survived by issue of a parent of the predeceased spouse, to the surviving issue of the parents of the predeceased spouse or either of them, the issue taking equally if they are all of the same degree of kinship to the predeceased spouse, but if of unequal degree those of more remote degree take by representation.

(4) If the decedent is not survived by issue, parent, or issue of a parent of the predeceased spouse, to the next of kin of the decedent in the manner provided in Section 6402.

(5) If the portion of the decedent's estate attributable to the decedent's predeceased spouse would otherwise escheat to the state because there is no kin of the decedent to take under Section 6402, the portion of the decedent's estate attributable to the predeceased spouse passes to the next of kin of the predeceased spouse who shall take in the same manner as the next of kin of the decedent take under Section 6402.

(b) For the purposes of this section, the "portion of the decedent's estate attributable to the decedent's predeceased spouse" means all of the following property in the decedent's estate:

(1) One-half of the community real property in existence at the time of the death of the predeceased spouse.

(2) One-half of any community real 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, or devise.

(3) That portion of any community real 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) Any separate real property of the predeceased spouse which came to the decedent by gift, descent, or devise of the predeceased spouse or which vested in the decedent upon the death of the predeceased spouse by right of survivorship.

(c) For the purposes of this section, quasi-community real property shall be treated the same as community real property.

(d) For the purposes of this section:

(1) Relatives of the predeceased spouse conceived before the decedent's death but born thereafter inherit as if they had been born in the lifetime of the decedent.

(2) A person who is related to the predeceased spouse through two lines of relationship is entitled to only a single share based on the relationship which would entitle the person to the larger share.

(Added by Stats.1983, c. 842, § 55.)

EXHIBIT 2

Extract from Niles, Probate Reform in California,
31 Hasting L. J. 185, 203-208

Succession Based on Source

While modern succession statutes provide a scheme of inheritance based on the relationship of possible successors to the decedent, older codes provide for the return of some real property to the blood line of a former owner. 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.[113] Inheritance based on the source of title has disappeared from modern codes[114] but, oddly, is retained in several sections of the CPC.

The first section, CPC section 227, was part of the Wills Act of 1850 and provides that if an unmarried minor child dies and leaves an estate acquired by succession from a deceased parent, such property passes to the other children of the deceased parent, or their issue, and not to the surviving parent[115] who normally would inherit under CPC

113. ATKINSON, *supra* note 30, at 77-81; Simes, *Ancestral and Non-Ancestral Realty under the Ohio Statutes of Descent*, 2 U. CIN. L. REV. 387 (1928).

114. *See Model Probate Code, supra* note 5, § 22, Comment. Neither the MPC nor the UPC has any remnant of the doctrine. States that once had some part of the doctrine tend to limit or abandon it. *See, e.g.* OHIO REV. CODE ANN. § 2105.01 (Page 1976). *See also* In re Costello's Estate, 147 Misc. 629, 265 N.Y.S. 905 (Sur. Ct. 1933), pointing out that former § 90 of the Decedent Estate Law, similar to CPC § 254, was abolished by § 81 of the Decedent Estate Law in 1929. N.Y. DECEDENT ESTATE LAW (repealed 1967), *reprinted in* N.Y. EST., POWERS & TRUSTS LAW app. 1 (McKinney 1967).

115. CAL. PROB. CODE § 227 (West 1956); *see* Evans, *supra* note 24, at 613-14.

section 221. The policy behind CPC section 227 makes little sense. Minor heirs usually would need a guardian to manage such estates, burdening them with the attendant expense and inconvenience. Even though the section is difficult to defend,[116] it remains in the code.

The policy concerning succession by half-bloods has changed over the last century. Modern codes treat half-bloods the same as full bloods.[117] There have been times, however, when half-bloods have had no rights, have received half portions, or have been in a class below full bloods of the same degree.[118] CPC section 254 provides that half-bloods take equally with full bloods, except that where property has been acquired from an ancestor, half-bloods not of the blood of the ancestor yield to relatives of an equal degree who are of the blood of the ancestor. This section is patently disfavored by the courts and has been restricted by judicial legislation to particular real property derived from the ancestor.[119] Even as restricted the section is anachronistic and sometimes is impossible to apply logically.[120]

The sections of the CPC which have caused the greatest confusion and the most litigation are those which attempt to alter ordinary succession when the intestate decedent has left property formerly owned by a predeceased spouse.[121] These sections involve a type of "ancestral property doctrine" unknown at common law.

The original section, the predecessor of CPC section 228, was added in 1880. As explained by Professor W.W. Ferrier, Jr.:

116. The draftsman of the 1931 revision saw no reason for the section, but had no authority to make substantive changes. CAL. PROB. CODE § 221 (West 1956); *see* Evans, *supra* note 24, at 613. See note 24 *supra*.

117. *Model Probate Code*, *supra* note 5, § 24, Comment.

118. *Cf.* ATKINSON, *supra* note 30, at 74 (some jurisdictions still treat half-bloods differently than full bloods).

119. Estate of Ryan, 21 Cal. 2d 498, 133 P.2d 626 (1943); *see* 31 CALIF. L. REV. 334 (1943). The California Court of Appeal has recently declined an invitation to reexamine the decision in *Ryan*. Estate of Hoegler, 82 Cal. App. 3d 483, 147 Cal. Rptr. 289 (1978).

120. *See, e.g.*, *In re* Nidever, 181 Cal. App. 2d 367, 5 Cal. Rptr. 343 (1960). The decedent was survived by a half-brother and the children of a deceased sister. Since the property had come from the decedent's mother, the sister, had she lived, would have taken to the exclusion of the half-brother. The court, noting the conflict with § 253, which states brothers are related in the second degree and nephews in the third degree, gave half to the half-brother and half to the sister's children by representation. *Id.* at 385-86, 5 Cal. Rptr. at 354-55.

121. CAL. PROB. CODE §§ 228-229 (West Supp. 1979), § 230 (West 1956). While this Article was at press, CPC §§ 228 and 229 were amended by the California legislature. 1979 Cal. Legis. Serv. ch. 298. The sections were clarified but remain subject to the basic criticisms discussed herein. Section 229(c), formerly § 229(b), is more clearly a partial reversion to, and extension of, the ancestral property doctrine, because the section is not limited to separate property attributable to a predeceased spouse.

> Its effect was simply this: if the property had been community property of the decedent and a predeceased spouse and the decedent was a widow or widower who had no relatives, instead of the property escheating to the state, as it had theretofore, it was provided that it should go to certain designated relatives of the predeceased spouse.[122]

In 1905, legislation extended the coverage of the section to include the separate property of the predeceased spouse as well as the community property of the decedent and the predeceased spouse.[123] The sections that have evolved, frequently amended and often litigated, have proved to be, as Professor Ferrier said, "productive of complexities, anomalies and injustices in the law of descent."[124]

Present section 228 relates to the community property of the decedent and the predeceased spouse that had passed to the decedent by survivorship or by other specified means. If the decedent dies intestate with neither spouse nor issue surviving, such property goes to the issue of the prior marriage, or if none, one half to the parents of the decedent or their descendants by representation and the other half to the parents of the predeceased spouse or their descendants by representation. Section 228, in conjunction with sections 230 and 296.4, provides for various alternatives if the predeceased spouse left no parents or their descendants but the decedent has left blood relatives, however remote.[125] On the other hand, relatives of the predeceased spouse, more remote than parents and their descendants, might take if the decedent has no blood relatives.[126]

Section 229 concerns the predeceased spouse's separate property that has been acquired by the decedent. If the decedent dies intestate, leaving neither spouse nor issue, such property goes to the issue of the prior marriage, or if none, to the predeceased spouse's parents or their descendants. If there are no descendants of parents, the property goes to the blood relatives of the decedent, or if none, to relatives of the predeceased spouse more remote than the issue of parents.[127]

The following extraordinary subsection, section 229(b), was added in 1970 and provides that if the decedent leaves neither issue nor spouse, that portion of the decedent's intestate estate acquired by gift,

122. Ferrier, *Rules of Descent under Probate Code Sections 228 and 229, and Proposed Amendments*, 25 CALIF. L. REV. 261, 261 (1937) [hereinafter cited as Ferrier] (discussing former § 1386(9) of the California Civil Code).

123. Cal. Stat. 1905, ch. 949, § 1386(8), at 608.

124. Ferrier, *supra* note 122, at 261.

125. *See, e.g.*, Estate of McDill, 14 Cal. 3d 831, 537 P.2d 874, 122 Cal. Rptr. 754 (1975).

126. CAL. PROB. CODE § 228 (West Supp. 1979).

127. *Id.* § 229(c).

descent, devise, or bequest from a parent or a grandparent, goes to the parent or grandparent, or if dead, "in equal shares to the heirs of such deceased parent or grandparent."[128] This crudely drafted, obscure subsection may be a revival of the ancestral property doctrine in modern dress.[129] The subsection is not limited expressly to property acquired from or through a predeceased spouse; it applies to personal property as well as to real property.[130] Taken literally, this subsection means that whenever a person dies intestate, leaving neither spouse nor 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.

These sections relating to the property of a predeceased spouse are based on three implicit premises: (1) That if there are no blood relatives of the surviving spouse, the property acquired from the predeceased spouse should go to relatives by affinity rather than escheat to the state. This was the original purpose of the section.[131] (2) That the general rule of intestate succession that all community property passes to the surviving member of the community may be unfair to some of the predeceased spouse's relatives, especially to issue by a prior marriage.[132] (3) That property acquired from a parent or a grandparent

128. *Id.* § 229(b). While this Article was at press, § 229(b) was amended and is now designated § 229(c). The amendment did not eliminate the ancestral property doctrine attributes of the section. See note 121 *supra*. Section 229(b) has recently been before the California Court of Appeal in a case of first impression, Estate of Hoegler, 82 Cal. App. 3d 483, 147 Cal. Rptr. 289 (1978). The facts squarely raised the question of whether § 229(b) was restricted to a case involving property acquired from a predeceased spouse, or was applicable to any separate property acquired directly from a parent or grandparent. The court properly held that §§ 228 and 229 should be interpreted together, but decided the case on a strained definition of "separate property" as used in § 229(a) and (b), instead of deciding that § 229(b) was restricted to property acquired from a predeceased spouse.

The court clearly thought that §§ 228 and 229(a) and (b) should be construed together but by its narrow holding left open the most important question: Assume that a parent or grandparent makes a direct gift of separate property to a child or grandchild; must that property, real or personal, pass by a special rule of succession, *i.e.*, § 229(b), and not by the general rule of §§ 221-226? *See* CAL. PROB. CODE §§ 221-226, 228, 229 (West 1956 & Supp. 1979).

129. The text refers to "gift, descent, devise or bequest from the separate property of a parent or grandparent." *See* CAL. PROB. CODE § 229(b) (West Supp. 1979); Estate of Hoegler, 82 Cal. App. 3d 483, 491, 147 Cal. Rptr. 289, 294 (1978).

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

131. Ferrier, *supra* note 122, at 261.

132. See notes 40, 63 & accompanying text *supra*.

should, in the absence of a spouse or issue of the intestate, return to the ancestral line of descent.

The first premise is quite rational; to avoid escheat, the property of the second spouse to die might well descend to the relatives of the first spouse if the second spouse leaves no blood relatives. Other states have such statutes, although they are more simply stated.[133]

The second premise would be better served by reexamining the basic rule of intestate succession governing the devisable half of community property on the death of the first spouse, with the goal of protecting children of a prior marriage. As suggested earlier, the rule of succession in some other community property states might be preferable to the relevant CPC sections.[134]

The third premise, that ancestral property should be restored to the blood line, is anachronistic. As suggested earlier, the revival of the ancestral property doctrine, as well as its extension to personal property, is contrary to all current scholarly opinion.[135]

The primary reason for the elimination of sections 228 and 229 is that the justifiable purposes of the sections can be accomplished more simply. These sections, persistently amended and enlarged, have become too complex and difficult to apply. Any attempt through intestate succession statutes to create the refined and esoteric distinctions found in sections 228 and 229 is bound to create uncertainty and may lead to capricious results.[136] Further, these sections can produce some quite

133. *See, e.g.*, MO. ANN. STAT. § 474.010(3) (Vernon 1956); OHIO REV. CODE ANN. § 2105.06 (Page 1976).

134. See text accompanying notes 60-63 *supra*.

135. *See Model Probate Code, supra* note 5, § 22, Comment.

136. Ferrier, *supra* note 122, at 263-71. Prior to 1937 there was a provision for the issue of such a subsequent marriage but no provision for a subsequent spouse. The amendments which followed Professor Ferrier's criticisms have introduced new injustices by favoring the subsequent spouse or the issue of such spouse, even if by prior marriage, over the children of the predeceased spouse by prior marriage. Estate of Lima, 225 Cal. App. 2d 396, 37 Cal. Rptr. 404 (1964).

Other capricious consequences are also possible. Assume that A had a son B by his first wife and that later A married C and they had a son D. When A died the community property owned by A and C went to C under CPC § 201, and the separate property of A was devised by A to C. When C died, intestate, she was survived by her stepson B and her son D. All of the property acquired from A would pass to her son D and none to her stepson B because C was survived by issue. The result would be the same if D had been the child of C by an earlier marriage, Estate of Lima, 225 Cal. App. 2d at 398-99, 37 Cal. Rptr. at 405, or by a marriage after A's death. Or had C married E late in life and was survived only by her stepson B and by her new husband E, E would have taken all.

If the second wife C died intestate without issue and without a spouse, even though she had a sister, F, all of the former community property and all of the separate property would go to her stepson B and none to her sister F.

unexpected consequences when there are gifts to heirs under wills and trusts.[137] Assume that a testatrix acquired property from her predeceased husband and at her death devised it "to my heirs at law." Assume further that she was survived by a sister and by a stepson, her husband's child by a prior marriage. The testatrix probably would prefer that her sister take under her will but her "heir" under section 229 is her stepson. The plight of the stepchild, especially when in an *in loco parentis* relationship, certainly deserves attention but not in the oblique and partial manner of these sections.[138] Finally, sections 228 and 229 have caused difficult problems when applied to property acquired in common law states.[139]

CPC Division II, and especially Chapter 2 (Separate Property) cannot be saved by mere patchwork. The time has come to repeal the present sections and to start over. The UPC sections are clearly superior, but even these sections well might be improved to better protect the dependents of a decendent.[140]

If, however, C were survived only by A's nephew G and by her sister F, all of the separate property and half of the community property would go to G and only half of the community property would pass to her sister F.

If, however, C were survived only by A's cousin, and by her cousin, all would go to her cousin. Estate of McDill, 14 Cal. 3d 831, 537 P.2d 874, 122 Cal. Rptr. 754 (1975).

If, however, C were survived only by A's cousin, and no blood relatives of her own, all would go to A's cousin.

For even more complex examples, see Estate of Simmons, 64 Cal. 2d 217, 411 P.2d 97, 49 Cal. Rptr. 369 (1966); Estate of Westerman, 62 Cal. Rptr. 449 (1967), *vacated*, 68 Cal. 2d 267, 66 Cal. Rptr. 29 (1968). See cases cited notes 137-38 *infra*.

137. *See* Estate of Page, 181 Cal. 537, 185 P. 383 (1919); 7 HASTINGS L.J. 336 (1956). *See also* Estate of Taff, 63 Cal. App. 3d 319, 133 Cal. Rptr. 737 (1976).

138. In Estate of Lima, 225 Cal. App. 2d 396, 37 Cal. Rptr. 404 (1964), the court said: "Stepchildren simply have not been embraced within the meaning of the word 'issue' as used in Probate Code section 222. . . . While the status of adopted and illegitimate children has been dealt with by the Legislature . . . the status of stepchildren has not been disturbed, and we must take the law as we find it." *Id.* at 398-99, 37 Cal. Rptr. at 405 (citations omitted). *See* Note, *Stepchildren and In Loco Parentis Relationships*, 52 HARV. L. REV. 515 (1939).

139. For example, assume that H and W accumulated an estate in New York which would have been community property if so acquired in California. After H's death, W migrated to California having succeeded to the property. When W later died intestate in California, H's son by a prior marriage was entitled to take the property in preference to the blood relatives. Estate of Perkins, 21 Cal. 2d 561, 134 P.2d 231 (1943) (4 to 3 decision). *See* Currie, *Justice Traynor and the Conflict of Laws*, 13 STAN. L. REV. 719, 733-42 (1961); Schreter, *Quasi-Community Property in the Conflict of Laws*, 5 CALIF. L. REV. 206, 238 (1962); Note, *Applicability of California Probate Code Sections 228 and 229 to Property Acquired under Laws of Jurisdictions Not Recognizing Community Property*, 31 CALIF. L. REV. 331 (1943).

140. *See* Note, *Stepchildren in Loco Parentis Relationships*, 52 HARV. L. REV. 515 (1939); see note 87 & accompanying text *supra*.

California Probate Code §229: Making Sense of a Badly Drafted Provision for Inheritance By a Community Property Decedent's Former In-laws

WILLIAM A. REPPY, JR.*
and
PETER G. WRIGHT**

Even under recent 1980 amendments, California's law of succession continues to discriminate in favor of persons related by marriage to a decedent who was a surviving spouse and who died intestate and without issue—and to the disadvantage of the intestate's own blood relatives. The authors call for outright repeal of §229 so as to eliminate all traces of ancestral property succession in California. If ancestral property succession is to be retained, then a complete rewrite of the section is in order.

A few years ago in California, Carl shot his wife Ann and then shot himself. Carl died a few minutes before Ann 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

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

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, sought in 1979 to amend the governing statute.[5] However, instead of moving towards the more common American approach to intestate succession in which the decedent's *own* 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 holds, 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 other spouse's (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

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.

6. 1980 Cal. Stats. ch. 119, §2.

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.

Terminology

Section 229 and its predecessors provide for inheritance by an intestate's stepchildren and more remote issue of the intestate's predeceased spouse; by the intestate's former mother-in-law and father-in-law ("former" here indicates the marriage between the 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) 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 the intestate—to inherit in some cases to the exclusion of the 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. (As will be seen, today the in-laws can inherit only if there are no such surviving claimants.) To avoid the 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.

7. ATKINSON, *supra* note 4, at p. 4.

History of California's In-Law Inheritance Scheme[8]

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 S-2's former community property? Probably the answer is that the legislature had in mind the fact situation—surely the most common—where S-2 was a surviving wife rather than a surviving 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

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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 §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).

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.

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 who are 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 grandchildren

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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 the intestate's former mother-in-law.

14. 1905 Cal. Stats. ch. 449, §2, p. 608. It amended the in-laws inheritance provision in Civil Code §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 and 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.

and S-1's mother, a gradual system of inheritance within S-1's family tree would favor the mother; a parentelic system, the grandchild.)[15]

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 see,[16] 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 S-2's 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

15. *See* ATKINSON. *supra* note 4, at pp. 44-49, 68-73.
16. *See* text accompanying notes 24-26.
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.

inheritance.[18] Those that did generally confined it to real property, as had common law England.[19] It was particularly 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 civil 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 viewed as a co-owner.

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,

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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-laws inheritance provisions now appeared in two subsections of former Civil Code §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.

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."

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(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 §§225 (exhausting the parentela headed by intestate's parents) and 226 (reverting to a system 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.

(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 that 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 come 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 the "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.

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 surviving second husband inherited to the exclusion of all in-laws. This gave the quoted passage a construction that implemented "will substitute" theory of succession.

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.

That is, S-2 would have wanted her surviving 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 California 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 closeness of the relationship to [the intestate] test of succession.[26]

The next year, 1931, the legislature amended the in-laws inheritance provisions to eliminate the ambiguity and codify the *McArthur* holding.[27]

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.[28] 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.

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26. 210 Cal. at 444, 445.

27. 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.

28. *See* the final quoted paragraph of footnote 21.

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).[29] 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 previously had 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* community 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*[30] 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[31]), and hence its community status did not exist at the critical point for classification.

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29. 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 rights 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.

30. 23 Cal. App. 2d 16, 71 P.2d 1117 (1937).

31. 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).

Contrary authority, *Estate of Rattray*,[32] reached the opposite result, but on a most unusual theory: that the language "by gift, descent, devise, or bequest" in section 229[33] 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[34] 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 that 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 to inherit a half interest. Although the *Rattray* court[35] 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 interest. 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 property of S-2, not just the donor S-1's half.

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32. 82 P.2d 625 (Cal. App. 1938), superseded 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 §228.

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

33. *See* footnote 27, *supra*.

34. 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 §228 broadly to effectuate ancestral property principles.

35. Both the court of appeal and supreme court in *Rattray* seem to have overlooked this point.

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. A literal and technical reading of each word in sections 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*,[36] decided in 1946. 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,[37] 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

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36. 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 principle 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 had $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 divorce like quasi-community property. *Compare* footnotes 68-72 and accompanying text, *infra*.

37. *See* text accompanying footnotes 21-23, *supra*.

oversight left the issue of S-1 in a preferred position vis-a-vis other kindred of S-1 that could not be justified 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."[38] It came to her as third party beneficiary under a contract, no completed inter vivos gift ever having been made by S-1.[39] 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, assume 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.

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 to

38. *See* footnote 29, *supra*.
39. *See* footnote 31, *supra*.

such interests as to which their relative, S-1, was the source (as between the two spouses).[40] 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."[41]

(Discussion of the ambiguities arising from the poorly drafted attempt to define this class of property is postponed.[42]) 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-1976 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

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40. 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, as opposed to S-2, was the *source* 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.

41. 1979 Cal. Stats. ch. 298, §2. 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 44, *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.

42. *See* text accompanying footnotes 46-52.

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, under the 1979 revision, would 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.[43] *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 sections 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."

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 was vested in the decedent upon the death of the predeceased spouse by right of survivorship.[44]

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43. 1980 Cal. Stats. ch. 136, §2. 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.

44. Enacted by 1979 Cal. Stats. ch. 298 §2.

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.[45]

Subsection (4) operates in the same manner if the probate homestead set aside to 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 California Supreme Court has repeatedly declared that the right of survivorship associated with joint tenancy cannot coexist with community ownership.[46] 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.[47] (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.[48])

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

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45. 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 40, *supra*.

46. *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).

47. 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).

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

ship in some asset in which S-1 has an "incident of ownership."[49] 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 the 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 S-2, there will not have been an inter vivos "gift."[50] 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.

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

49. *See* text preceding footnote 44, *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).
50. Estate of Castagnola, 68 Cal. App. 732, 230 P. 188 (1924).

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"[51] 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 of 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 drafters first wrote subsection (1)—intending "in existence" to refer to the assets 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 drafters 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 drafters 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 drafters 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.

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51. *See* text preceding footnote 44, *supra*.

In any event, the *Abdale* approach[52] 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 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

52. The difficulty of meshing subsections (b)(1) and (2) has 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, means 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 29 for the location in the 1939 version of section 228 of "belonged 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) is sufficiently muddied as to permit the courts to adopt an interpretation that effectuates 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 §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*."

in the community policy would plainly fall within subsection (1) under the interpretation proposed; the half interest referred to being his.

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.[53] 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.[54]

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 her death intestate. Suppose S-1 had no issue surviving S-2 but had a mother and issue of a deceased father. The 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, the 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 the 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

53. 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).
54. 1979 Cal. Stats. ch. 298 §2.

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.[55] 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 her a farm that was their community property.[56] The ancestral property theory behind subsection (c) should require that 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 her 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 the 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 the 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 §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 §§225 and 226, which provides 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 pos-

55. We obviously consider Estate of Hoegler, 82 Cal. App. 3d 487, 147 Cal. Rptr. 289 (1978), an erroneous decision in its 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.

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

sible from 1970 through 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 that S-2 received an inter vivos gift, a devise, or a bequest directly from S-1's parents or grandparents. However, subsection (c) also envisions S-2 as 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 necessarily 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 an item of separate property to S-1 by gift or succession who then passes it by gift or succession 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.

Other Problems Raised by Section 229

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, S-2 will keep the asset[57] when the couple are divorced. When she later dies intestate, do her former in-laws take all or half as heirs under section 229? Or, notwithstanding they are divorced, S-1 may devise or be-

57. 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 §4800(a).

queath 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[58]). 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 cuts 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.[59]

In any event, if California is to retain a scheme of in-law inheritances, 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).

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.[60] 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.[61] 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 case law permits a surviving putative spouse to inherit the decedent's half of what would have been community property had the marriage been valid[62] but denies inheritance of any part of decedent's separate property (which would not have been

58. 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 100 percent of it—not the normal 50 percent in the case of community property—because at divorce he "bought out" his former wife's interest.

See cases cited at footnote 23, *supra*.

60. Estate of Foy, 109 Cal. App.2d 329, 240 P.2d 685 (1952); Estate of Vargas, 136 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).

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

62. 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).

community had the marriage been valid).[63] 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 case law treating the putative spouse as "heir" of what would have been community property is based on civil law principles,[64] it would recognize heirship claims against S-2[65] 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 benefit 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.

Marvinizers

One party to a *Marvin* relationship[66] (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

63. Estate of Levine, 50 Cal. App. 3d 572, 123 Cal. Rptr. 445 (1975).

64. *See* note 60 *supra* and DE FUNIAK & VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY §§56, 56.2 (2d ed. 1971); REPPY, COMMUNITY PROPERTY IN CALIFORNIA 280-287 (1980).

65. 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.

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

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.[67] 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 improbable 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.

Quasi-Community Property

Suppose, while married and domiciled in a non-community-property jurisdiction, S-1 acquires 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.[68] It is then called quasi-community property.[69] At the death of S-1 while married and domiciled in California, S-2 will usually

67. *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 the 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 that 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 is 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. 83, 159 Cal. Rptr. 673 (1979).

68. 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 that 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*.

69. Calif. Civ. Code § 4803.

get the same interest she would have if the couple had been domiciled in California at the time of S-1's acquisition.[70]

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.[71]

The present state of the law is best understood as development by case-law of the quasi-community property theory rather 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.[72] 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 interaction of quasi-community property and ancestral property theory is needed.

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70. *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-quoted 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).

71. 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).

72. *See* Addison v. Addison, 62 Cal.2d 558, 43 Cal. Rptr. 97, 399 P.2d 897 (1965), distinguishing the present 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).

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 §§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.[73] 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.[74] 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,[75] 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.[76]

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73. 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 (1959); Estate of Halcourt, 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.

74. Estate of Brody, 171 Cal. 1, 151 P. 275 (1915); Simonton v. Los Angeles Trust & Sav. Bank, 205 Cal. 252, 270 P. 672 (1928); Pickens v. Merriam, 274 F. 1 (9th Cir. 1921).

75. 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).

76. *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).

If, during S-2's ownership, the asset subject to section 229 produces 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[77]—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*[78] 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 the subsection 229(b) portion constituted at S-2's death (after the death of the spouse by remarriage).

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

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

78. 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.

(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. Subsections (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.[79]

79. *Accord*, 7 R. POWELL, REAL PROPERTY ¶1001 (Rohan rev. 1979).

Appendix

Chart Attached to Report of the Senate Committee on Judiciary on A.B. 1750 (1979 legislature)

LEGEND:
M,F - PARENT: MOTHER, FATHER
B/S - BROTHER OR SISTER
D - DECEDENT
C - CHILD
PS - PREDECEASED SPOUSE
S_1 - PREDECEASED SPOUSE'S FIRST SPOUSE

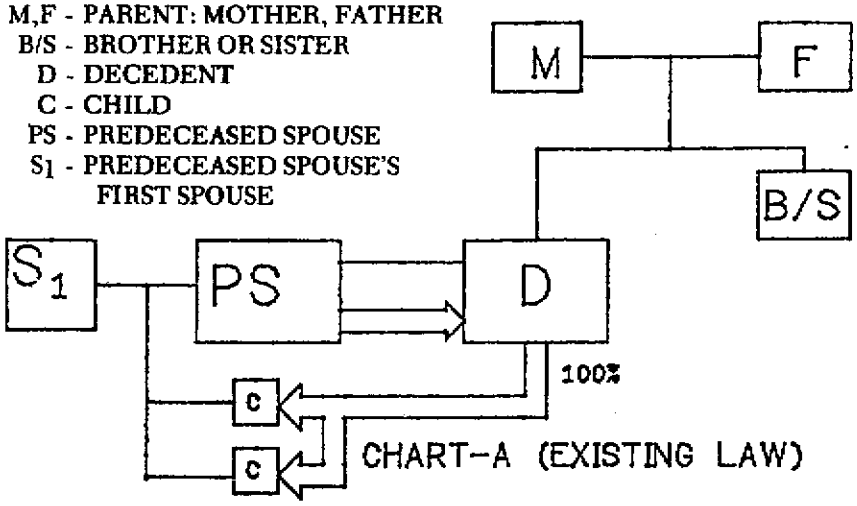

CHART-A (EXISTING LAW)

PATH OF COMMUNITY PROPERTY INTEREST

LEGEND:
M,F - PARENT: MOTHER, FATHER
B/S - BROTHER OR SISTER
D - DECEDENT
C - CHILD
PS - PREDECEASED SPOUSE
S_1 - PREDECEASED SPOUSE'S FIRST SPOUSE

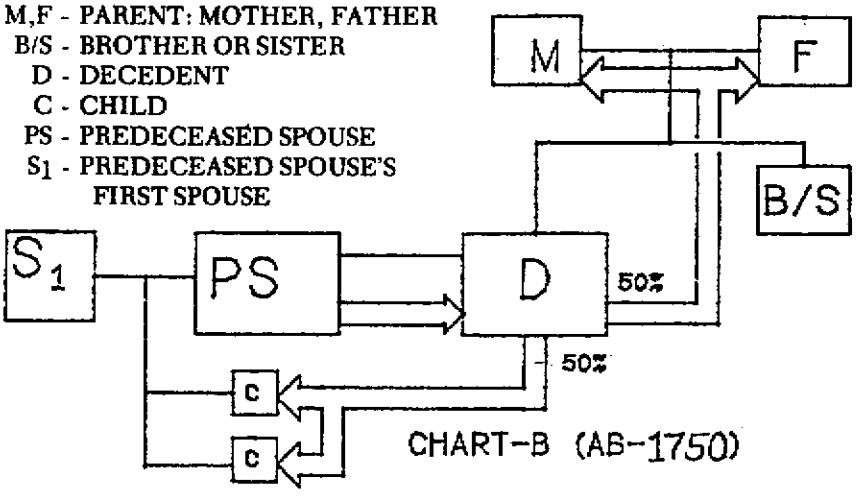

CHART-B (AB-1750)

EXHIBIT 4

Extract from Fellows, Simon & Rau,

Public Attitudes About Property Distribution
At Death and Intestate Succession Laws
In the United States

American Bar Foundation Research Journal 1978

In addition to the above dispository patterns generally applicable to all decedents, some states make special provisions for property received from ancestors through inter vivos gifts or succession. Statutes of this kind frequently provide that if a minor dies unmarried and owning property inherited or devised to the decedent by a parent, the other children of that parent or their issue shall inherit such property from the decedent.[90] A Kentucky statute provides that if a person, regardless of age or marital status, dies without issue owning real property received by inter vivos gift from a parent and does not otherwise dispose of the property by will, that property shall be returned to the

90. Cal. Prob. Code § 227 (West 1956); Me. Rev. Stat. tit. 18, §§ 851, 1001(7) (1964); Mich. Comp. Laws Ann. § 702.80 (Second) (Cum. Supp. 1978-79), § 702.93(4)-(5) (1968); Minn. Stat. Ann. § 525.16(5) (West 1975) (requirement that there be no surviving spouse rather than that the decedent be unmarried; further requirement that the decedent be without issue); Nev. Rev. Stat. § 134.070-.080 (1973); N.H. Rev. Stat. Ann. § 561.2 (1974) (brothers and sisters or their issue are the designated takers; thus, the statute does not require that these persons be the issue of the parent); Okla. Stat. tit. 84, § 213 (Seventh)-(Eighth) (1971).

Except for Minnesota, these statutes have the effect of disinheriting nonmarital children of a minor, as they apply whenever a decedent dies under age and not having been married, regardless of whether issue survive the decedent. See notes 162-79 *infra* and accompanying text for further discussion of the inheritance right of nonmarital children.

Connecticut has enacted a statute of limited scope for the disposition of property from the estate of a minor who dies unmarried and without issue. If a child dies after his parent's death but before any legal distribution of the parent's estate, that part of the parent's estate that would have gone to the now-deceased child shall be distributed as if the child had predeceased the parent. Conn. Gen. Stat. Ann. § 45-276 (West 1960).

donor-parent if living.[91] A Louisiana statute provides that if a person dies without issue owning real property received by inter vivos gift from an ancestor, that ancestor shall receive the property back unless the person provides otherwise by will.[92] Under another statutory provision in Kentucky, if a person 18 or under dies without issue owning real property received from a parent by gift or succession, the property shall be distributed to the parent if living and if not to the parent's kindred. If no kindred of the parent survive, the other parent and that parent's kindred can share in this property.[93] Again, marital status is not relevant.

These types of provisions are theoretically appealing because they seem to provide precisely for the situation hypothesized when the general statutes were designed. For practical reasons, however, they should be discouraged.[94] They create statutory construction issues, such as (1) the types of transfers to the child included within the statutory language; (2) qualification as unmarried if a person had been previously divorced or widowed; and (3) qualification as dying without issue if a person had a child who predeceased the decedent. Furthermore, probate administration is made substantially more complicated with the added requirements of tracing and the need to account for accretion to the property received.[95] Finally, the Kentucky and Louisiana statutes that apply regardless of whether decedent is survived by a spouse seem contrary to public policy and the dispository preferences of intestate decedents.[96]

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91. Ky. Rev. Stat. § 391.020(1) (1972). California and Hawaii have similar statutes except that the decedent must not be survived by a spouse and it applies to both realty and personalty. Cal. Prob. Code § 229(b) (West 1956) (parent or grandparent); Haw. Rev. Stat. § 560:2-103(4), (5) (Supp. 1977) (grandparent or great-grandparent).

92. La. Civ. Code Ann. art. 908 (West 1952). See also *id.* art. 909 (applies to dowry that ancestor settled on the decedent).

93. Ky. Rev. Stat. § 391.020(2) (1972).

94. Cf. Chaffin, *supra* note 78, at 14–16 (criticism of ancestral estates in general). These provisions, however, have limited practical significance because of the infrequency of a minor dying intestate with property derived from a single parent. See 7 Powell, *supra* note 9, ¶ 1001, at 676.

95. These problems are most acute for personal property.

96. See notes 103–13 *infra* and accompanying text.