

## Memorandum 81-35

Subject: Study L-602 - Probate Code (Intestate Succession--Share of Surviving Spouse)

This memorandum is concerned with the share of community and quasi-community property or separate property to be taken by intestate succession by the surviving spouse. Two important policy issues are presented: (1) Should the share of the surviving spouse in community and quasi-community property be reduced in order to permit the step-children of the deceased spouse to take some of the property by intestate succession? (2) Should the share of the surviving spouse in the deceased spouse's separate property be increased? These issues are discussed below.

COMMUNITY AND QUASI-COMMUNITY PROPERTY: IMPROVING  
THE RIGHTS OF STEPCHILDREN

Enactment of the UPC would not change intestate succession of community property in California, since under the UPC as under existing California law, on the intestate death of a married person, all community property passes to the surviving spouse. Prob. Code § 201; UPC § 2-102A (alternative provision for community property states); Niles, Probate Reform in California, 31 Hast. L.J. 185, 194 (1979). Quasi-community property is similarly treated under California law. See Prob. Code § 201.5. Empirical studies indicate that this disposition (all to surviving spouse) is consistent with what most decedents want, either where the decedent leaves no issue or where all of the decedent's issue are also issue of the surviving spouse or have been adopted by the surviving spouse. Niles, supra at 192; Joint Editorial Board for the Uniform Probate Code, Response of the Joint Editorial Board 4 (1974).

However, when the decedent is survived by a spouse and children of a prior marriage, the UPC and California rule which gives all of the community property to the surviving spouse may not be what most people want: The American Bar Foundation study indicates that, where there are children of a prior marriage, most people prefer that about two-thirds of the deceased spouse's estate be given to the surviving spouse and the remaining one-third divided among all of the decedent's issue (which

would include the decedent's children of a prior marriage). See Simon, Fellows & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. Bar Foundation Research J. 367 [Exhibit 3 to Memorandum 81-27].

Professor Niles has suggested that when the decedent leaves children of a prior marriage it would be fairer to such children to depart from the California-UPC rule which gives all community property to the surviving spouse. Niles, supra at 194. Professor Niles has suggested two possible alternatives:

(1) Adopt the Arizona rule, which divides all of the decedent's one-half share of community property among the decedent's issue when one or more of them are not issue of the surviving spouse (Ariz. Rev. Stat. § 14-2102).

(2) Modify the UPC to permit the decedent's one-half share of the community property to pass as if it were separate property (viz., one-half of the decedent's one-half to the surviving spouse and the remaining half to the decedent's issue). Niles, supra at 194.

Note that, under the Arizona system the surviving spouse takes half of the community property and the other half is divided among the decedent's issue, while under the Niles modification of the UPC the surviving spouse would take three-quarters of the community property with the remaining one-quarter divided among the decedent's issue.

The Niles proposal to give stepchildren an intestate share of the community property should be considered by the Commission. The empirical studies show that most people want the stepchildren to receive something. (However, the studies were directed toward the entire estate of the deceased spouse, not just the community property.) Under existing California law, the children take one-half or two-thirds of the separate property (see table under heading "Separate Property" below) but none of the community property. But there may not be any separate property or it may not be significant in amount. In that situation, the stepchildren will receive nothing or only a small amount of separate property upon the death of the first spouse and may receive nothing upon the death of the second spouse (depending on what is provided by statute) unless the second spouse provides for them by will. Also, to give stepchildren an intestate share of community property will reduce the need to continue

the ancestral property doctrine in California to protect children by a prior marriage--a doctrine which the staff recommends eliminating. See Prob. Code § 229 and discussion of this doctrine in Memorandum 81-36. (Under Probate Code Section 229, when the surviving spouse ultimately dies, and does so intestate without leaving a surviving spouse or issue, the property attributable to the predeceased spouse is divided among issue of the latter.) If the major community asset is a home occupied by the surviving spouse, the Niles proposal would appear not to create an undue likelihood of a forced sale, since the probate court may set aside a probate homestead to the surviving spouse and the minor children of the current marriage.

On the other hand, to give children a share of community property on the death of a parent when some of the children are the decedent's from a prior marriage would be undesirable when the latter are all self-sufficient adults and the surviving spouse is not economically self-sufficient. This may be the most common type of case where the disposition of property is governed by the intestate succession statute; in cases when the decedent's estate is substantial it is more likely that disposition will be governed by a will. Even though the court sets aside a probate homestead for the surviving spouse, all of the liquid community property assets may be distributed to the decedent's issue (since they would be entitled to one-fourth of the community property) with the result that the surviving spouse would be left with no liquid estate.

Assuming that the Commission decides that some share of community property should be given to children where some of them are children of a prior marriage of the decedent, the Commission must decide which approach is preferable--the Arizona system (half of community property to surviving spouse and other half divided among decedent's issue) or the Niles modification to the UPC (three-quarters of community property to surviving spouse and one-quarter divided among decedent's issue). The Niles proposal has the advantage of treating the decedent's half of the community property and the decedent's separate property alike, rather than giving the decedent's children a larger share of the decedent's half interest in community property than their share of the decedent's separate property as Arizona law does. The disadvantage of the Niles

proposal is that when one-quarter of the community property is divided among the decedent's children the individual shares may be quite small, giving the stepchildren relatively little protection.

SEPARATE PROPERTY: INCREASING SURVIVING  
SPOUSE'S INTESTATE SHARE

In five out of seven possible fact patterns, the UPC gives to the surviving spouse a larger share of the decedent's separate property than does existing California law. This is illustrated by the following table:

	<u>Surviving spouse's intestate share of decedent's separate property:</u>	
	<u>UPC</u>	<u>California</u>
No issue or parent of the decedent survive, and no issue of either parent of the decedent survive	All	All
No issue or parent of the decedent survive, but issue of one or both parents of the decedent survive	All	Half
No issue of the decedent survive, but one or both parents of the decedent survive	\$50,000 plus half the balance	Half
One child of the decedent and the surviving spouse, or the issue of such child, survives	\$50,000 plus half the balance	Half
One child of the decedent who is not the child of the surviving spouse, or the issue of such child, survives	Half	Half
Two or more children, all of whom are children of the decedent and the surviving spouse, or the issue of such children, survive	\$50,000 plus half the balance	One-third
Two or more issue of the decedent, some of whom are not the issue of the surviving spouse, survive	Half	One-third

Thus the UPC increases the surviving spouse's share of the decedent's separate property from half as under California law to all when the decedent leaves brothers, sisters, nieces, or nephews, but leaves no issue or parent. When the decedent leaves a parent but no issue, or one child, the UPC increases the surviving spouse's share from half as under California law to \$50,000 plus half the balance. If the decedent leaves two or more children, the UPC gives the surviving spouse half if some are children of a prior marriage of the decedent, and \$50,000 plus half the balance where all are children of the decedent and the surviving spouse; California law gives the surviving spouse one-third in both of these situations.

All of the UPC increases of the surviving spouse's share are based on the perceived "desires of most married persons, who almost always leave all of a moderate estate or at least one-half of a larger estate to a surviving spouse when a will is executed." Official Comment to UPC § 2-102. Where the estate is small (i.e., less than \$50,000), "the surviving spouse is given the entire estate if there are only children who are issue of both the decedent and the surviving spouse; the result is to avoid protective proceedings as to property otherwise passing to their minor children." Id.

Professor Niles supports the view of the UPC drafters: "Empirical studies indicate that most decedents leaving a spouse and children would prefer to have a major part, if not all, of their estate go to the surviving spouse." Niles, supra at 192. Professor Niles reports that one recent study was summarized as follows:

In summary, a majority of the respondents want to leave their entire estates to their spouses [where such spouses are the parents of the surviving children]. The findings obtained in this study combined with prior will studies indicate that most citizens prefer distribution of the entire estate to the spouse and are in favor of recent legislative changes so providing.

Id. at 192 n.47.

In its 1973 critique of the UPC, the California State Bar was critical of the UPC provisions for succession of a married person's separate property on the ground that (1) the \$50,000 share may require inadvisable liquidation of assets or, if distribution is made in kind, present difficult valuation problems, and (2) it is not clear that the

UPC provisions conform more closely to the average decedent's intent than does existing California law. State Bar of California, The Uniform Probate Code: Analysis and Critique 29 (1973). The Joint Editorial Board for the UPC has responded that the valuation problems are no more difficult than the valuation required under existing California law when the small estate set-aside provisions are applied or a probate homestead is designated, and that the UPC provision for a larger share to the surviving spouse is consistent with clear preferences established by reliable empirical studies. Joint Editorial Board for the Uniform Probate Code, Response of the Joint Editorial Board at 3-5 (1974).

In the staff's view, the UPC provisions (Section 2-102A) are the better-supported ones and should be adopted as more closely conforming to the desires of the average decedent.

Respectfully submitted,

Robert J. Murphy III  
Staff Counsel