Probate Reform in California

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by RUSSELL NILES*

Introduction

Interest in the reform of probate law is difficult to generate. Lawyers who specialize in estate practice are skillful in applying existing law, and have a natural reluctance to adopt new forms and procedures. Nevertheless, changes in family structure and the nature of modern society require a reexamination of this ancient and traditional subject, and there appears to be growing interest in reform.

Over the years various professional groups have been concerned with reform. Revised statutes sometimes have resulted from the efforts of special legislative commissions which have studied and reconsidered all aspects of both substantive and procedural law relating to decedents’ estates. An important contribution to systematic reform was made in 1946 when A Model Probate Code was drafted by scholars at

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1. As Professor Eugene Scoles has stated: “The debate in probate reform is largely a lawyer's debate with one side urging change and the other responding that the change is not worth the cost. Some lawyer resistance follows from genuine doubt, other from self-interest in the working knowledge of the system within which one is operating with profitable assurance. . . . But the legal profession has a singular responsibility to implement efforts to improve those areas of the law, such as probate, which do not excite the support of the professional lobbyists, the institutions of commerce or political leaders.” Scoles, Probate Reform in Death, Taxes and Family Property 139-40 (E. Hallbach ed. 1977).


3. For a running account of the activities of legislatures, commissions, bar associations, and other organizations involved in the probate reform movement, see UPC Notes, Nos. 1-23 (R. Wellman ed. 1972-1979) [hereinafter cited as UPC Notes]. See also law review commentaries cited after Uniform Probate Code § 1-101 (Uniform Laws Annotated Supp. 1979).

the University of Michigan, with the active collaboration of the Section on Real Property, Probate, and Trust Law of the American Bar Association. The *Model Probate Code* (MPC), with its supporting monographs, has been of great assistance to many state legislatures.

The MPC was intended to be a model only, not a uniform law. A generation after the publication of the MPC, however, the same Section of the American Bar Association began a movement to draft a uniform code. With so many persons crossing state boundaries at various stages in their lifetimes, uniformity was perceived to be increasingly important. After six years of study and research under the auspices of the Section, successive revisions, and consideration of many points of view, the Uniform Probate Code (UPC) finally was approved by the Commissioners on Uniform State Laws and the House of Delegates of the American Bar Association in 1969. The UPC has been adopted in nine states, adopted in substantial part in three states, and is being

REPORTS]. This commission, chaired by J.D. Bennett, generated a total of 3781 pages in its six reports.

Other legislative commissions have been at work in various states as mentioned in UPC Notes, supra note 3. Recent examples include Arkansas, *id.* No. 21 at 2 (1977); and Maine, *id.* No. 20 at 3 (1977).


7. UNIFORM PROBATE CODE §§ 1-101 to 8-102.


South Dakota adopted the UPC in 1974 but repealed it in 1976. See Wellman, *The U.P.C. Defeat in South Dakota*, UPC NOTES, supra note 3, No. 20 at 5. The Wyoming Legislature twice approved the UPC but the Governor vetoed the bill each time. *Id.* at 2.
considered by state commissions, legislative committees, and bar associations in many other states.11

Shortly after the UPC was promulgated, the Board of Governors of the State Bar of California appointed a committee of judges and lawyers to study the UPC. The committee made its report in 1973,12 and noted in the introduction that "[t]he California Probate System has enjoyed the reputation of being one of the best and most efficiently operated in the United States."13 Starting from this premise, the committee conducted a detailed analysis and critique of the UPC, summarizing its conclusions as follows:

The California Legislature has been attentive to the need for constantly updating and modernizing the California Probate Code and, in fact, more than 120 changes and amendments have been made in the California Probate Code in the last five year period. To repeal a system of laws that reflects the public policy of this State, carefully honed and refined over a great number of years, for an Act which . . . strips the system of laws of even minimal safeguards for the persons beneficially interested in a decedent's estate . . . would be a mistake from which it would take California years to recover.

. . .

The Analysis and Critique relates to California Law and is not intended as a condemnation of the UPC. The UPC may well be an improvement over the laws of many of the states of the United States. In each state the question must be: "Will the adoption of the Uniform Probate Code constitute an improvement over the existing probate system?" In California the answer is a firm and confident "No."14


11. See UPC Notes, supra note 3. The UPC is being considered in over half of the states in which it has not been adopted. Some 24 states have adopted a self-proved will provision like UPC § 2-504, id. No. 22 at 3-5, and 36 states have adopted a durable power statute like §§ 5-501 and 5-502, id. No. 22 at 6. States that have reported substantial progress toward probate reform include Delaware, id. No. 20 at 2; the District of Columbia, id. No. 20 at 2; Maine, id. No. 20 at 3, 5; Michigan, id. No. 21 at 9; Missouri, id. No. 15 at 3; Ohio, id. No. 20 at 5.


14. Id. at xxxiii-xxxiv. Some lawyers who otherwise support the UPC agree with the committee with respect to informal probate without prior notice to beneficiaries. Two states which adopted the UPC later added a notice requirement. See 59 Minn. L. Rev. 875 (1975) (citing 1975 Minn. Laws ch. 347, § 34, and 1974 Neb. Laws No. 354, § 98(c)).

Not all of the comments of California lawyers and scholars have been so negative. See McClanahan, Changing Concepts in the Law of Wills and Probate, 48 Cal. St. B.J. 274
The principal objections of the committee were to Article III of the UPC which provides more flexible and informal procedures and more independent estate administration than the committee thought safe. Rather than supporting the UPC, the State Bar endorsed the Independent Administration of Estates Act, which was adopted in California in 1974. This Act has been criticized for not going far enough in allowing independent administration, but until the statute has been given a fair trial pressing for adoption of Article III of the UPC hardly is realistic.

There is, however, no reason that the adoption of Article II, relating to the substantive law of family rights, intestate succession, and wills, cannot be considered separately. In fact, the State Bar committee was less critical of Article II and expressly approved some of its sections.

Despite the many recent changes in the California Probate Code (CPC) noted by the State Bar Committee, there unfortunately has been no thorough revision of the substantive provisions of the CPC for over a century. Changes have been piecemeal, often restricted to a specific section relating to a topic of current public interest, such as alienage, adoption, or succession by children born out of wedlock. Much of the CPC has not changed since it was copied from the Texas Code in 1850, or modified by the Field Code in 1872. In its phraseology, in its excessive detail, even in many of its premises, it is a nineteenth century code.

(1973). See also Gother, The Impending Probate Reform, 48 Cal. St. B.J. 417 (1973), in which the author writes: "The members of the practicing Bar would be misleading themselves if they merely took the position that the California probate system is superior to either the Uniform Probate Code or the Independent Administration of Estates Act." Id. at 422.

17. REPORT, supra note 12, at xvii-xx.
18. Id. at xxxiii.
19. CAL. PROB. CODE § 259 (repealed 1974).
20. CAL. PROB. CODE § 257 (West 1956).
22. See Turrentine, Introduction to the California Probate Code, West's Annotated California Codes, Probate Code 8-21 (1956) [hereinafter cited as Turrentine]. See also In re Shoreder's Estate, 46 Cal. 304, 319 (1873).
24. The CPC underwent a critical reevaluation in 1931, when the California Code Commission was charged with its revision. The Commission, however, had no authority to do more than clarify and consolidate the code, or conform it to interpretations by the supreme court; hence no substantial revision occurred. California Code Commission,
This Article addresses the question posed by the State Bar Committee: would the UPC, if adopted, constitute an improvement over the CPC. By comparing the sections of the UPC and the CPC which relate to the protection of the decedent's family, to intestate succession, and to the execution, revocation, revival, and construction of wills, this Article evaluates whether the relevant sections of the UPC would better serve the citizens of California than do the corresponding sections of the existing CPC.

Protection of the Family of a Decedent

Surviving Spouse

A modern probate code, as a minimum, should assure a surviving spouse a fair share of a decedent's estate if the decedent leaves no will, a right to elect to take a forced share if the decedent leaves a disinherit ing will, and probably a right to avoid certain inter vivos transfers made by the decedent which unduly diminish the decedent's estate. The UPC has thoughtful and contemporary provisions covering all of these points in a common law state. If a decedent leaves no will and is survived by a spouse and issue who are all issue of the surviving spouse, the spouse takes the first $50,000 and half of the balance; the issue take the diminished half. If, however, the decedent's issue are not all the issue of the surviving spouse, the surviving spouse does not receive the preemptive $50,000; hence, the issue of a prior marriage receive more protection. If no issue of the decedent survive, then the spouse takes all except as against parents of the decedent.

There are two situations in which disfavored surviving spouses are protected by the UPC. If the testator fails to provide for a surviving spouse who married the testator after the execution of the will, the omitted spouse receives an intestate share unless the omission was intentional or the spouse was provided for outside of the will. If the

REPORT 10 (1930); Turrentine, supra note 22, at 27-29. See Kleps, The Revision and Codification of California Statutes 1849-1953, 42 CALIF. L. REV. 766 (1954). The draftsman for the Commission, Professor Perry Evans, was capable of modernizing and improving the CPC, but thought he lacked the authority to do so. Evans, Comments on the Probate Code of California, 19 CALIF. L. REV. 602 (1931) [hereinafter cited as Evans].

25. UNIFORM PROBATE CODE § 2-102(3).
26. Id. § 2-102(4).
27. Id. § 2-102(1), (2). A parent or parents take half. Not even brothers or sisters share with the spouse.
28. Id. § 2-201(a), (b). It should be noticed that this provision is analogous to pretermission and not considered a partial revocation as provided in CPC § 70. CAL. PROB. CODE § 70 (West 1956).
decedent leaves a will which gives a surviving spouse less than one third of the decedent's "augmented estate," the surviving spouse has a right of election to take one third of such estate. The augmented estate is more than the probate estate; the UPC therefore goes beyond the provisions of many states, which only give a surviving spouse a right to take a forced share of the net assets passing by will. This augmented estate is comparable to the gross taxable estate under federal estate tax law and gives to the surviving spouse the right to have various inter vivos transfers brought back into hotchpot. The concept cuts both ways, however, requiring the surviving spouse to deduct from his or her share gratuitous inter vivos transfers made to him or her by the decedent. The determination of the augmented estate and the computations that are necessary for its application are complicated, and the survivor's right of election may not be asserted often. If the concept of recapturing some assets transferred inter vivos is to be accepted, however, then the UPC provisions are fair and evenhanded. As discussed below, California has accepted the idea of recapture of certain inter vivos transfers with respect to quasi-community property, but in a simplistic fashion that may cause substantial inequities.

Initially, the UPC may seem irrelevant in a community property state like California. If a decedent leaves only community property a

29. **Uniform Probate Code** §§ 2-201 to 2-207.
32. **Uniform Probate Code** § 2-202(2).
36. See note 63 infra. See Peterson, *supra* note 34, at 15.
surviving spouse is well cared for whether the decedent dies intestate or testate and regardless of whether improper transfers were made while the decedent lived. Under present law, if a husband or a wife dies intestate, the surviving spouse takes all of the community property. If the decedent leaves a will which purports to disinherit the surviving spouse, the surviving spouse may, absent waiver, claim a full half of the community property. If the decedent had attempted to make improper transfers of the survivor's community property interest without the consent of the spouse, the surviving spouse may recapture a half interest.

The relevance of the UPC in California results from the increasing number of decedents leaving separate property in their estates. As the divorce rate rises the amount of separate property in decedents' estates increases, because the decedents' share of community property in prior marriages will be separate property in later marriages and at death. Decedents who lived solely on inherited capital, or capital acquired before marriage, will leave only separate property at death.

With respect to separate property, the rights of a surviving spouse in California are wholly inadequate by standards prevailing in most states. If the decedent dies intestate in California and is survived by a spouse and plural children or their issue, the spouse receives only one third of the decedent's estate; if there is one child or the issue of one child, the spouse receives half of the estate. Even if there are no issue the spouse takes only one half if the decedent is survived by a parent or by any of the issue of a parent. Indeed, if the decedent is survived by a spouse and a grandnephew, the grandnephew takes as much as the

37. CAL. PROB. CODE § 201 (West 1956). This has not always been the law in California. Painter v. Painter, 113 Cal. 371, 45 P. 689 (1896). Under the 1850 statute the decedent's half would pass to his or her descendants and, if none, to his or her surviving spouse. Turrentine, supra note 22, at 7. See CAL. PROB. CODE § 201 (West 1956) (historical note).

38. CAL. PROB. CODE § 201 (West 1956); Estate of Murphy, 15 Cal. 3d 907, 544 P.2d 956, 126 Cal. Rptr. 820 (1976).


41. Id. at 415.
42. Id. at 381.
43. CAL. PROB. CODE § 221 (West 1956).
44. Id.
45. Id. § 223.
spouse.\textsuperscript{46} 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.\textsuperscript{47} In apparent recognition of this preference, some states that have reconsidered the problem recently have been even more generous to the surviving spouse than the UPC.\textsuperscript{48} In California, a surviving spouse still takes the same share in separate property that a surviving widow took under the Statute of Distributions in 1670.\textsuperscript{49} Surely attitudes have changed in 300 years.

In California a surviving spouse has no right of election to take a share of the decedent's separate property if the testator leaves a postmarital will in favor of others.\textsuperscript{50} If the testator's will had been executed before marriage and did not provide for the subsequent spouse, the surviving spouse's only claim to an intestate share would be under the doctrine of partial revocation.\textsuperscript{51} A clear intention by the testator to

\textsuperscript{46} Id. The surviving spouse takes all only if there is neither a parent nor a brother or sister of issue of a deceased brother or sister. \textit{Id.} \S 224.

\textsuperscript{47} For a summary of the most recent study, see Fellows, Simon & Rau, Public Attitudes about Property Distribution at Death and Intestate Succession Statutes, 1978 AM. BAR FOUNDATION RESEARCH J. 321 (1978) [hereinafter cited as Fellows, Simon & Rau]: "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."

The prior studies referred to are of probated wills. The inference is that persons who died intestate would have had similar preferences. The studies were: Sussman, Cates & Smith, The Family and Inheritance (1970); Browder, Recent Patterns in Testate Succession in the United States and England, 67 Mich. L. Rev. 1303 (1969); Dunham, The Method, Process and Frequency in Wealth Transmission at Death, 30 U. Chi. L. Rev. 241, 252, 258 (1963); Ward & Beuscher, The Inheritance Process in Wisconsin, 1950 Wis. L. Rev. 393.

In several of the more recent studies, individuals were interviewed to determine how they would want their property to devolve upon their deaths. Fellows, Simon & Rau, supra. See two prior studies based on interrogation of living persons: Fellows, Simon, Snapp & Snapp, An Empirical Study of Illinois Statutory Estate Plan, 1976 U. ILL. L.F. 717, referred to as the Illinois study; Glucksman, Intestate Succession in New Jersey: Does it Conform to Popular Expectations?, 12 COLUM. J. L. & SOC. PROB. 253 (1976), referred to as the New Jersey study.

\textsuperscript{48} See, e.g., Arizona, ARIZ. REV. STAT. ANN. \S 14-2102 (West 1975); Colorado, COLO. REV. STAT. \S 15-11-102 (West 1974); Montana, MONT. REV. CODES ANN. \S 91-403(1) (1964).

\textsuperscript{49} An Act for the Better Settling of Intestates Estates, 1670, 22 & 23 Car. 2, c. 10, \S 6. The present English law is much more favorable to the surviving spouse. See Administration of Estate Act, 1925, 15 Geo. 5, c. 23, \S 5, at 893 (1925), as amended by Intestates' Estate Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 64, \S\S 1-6, at 1350 (1952), and by Family Provision Act, 1966, c. 35, \S\S 1-10, at 637 (1966). See Kahn-Freund, Recent Legislation on Matrimonial Property, 33 MOD. L. REV. 601 (1970).

\textsuperscript{50} Estate of Stewart, 69 Cal. 2d 296, 444 P.2d 337, 70 Cal. Rptr. 545 (1968); Estate of Cudworth, 133 Cal. 462, 65 P. 1041 (1901).

\textsuperscript{51} CAL. PROB. CODE \S 70 (West 1956).
exclude the spouse, however, would be controlling. Scholars over the years have pointed out the need to afford greater protection to a surviving spouse where all or part of the decedent’s estate was separate property, but there has been no change in the CPC.

There has been reform, however, with respect to one type of separate property. A generation ago so many married couples migrated to California with separate property acquired while they were domiciled in other states that some relief from the law governing separate property was imperative. In 1956, the Law Revision Commission, on the basis of a study prepared by Professor Harold Marsh, recommended changes that resulted in the adoption of what are now CPC sections 201.5 to 201.8. Although the property acquired by married persons in other states was separate property under conflict of law rules, it was denominated quasi-community property in California under the new CPC sections.

Under the revised law a spouse is entitled to inherit all of the quasi-community property in case of intestacy, to have a forced share in half of such property against a disinheriting will, and to recapture one half of such property disposed of by the decedent gratuitously if he or she retained “a substantial quantum of ownership and control.” Thus in the case of quasi-community property a surviving spouse is given a limited right to recapture, but without setoffs; if the decedent had made substantial inter vivos gifts to the spouse, or had provided generously for the spouse with insurance, such a donee-spouse could, notwithstanding such benefits, claim one half of revocable inter vivos gifts made to other persons. If the concept of the augmented estate is

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52. See, e.g., Bodenheimer, supra note 40, at 414-18; Turrentine, supra note 22, at 34.
53. CALIFORNIA LAW REVISION COMMISSION, RECOMMENDATION AND STUDY RELATING TO RIGHTS OF SURVIVING SPOUSE IN PROPERTY ACQUIRED BY DECEDENT WHILE DOMICILED ELSEWHERE, 1 REPORTS, RECOMMENDATIONS AND STUDIES, E-5 TO E-39 (1956). See also CALIFORNIA LAW REVISION COMMISSION, RECOMMENDATION AND STUDY RELATING TO INTER VIVOS MARITAL PROPERTY RIGHTS IN PROPERTY ACQUIRED WHILE DOMICILED ELSEWHERE, 3 REPORTS, RECOMMENDATIONS AND STUDIES, I-1 TO I-35 (1960); CALIFORNIA LAW REVISION COMMISSION, RECOMMENDATION RELATING TO QUASI-COMMUNITY PROPERTY, 9 REPORTS, RECOMMENDATIONS AND STUDIES 117 TO 112 (1969).
54. CAL. PROB. CODE §§ 201.5 TO 201.8 (WEST SUPP. 1979). See Abel, Barry, Halstead & Marsh, Rights of a Surviving Spouse in Property Acquired by a Decedent While Domiciled Outside of California, 47 CALIF. L. REV. 211 (1959).
55. CAL. PROB. CODE § 201.5 (WEST SUPP. 1979).
56. I.e., the decedent has a devisable interest in only one half. Id.
57. Id. § 201.8.
58. These other persons would include such likely donees as children by a prior marriage. See Kurtz, The Augmented Estate Concept under the Uniform Probate Code: In Search of an Equitable Elective Share, 62 IOWA L. REV. 981, 1036-43 (1977); Peterson, supra note
to be used, fairness demands the setoffs authorized by the UPC.

California's community property system would not be disturbed by enactment of the UPC. The adoption of the UPC, however, might invite legislators to reconsider the devolution of the decedent's devisable one half of community or quasi-community property if the decedent dies intestate. The preferable course of action might be to adopt the law of another community property state, such as Arizona, or to modify the UPC to permit one half of the community property to pass as if it were separate property. If this latter approach were followed, the decedent's estate in a nuclear family with issue only of the decedent and the surviving spouse often would pass to the surviving spouse as it does now. However, in the troublesome cases in which the decedent had children by a prior marriage, i.e., the surviving spouse's stepchildren, the division of the estate would be fairer to such children. Such a change in CPC sections 201 and 201.5 would minimize the need for CPC sections 228 and 229, considered in the next section of this Article.

61. UPC § 2-102A gives the surviving spouse the same share as to separate property that was provided in § 2-102, and in regard to community property provides: "The one-half of which belongs to the decedent passes to the [surviving spouse]." Uniform Probate Code § 2-102A. The enacting state is free to fill in the brackets as it chooses and hence could provide that the devisable half also passes under UPC § 2-102.
62. If the issue were the issue of both the decedent and the survivor, the survivor would take $50,000 plus half and therefore would take all or almost all of moderate estates. See notes 25-27 & accompanying text supra.
63. That is, the decedent's children of each marriage would divide one half of the decedent's estate in equal shares (per stirpes) without the preemptive $50,000 to the surviving spouse. Professor Gibson would favor the surviving spouse even where there are children by a prior marriage. Gibson, Inheritance of Community Property in Texas—A Need for Reform, 47 Tex. L. Rev. 359, 366-67 (1969). See Fellows, Simon & Rau, supra note 47, at 364-68, suggesting that those interviewed would prefer that about two thirds be given to the surviving spouse in this situation. Until 1974, the law in Washington provided that the decedent's half of community property would be divided between a surviving spouse and descendant, so that such a spouse would take three fourths. By a recent amendment, all of the community property now passes to the surviving spouse. Wash. Rev. Code Ann. § 11.04.015 (1967) (amended 1974); Cross, The Community Property Law in Washington, 49 Wash. L. Rev. 729, 797 (1974). This result is reasonable when the children are the children of both spouses but is unfair to children of a prior marriage. See Sweet, Rights of a Pretermitted Heir in California Community Property—A Need for Clarification, 13 Stan. L. Rev. 80, 85 n.29 (1960).
64. See notes 121-40 & accompanying text infra. The UPC and the CPC do have similar provisions with respect to family allowances and exemptions. See Peterson, Family
Adoption of the UPC in California would not necessarily change the rights of surviving spouses with respect to community property. The surviving spouse would, however, take a much greater share of separate property if the decedent died intestate, and would have new and much needed protection against disinheriting wills and inter vivos transactions which were testamentary substitutes. With respect to quasi-community property, the UPC would replace the simplistic and sometimes unfair recapture provisions of CPC section 201.8 with the more equitable provisions of UPC sections 2-201 to 2-207.65

Surviving Issue

Both the UPC and the CPC accept the common law doctrine of freedom of testation as modified by the rights accorded to a surviving spouse.66 Issue have no right to elect to take a portion against a disinheriting will67 and, a fortiori, no right to recapture any assets disposed of inter vivos. The only protection afforded them, beyond the incidental protection afforded by family allowance, exempt property, or home-


65. For a remarkably lucid and fair treatment of all of the alternative systems which would give to a surviving spouse the most equitable share in the combined assets of a married couple, without excessive demands on judicial time or discretion, see GREAT BRITAIN LAW COMMISSION, THE LAW COMMISSION PUBLISHED WORKING PAPER No. 42, FAMILY PROPERTY LAW (1971), reprinted in 5 THE LAW COMMISSION WORKING PAPERS (1976). See Kahn-Freund, Law Commission: Published Working Paper No. 42: Family Property Law 1971, 35 Mod. L. Rev. 403 (1972).


The California law relating to quasi-community property is somewhat more favorable to a surviving spouse than the UPC provision because the elective share is one half instead of one third. There is no reason, however, why the legislature could not enact UPC §§ 2-201 and 2-202 with a higher fraction both for separate and quasi-community property.


67. Louisiana, which follows the civil law, is the only exception. See Cahn, Restraints on Disinheritance, 85 U. Pa. L. Rev. 139 (1936); Gaubatz, supra note 30, at 524.
stead, is the pretermission statute which awards an intestate share to
some descendants who may have been omitted inadvertently from a
will.\textsuperscript{68} This statute is based on the fiction that unless a contrary intent
is expressed clearly, the testator-parent would not omit a natural object
of bounty. In spite of their common doctrinal assumptions, however,
the pretermission sections of the two codes differ substantially.

The protection of the UPC section\textsuperscript{69} is limited to children of the
testator, and to after-born or after-adopted children, with the single ex-
ception of a child omitted solely because the testator believed the child
to be dead.\textsuperscript{70} Issue of deceased children are not provided for. An omit-
ted child receives an intestate share unless (1) it appears from the will
that the omission was intentional; (2) when the will was executed the
testator had one or more children and devised substantially all of his or
her estate to the other parent of the omitted child;\textsuperscript{71} or (3) the testator
provided for the child by transfer outside the will and the intent that
the transfer be in lieu of a testamentary provision is shown by state-
ments of the testator, from the amount of the transfer, or by other evi-
dence.\textsuperscript{72}

The UPC section is consistent with the contemporary preference of
most testators who have a spouse and children to devise substantially
all of their property to the spouse. In light of this common pattern, to
give an after-born child a full intestate share while the other children
take nothing would be an obvious injustice.\textsuperscript{73}

\begin{itemize}
  \item \textsuperscript{68} Mathews, \textit{Pretermitted Heirs: An Analysis of Statutes}, 29 \textsc{Colum. L. Rev.} 748, 749 (1929).
  \item \textsuperscript{69} Uniform Probate Code § 2-302.
  \item \textsuperscript{70} Id. § 2-302(b).
  \item \textsuperscript{71} The UPC section is subject to the criticism that it cuts off after-born children if
  children at the time of the making of the will were not named, and additionally does not
give them a share of any amounts that may have been given to other children. Gaubatz, \textit{supra}
  note 30, at 528. The New York legislature followed the recommendation of the Ben-
nett Commission, Bennett Commission Reports, \textit{supra} note 4, at 2736-49, in amending its
  statute to provide that, if the testator had children when the will was made but made no
  provision for them, an after-born child takes nothing. If, however, the testator then had one
  or more children and made legal or equitable gifts to them, then an after-born child shares
equally with them. N.Y. Est. Powers & Trusts Law § 5-3.2 (McKinney 1967).
  \item \textsuperscript{72} See Uniform Probate Code § 2-302, Comment, to the effect that oral proof is
  here permitted even though advancements, § 2-110, must be evidenced by a writing.
  \item \textsuperscript{73} The typical situation justifying the need for a pretermission statute occurs when a
  testator devises substantially all of his or her estate to living children, or advances each
  child's share, has another child, and dies before changing the will. When, however, substan-
tially all of the estate is given to the surviving spouse, an after-born child gets an unfair
advantage under a pretermission statute. If the surviving spouse dies intestate, or with a will
with a class gift to children, the pretermitted child may take a double share and get a first
share long before the others, who take, if at all, at the surviving spouse's death.
\end{itemize}
The California pretermission statute, CPC section 90, generally is much more favorable to the testator's issue than the law in most states and the UPC, because it applies to living and after-born children and to the issue of deceased children.74 Professor Evans, the draftsman of the 1931 Revision, has said that section 90 "does as much harm as good."75 If intention of the testator is the proper test, then section 90 fares poorly as that intention is frustrated as often as it is carried out.76 The latest supreme court case on the issue, Estate of Gardner,77 supports Professor Evans' view. In Gardner, the testator had had two children but, at the time she executed her will, one child had died, survived by three children (testatrix's grandchildren). The testatrix not only devised all of her estate to her only living child, but stated in her will: "I declare that I have intentionally failed to provide for any person not mentioned herein." The court held that under the statute, the grandchildren were entitled to a share of her estate, patently contrary to the testatrix's intention.78

The State Bar committee has conceded that there was "considerable merit to the proposal to eliminate the section 90 protection for the child who is alive at the time the will is executed."79 The most appealing case for an exception arises where there is evidence that the testator thought the child to be dead,80 or evidence that a testator did not know of the birth of a child,81 but slight revisions of UPC section 2-302(b) would cover these cases.

Section 90 has caused an inordinate amount of litigation due not only to its atypical provisions but also because of the burden of proof

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74. CAL. PROB. CODE § 90 (West 1956).
75. Evans, Should Pretermitted Issue be Entitled to Inherit?, 31 CALIF. L. REV. 263, 269 (1943).
76. Professor Evans pointed out that in the past testators with large families might have unintentionally omitted one of their living children or grandchildren, but that omission is not as likely to happen in the small families of today. Evans, Should Pretermitted Issue be Entitled to Inherit?, 31 CALIF. L. REV. 263, 265 (1943). See Estate of Gardner, 21 Cal. 3d 620, 580 P.2d 684, 147 Cal. Rptr. 184 (1978); Gaubatz, supra note 30, at 524-28.
79. REPORT, supra note 12, at 34.
81. See, e.g., Estate of Smith, 9 Cal. 3d 74, 507 P.2d 78, 106 Cal. Rptr. 774 (1973). Estate of Torregano and Estate of Smith were relied on by the supreme court in Estate of Gardner, 21 Cal. 3d 620, 580 P.2d 684, 147 Cal. Rptr. 184 (1978). The fiction that the testator did not intend what was said, because of possible mistake about the facts, seems more plausible in these cases than in Gardner.
imposed by the courts on the claimant to demonstrate that the testator had in mind all persons protected by section 90 when various terms of disinherittance were used.\textsuperscript{82} Difficulties also have arisen in applying section 90 to community property,\textsuperscript{83} and in cases involving the interaction of section 90 with section 92, the anti-lapse statute, for example, where the testator gave to a named child a nonexistent residue, or a nominal sum of money, and the child died before the testator, leaving a child.\textsuperscript{84}

Even if the California law is not always "intent fulfilling" it is not necessarily wrong as a matter of public policy. In 1929 Professor Robert E. Mathews in his classic article on pretermission posed the question of whether the only relief against disinherittance of issue should be the pretermission statutes.\textsuperscript{85} He was impressed by the Family Maintenance Acts then being adopted in some parts of the British Commonwealth.\textsuperscript{86} There now has been enough experience in England, New Zealand, Australia, and Canada under these acts to demonstrate that freedom of

\textsuperscript{82} See cases cited notes 76, 78, 80 & 81 supra.


\textsuperscript{85} Mathews, Pretermitted Heirs: An Analysis of Statutes, 29 COLUM. L. REV. 748 (1929). Professor Max Radin has stated: "In the nineteenth century, however, a modified legitim was created by the pretermission statutes . . . ." M. RADIN, HANDBOOK ON ANGLO-AMERICAN LEGAL HISTORY 417 (1936). Professor Dainow, in Dainow, Inheritance by Pretermitted Children, 32 ILL. L. REV. 1 (1937), after considering cases which qualified the alleged freedom of testation, concluded: "In any event, there is a basic common denominator between the American and civil law systems in the disapproval of the power of disinherittance; The difference is a matter of degree." Id. at 10.

\textsuperscript{86} The pioneer act was adopted in New Zealand in 1900 and later spread to Australia and most provinces of Canada. Wright, Testator's Family Maintenance in Australia and New Zealand (2d ed. 1966); Dainow, Restricted Testation in New Zealand, Australia and Canada, 36 MICH. L. REV. 1107 (1938).

The Inheritance (Family Provision) Act, 1938, I & 2 Geo. 6, c. 45, was adopted in England after many years of debate and over considerable opposition of British judges and lawyers. See Dainow, Limitations on Testamentary Freedom in England, 25 CORNELL L.Q. 337 (1940). See also Macdonald, supra note 30, ch. 21.

testation can remain substantially unimpaired even if a decedent's estate cannot escape liability for the maintenance of dependents whom the decedent morally or legally was obligated to support when alive. The administration of such acts has not proved as burdensome as feared. Moreover, the Bennett Commission in New York recommended the adoption of a Family Maintenance Act limited to children. The recommendation was approved by the New York Senate but failed to become law. Although no American jurisdiction has yet adopted a Family Maintenance Act, there is a need for further study of such legislation.

While UPC section 2-302 appears superior to CPC section 90, neither statute meets the need shown by experience. The allowance of an intestate share may provide too much or too little, be fair or unfair, carry out or frustrate intent. While the compassion of the California courts may be admired, to achieve a contemporary policy California

87. The 1975 amendment to the English statute increased the number of dependents who may apply for an order to provide enough for subsistence to include children born out of wedlock and even stepchildren who are dependent members of the decedent's family. Inheritance (Provision for Family and Dependents) Act, 1975, c. 63. Except for spouses, the allowance from the estate is limited to subsistence, on an objective standard. Samuels, Inheritance (Provision for Family and Dependents) Act 1975, 39 MOD. L. REV. 183, 183 (1976).


89. BENNETT COMMISSION REPORTS, supra note 4, at 2004-06, 2076-79.

The Act was restricted to dependent children, with no provision for a surviving spouse, and was expressly coordinated with the pretermination statute. The Act left the pretermination statute in operation for a will executed before the effective date of the Act, but applied to a decedent who died after the date of the Act, leaving a later will or without a will, and having made no reasonable provision for the maintenance of a dependent child. In such a case, the court might in its discretion make a reasonable provision out of the decedent's estate for the maintenance of such child. The Act set forth definitions, standards, and the factors that might be considered by the court. The Act followed the general plan of the British Commonwealth statutes except that it was limited to a minor child or to an adult child with a mental or physical disability. The Act included adopted and illegitimate children who were entitled to inherit but not stepchildren even if dependent. The court in its discretion could refuse to entertain an application under the Act.


91. Gaubatz, supra note 30, at 520.
needs a statute different than both CPC section 90 and UPC section 2-302, and more akin to a limited family maintenance act.

**Intestate Succession**

By what criteria should intestate succession statutes be judged? Such statutes should be clear and simple; they should not attempt to provide for all of the complex alternatives that might be covered by wills. Because succession statutes provide the estate plan for the majority of persons, such statutes should be comprehensible to any intelligent person and should provide for a distribution that the average decedent probably would have wanted if an intention had been expressed by will.

In considering intestate succession statutes their importance in the law of wills and trusts should not be ignored because many instruments provide for a final gift to the heirs of the donor or of some other specified person. The term "heirs" generally is construed according to the statute on intestate succession. Furthermore, the persons who have standing to contest wills are usually those who would take by intestate succession.

The UPC sections on succession are brief, clear, internally consistent, and yet contain several important reforms. Like the statutes in England and in some states, inheritance is not unlimited; the "laughing heir" is cut off, and inheritance is restricted to the relatives whom the decedent probably knew and had an interest in, i.e., none beyond grandparents and their descendants. There are many practical advantages to such a rule, especially in the administration of estates and trusts. The escheat to the state of such remote interests is not unreasonable when one considers that estate taxes now deprive even

92. CAL. PROB. CODE § 108 (West 1956); UNIFORM PROBATE CODE §§ 1-201(17), 2-611. The problem is more likely to arise since the doctrine of worthier title has been abolished and heirs take by purchase. CAL. PROB. CODE § 109 (West Supp. 1979); CAL. CIV. CODE § 1073 (West Supp. 1979).

93. See CAL. PROB. CODE § 370 (West Supp. 1979). Even absent a meritorious case, a distant relative may contest a will in the hope of obtaining a settlement. For an extreme example, see Matter of Wendel, 143 Misc. 480, 257 N.Y.S. 87 (Sur. Ct. 1932), in which over 1600 claimants appeared. See generally ATKINSON, supra note 30, at 34.

94. See generally Administration of Estates Act, 1925, 15 Geo. 5, c. 23.

95. Model Probate Code, supra note 5, § 22, Comment (citing statutes).


97. UNIFORM PROBATE CODE § 2-105 & General Comment following.

98. In probate, the delay and expense of attempting to find remote missing heirs is eliminated, and problems of service of notice are minimized. In the administration of trusts, which include gifts to "heirs," there are advantages in having a finite class in litigation which
the closest and dearest relatives at rates of up to seventy percent.\textsuperscript{99} Moreover, the drafters of the UPC had the advantage of modern scholarship and contemporary codes in drafting clear and simple rules of representation\textsuperscript{100} and in eliminating anachronisms such as the ancestral property doctrine and the disfavored status of half-bloods.\textsuperscript{101}

The CPC has been modernized in several individual sections governing succession,\textsuperscript{102} but most of the existing sections were copied from the Texas code in 1850 or the Field Code in 1872.\textsuperscript{103} Inheritance is unlimited, however remote the heir may be.\textsuperscript{104} The doctrine of representation, often confusing in American codes,\textsuperscript{105} probably is more confused in California than in any other state. The CPC retains several aspects of the ancient ancestral property doctrine. Several sections involving representation and succession based on source of property are examined in detail to demonstrate that the whole chapter, and not just a few sections, should be reconsidered.

Representation

Representation under the UPC is the same for the descendants of the decedent, descendants of his or her parents, or descendants of his or her grandparents, except if both paternal and maternal grandparents survive the decedent, or leave descendants who do, one half of the de-


100. Section 2-106 states the doctrine with clarity and consistency: "If representation is called for by this Code, the estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survive the decedent, each surviving heir in the nearest degree receiving one share and the share of each deceased person in the same degree being divided among his issue in the same manner." \textit{Uniform Probate Code} \textsuperscript{\textsection} 2-106.

101. \textit{Uniform Probate Code} \textsuperscript{\textsection} 2-107. Other innovations include the requirement that heirs survive the decedent by 120 hours. \textit{Uniform Probate Code} \textsuperscript{\textsection} 2-104 & Comment. The State Bar Committee has drafted a proposed amendment to the CPC along similar lines. \textit{Report}, supra note 12, at 30.


103. Turrentine, supra note 22, at 8-22.


105. \textit{See Model Probate Code, supra} note 5, \textsuperscript{\textsection} 22(c), Comment. The difficulty in developing a simple, consistent law of representation probably results from the differences between limited representation under the Statute of Distributions, \textit{Cal. Prob. Code} \textsuperscript{\textsection} 221 (West 1956), and unlimited representation under the parentelic system of the Canons of Descent. \textit{See Atkinson, supra} note 30, at 37-74; Eagleton, \textit{The Intestacy Act}, 20 \textit{Iowa L. Rev.} 244 (1935).
The decedent's estate goes to each line. The CPC sections on representation, as interpreted, are in need of reconsideration as they apply to lineal descendants of the decedent, to the descendants of parents, and to the descendants of grandparents.

The CPC states the rule of representation among lineal descendants of the decedent in the traditional form when one or more children survive the decedent, and then continues: "[B]ut if there is no child of decedent living at his death, the remainder goes to all of his lineal descendants; and if all of the descendants are in the same degree of kindred to the decedent they share equally, otherwise they take by right of representation." Thus, if one or more children survive the decedent, and one or more children with issue predecease the decedent, the division is per stirpes with the decedent's children as the stocks. If only grandchildren survive, they take equally, per capita, regardless of how many grandchildren were in each child's family. If, however, a grandchild with issue should predecease the decedent with other grandchildren still living, the generations being unequal, the division is per stirpes, but not with the grandchildren as the stocks, as under the UPC and the general American law, but rather with the original children as the stocks. Although this rule does little harm in intestate succession—few testators are durable enough to be survived only by grandchildren and the issue of deceased grandchildren—it has controlled the devolution of some substantial estates in California where the ultimate gift in a trust was to the settlor's heirs as determined by reference to the statute of intestate succession.

Although the CPC permits grandchildren to take equally if no children survive the decedent, this is not so for nephews and nieces, even where no brothers or sisters survive and the nephews and nieces are therefore of the same generation. The stocks of the brothers and sisters are maintained through all generations. On the other hand,

106. CAL. PROB. CODE §§ 221-222 (West 1956).
107. CAL. PROB. CODE § 221 (West 1956).
108. UNIFORM PROBATE CODE § 2-103(1); see ATKINSON, supra note 30, at 64-65.
111. The strong popular preference for having all issue in the same generation share equally is demonstrated in the survey of public attitudes in Fellows, Simon & Rau, supra note 47, at 368-84. Presumably this attitude would prevail in the case of other heirs when representation applied. These findings would justify the change in the UPC § 2-103 suggested in Waggoner, A PROPOSED ALTERNATIVE TO THE UNIFORM PROBATE CODE'S SYSTEM FOR INTESTATE
there is no representation at all if the nearest relatives are an aunt or uncle and cousins who are the children of a deceased aunt or uncle.\(^1\)

**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.\(^2\) Inheritance based on the source of title has disappeared from modern codes\(^3\) 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\(^4\) who normally would inherit under CPC

\(^tate\) Distribution Among Descendants, 66 NW. U.L. REV. 626 (1971). The Joint Editorial Board, the committee which oversees the development of the UPC, favored the proposal as a recommended change in the Code if an adopting state did not enact § 2-103 as written. The Waggoner system provides for per capita distribution in each generation, regardless of the number in each family. For example, if two of three children predeceased the decedent, one leaving one child and the other three, the estate would be divided one third to the living child, and two thirds to the grandchildren, each one taking one fourth of the two thirds. The scheme would be the same with collateral relatives so far as representation is allowed. The Waggoner proposal would change the law in California as to the decedent’s issue if in unequal degrees, and among the issue of brothers and sisters whether equal in degree or not.

\(^1\) CAL. PROB. CODE § 226 (West 1956); Marlow v. Superior Court, 17 Cal. 2d 393, 110 P.2d 11 (1941).

The difference between the two codes is dramatically illustrated in the estate of the late Howard Hughes. He reportedly was survived by a maternal aunt of advanced years and many cousins, the children of deceased maternal and paternal aunts and uncles. If Mr. Hughes were held to have died intestate domiciled in California, all of his estate would have passed to the maternal aunt. CAL. PROB. CODE § 226 (West 1956). Had he died domiciled in a state with the UPC, cousins would have represented their deceased parents, with one half of the estate being divided among each of the maternal and the paternal lines. UNIFORM PROBATE CODE §§ 2-103(4), 2-106.

\(^112\) 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).

\(^113\) 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. DECEDE NT ESTATE LAW (repealed 1967), reprinted in N.Y. Est., Powers & Trusts Law app. 1 (McKinney 1967).

\(^114\) 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, 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. 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. 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. Even as restricted the section is anachronistic and sometimes is impossible to apply logically.

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. 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.:
Its effect was simply this: if the property had been community prop-
erty 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 de-
cedent 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. Sec-
tion 228, in conjunction with sections 230 and 296.4, provides for vari-
ous alternatives if the predeceased spouse left no parents or their
descendants but the decedent has left blood relatives, however re-
move.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).
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." This crudely drafted, obscure subsection may be a revival of the ancestral property doctrine in modern dress. 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. 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. (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. (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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{136} Further, these sections can produce some quite

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., Mo. ANN. STAT. § 474.010(3) (Vernon 1956); OHIO REV. CODE ANN. § 2105.06 (Page 1976).
\item See text accompanying notes 60-63 supra.
\item See Model Probate Code, supra note 5, § 22, Comment.
\item 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).
\end{enumerate}
\end{footnotesize}
unexpected consequences when there are gifts to heirs under wills and trusts. 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. Finally, sections 228 and 229 have caused difficult problems when applied to property acquired in common law states.

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 decedent.

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. 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).

Wills

The CPC sections on wills also remain much as they were when they were copied from the Texas code in 1850 or from the Field code in 1872; they retain the earlier codes' basic philosophy, extensive detail, and quaint phraseology. The modern reform codes are simpler, clearer, and have fewer traps for the inexperienced drafter. The UPC has reduced the formal requirements both for witnessed wills and for holographic wills to a safe minimum. It has simplified the law of revocation, returned to the rule of the ecclesiastical courts with respect to the revival of revoked wills, and reexamined a number of incidental topics such as anti-lapse, exoneration, and rules of construction.

Execution

The UPC provides that all attested wills "shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by at least two persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will." It provides further that any person generally competent may be a witness to a will and that neither the will nor any provision thereof shall be invalid because it is signed by an interested witness. A holographic will is valid if the signature and the material provisions are in the handwriting of the testator. CPC section 50 has nine requirements for an attested will.

143. In 1946, § 47 of the MPC retained essentially the same formal requirements for the execution of wills as the CPC. One of the most respected scholars in the field of probate law, the late Professor Philip Mechem, responded vigorously with his classic article, in which he urged the elimination of the formal requirements that experience had shown were unnecessary. Mechem, Why Not a Modern Wills Act?, 33 IOWA L. REV. 501 (1948). His suggested reform statutes are closely followed in the UPC. Other scholars support the Mechem view or go beyond it. See Gaubatz, supra note 30; Kossow, Probate Law and the Uniform Code: "One for the Money . . . ", 61 GEO. L.J. 1357 (1973).
In a recent article Professor Langbein makes a persuasive case for extending the doctrine of substantial compliance to wills. Langbein, Substantial Compliance with the Wills Act, 88 HARV. L. REV. 489 (1975).
144. For a detailed comparison of the CPC and the UPC, see French & Fletcher, A Comparison of the Uniform Probate Code and California Law with Respect to the Law of Wills, in COMPARATIVE PROBATE LAW STUDIES 331 (1976).
145. UNIFORM PROBATE CODE § 2-502.
146. UNIFORM PROBATE CODE § 2-505.
147. UNIFORM PROBATE CODE § 2-503.
148. A will, other than a nuncupative will, must be (1) in writing and (2) other than a holographic will, subscribed (signed) by the testator or by some other person in his or her
Many wills which would have satisfied the UPC minimums have been
denied probate because they have failed to comply with one or more of
the CPC requirements, even when there was no reasonable doubt about
the testator's intent and no suspicion of fraud.149

Judges and scholars have criticized some of the nine requirements
in section 50, questioning the materiality of a request by the testator
that the witnesses sign,150 a declaration that the document is the testa-
tor's will,151 a requirement that the two witnesses be in the presence of
each other,152 and the requirement that the will be signed "at the end
thereof."153 Furthermore, now that interested witnesses in general are
not barred from testifying in court, if a witness to a will is interested,
there is little reason not to allow that interest to go only to the credibil-
ity of the witness without requiring a forfeiture of any part of a de-
vice.154 While lawyers undoubtedly will continue to have wills
executed with all of the traditional ceremony, and for good reasons be-
yond validity,155 should testators be frustrated if they comply with the
basic requirements of the UPC?

The UPC authorizes a self-proved will and provides a form for the

149. See generally Mechem, Why Not a Modern Wills Act?, 33 IOWA L. REV. 501 (1948);
Langbein, Substantial Compliance with the Wills Act, 88 HARV. L. REV. 489 (1975).


151. See Estate of Silva, 169 Cal. 116, 145 P. 1015 (1915); Estate of Lorenz, 136 Cal.

152. Prior to 1931 the CPC did not expressly require both witnesses to be present when
the testator signed or acknowledged his or her signature. Evans, supra note 24, at 605-06.

153. There has been some debate over whether the statute means the end of a will is its
physical or rhetorical end. Compare Estate of Seaman, 146 Cal. 455, 80 P. 700 (1905) with
2d 211, 324 P.2d 578 (1958); Estate of Tonnesson, 81 Cal. App. 2d 703, 185 P.2d 78 (1947);
ATKINSON, supra note 30, at 303. In In re Beadle, [1974] 1 W.L.R. 417, the testatrix signed
at the top and placed the will in an envelope which she sealed and signed. The judge "re-
gretfully" declared the will invalid.

154. For the long and confusing history of the requirements of "credible" and "compe-
tent" witnesses, and the purging statutes, see ATKINSON, supra note 30, at 308-20. See also
Estate of Tkachuk, 73 Cal. App. 3d 14, 139 Cal. Rptr. 55 (1977). The State Bar Committee
does not think the witness requirements should be changed, at least not if informal probate
without notice is accepted. REPORT, supra note 12, at 44.

155. For analyses of the policy reasons underlying the formal requirements for the exe-
cution of wills, see Gulliver & Tilson, Classification of Gratuitous Transfers, 51 YALE L.J. 1
(1941); Langbein, Substantial Compliance with the Wills Act, 88 HARV. L. REV. 489 (1975);
acknowledgment of the testator and for affidavits of the witnesses made before "an officer authorized to administer oaths" either when the will is executed or subsequent thereto. This provision, approved by the California State Bar committee, is proving popular even in states not ready to adopt the UPC.

Holographic wills were not permitted in California under the Wills Act of 1850, but were permitted after 1872 as provided in the Field Code. The 1850 act had rather elaborate provisions for nuncupative wills for persons in danger, which might have been quite necessary in a pioneer society. With holographic wills permitted, there seems to be scant reason today why nuncupative wills should not follow deathbed oral wills into history.

The California courts have, in some ways, been most indulgent with testators who have written their own wills, permitting the integration of separate pages, even though obviously written at different times on different types of paper and with different colors of ink. Interlineations have been permitted, even if made at later times. But the courts have relentlessly adhered to the statutory requirement of a date, and have rejected unattested handwritten wills that have any printing, stamping, or typing that the testator considered part of the will, even if the words were not essential to the testator's meaning.

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156. Uniform Probate Code § 2-504.
158. UPC Notes, supra note 3, No. 22 at 3.
160. Id. at 20.
161. Id. at 9-10. The present restricted statute is Cal. Prob. Code § 54 (West 1956).
164. Estate of Finkler, 3 Cal. 2d 584, 46 P.2d 149 (1935).
166. The early cases went to an extreme, rejecting holographic wills with any printing or stamping. Estate of Bower, 11 Cal. 2d 180, 78 P.2d 1012 (1938); Estate of Thorn, 183 Cal. 512, 192 P. 19 (1920). Even after the amendment to CPC § 53 in 1931 and the liberal decision in Estate of Baker, 59 Cal. 2d 680, 381 P.2d 913, 31 Cal. Rptr. 33 (1963), there are still
Logically, however, if a holographic will is permitted, the statutes should not contain traps that a reasonable layperson would not anticipate.

**Revocation**

The CPC section\(^{167}\) relating to revocation by act to the instrument is similar to that of the UPC,\(^{168}\) but the two codes differ on revocation by operation of law and by later inconsistent instruments. Revocation by operation of law in marital status cases is restricted in California to a premarital will which does not make provision for a contemplated spouse.\(^{169}\) At the time of the Field Code, divorce was much less common than it is today. The failure to provide for the revocation of devises to a spouse in the event of a divorce is a serious defect in any contemporary code. Such a provision was included in the MPC,\(^{170}\) and is included as the only type of revocation by operation of law in the UPC.\(^{171}\) This change in California law was suggested by Professor Evans in 1931,\(^{172}\) but the legislature has yet to act.\(^{173}\)

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problems when the testator considers the printed or typed words to be part of the will, even though not material to the meaning. See Estate of Christian, 60 Cal. App. 3d 977, 131 Cal. Rptr. 841 (1976); Estate of Helmar, 33 Cal. App. 3d 109, 109 Cal. Rptr. 6 (1973).

167. CAL. PROB. CODE § 74 (West 1956).
168. UNIFORM PROBATE CODE § 2-507.
169. CAL. PROB. CODE § 70 (West 1956).
170. Model Probate Code, supra note 5, § 53.
171. Section 2-508 revokes any “disposition or appointment” made by a prior will if the testator is divorced or the marriage is annulled. This change of circumstance also revokes any nomination of the former spouse as a fiduciary unless the will expressly provides otherwise. Property not passing to a former spouse passes as if the former spouse failed to survive the testator. The meaning of the terms “divorce,” “annulment,” and “separation” are made clear by § 2-802. The period between a complete property settlement in anticipation of a divorce and the divorce is covered by a useful section, § 2-204, which provides that the spouses may by a written contract after fair disclosure waive all rights of a surviving spouse, including a renunciation of all benefits by intestate succession or by prior will. UNIFORM PROBATE CODE § 2-508.

The UPC also has a renunciation section, § 2-801, based on the Uniform Disclaimer of Transfer by Will, Intestacy or Appointment Act of 1973. UNIFORM PROBATE CODE § 2-801.

172. Evans, supra note 24, at 610. See also Note, The Effect of Divorce on Wills, 40 S. CAL. L. REV. 708 (1967).
173. The State Bar Committee approved the concept of partial revocation by divorce and stated that legislation was being considered by the Probate and Trust Law Committee. REPORT, supra note 12, at 45.

The opinion in Estate of Murphy, 92 Cal. App. 3d 413, 154 Cal. Rptr. 859 (1979), demonstrates the need in California for provisions like UPC §§ 2-508, 2-802, and 2-801. In Murphy, the decedent was survived by his parents, by his divorced wife, and by her son by a prior marriage. The testator, whose 1972 will left his entire estate to his wife or alternatively to her son, had entered into a marital settlement agreement with his wife in 1975 in which each waived and renounced “any and all rights to inherit the estate of the other at the other's
The methods of revocation provided by CPC section 74 are exclusive. This section, in conjunction with CPC section 350 relating to the proof of missing wills, illustrates a substantial defect of the CPC. If, for example, a testator should telephone his or her lawyer and ask that the testator’s will be destroyed and the lawyer should comply, the will would not be revoked because the act was not in the presence of the testator as expressly required by CPC section 74. If the will is not revoked, its admissibility to probate by proof of its contents, as by submission of a copy, is questionable. Section 350 permits such proof only if the will was in existence at the death of the testator or was destroyed “fraudulently or by public calamity” during his or her lifetime.

The California Supreme Court in the famous case of *Estate of Cuneo*, 1 permitted a will to be proved by a copy although the original will had been destroyed by the testatrix. The court unanimously held that the will had not been revoked because of the application of the doctrine of dependent relative revocation. 2 Unfortunately, however, section 350 was not mentioned by the court and apparently not by counsel. 3 The idea that a will is not revoked but cannot be proved is unsatisfactory. Chief Judge Fuld, referring to a similar statute, has explained that “to speak of a destroyed will which is valid and unrevoked but which may not be admitted to probate is legal sophistry unless the refusal to admit it is based on reasonable doubt as to whether the will was really the testator’s will.” 4 There was no provision comparable to death, or to receive any property of the other under a Will executed before the effective date of this Agreement.” 92 Cal. App. 3d at 418, 154 Cal. Rptr. at 862 (emphasis omitted). The testator and his wife were divorced in 1976 and the decree adopted the agreement. The decedent died in 1977 without revoking his 1972 will, and his former wife received one fifth of the estate and renounced the balance in a compromise agreement with the decedent’s parents. The former wife’s son, arguing the marital settlement agreement in effect required that the estate pass as if the former wife had predeceased the decedent, claimed as the contingent beneficiary. The court held the wife’s right to take under the will was not affected either by the divorce or by the settlement agreement. The court indicated that the decedent, by leaving the will intact, in effect made a new will after the 1975 agreement. The case illustrates that there is enough confusion in the law to justify a code section like UPC § 2-204 in addition to a revocation-by-divorce section like UPC § 2-508. See note 171 supra.

174. 60 Cal. 2d 196, 384 P.2d 1, 32 Cal. Rptr. 409 (1963).
175. *Id.* at 204, 384 P.2d at 6-7, 32 Cal. Rptr. at 413-14.
177. Matter of Fox, 9 N.Y.2d 400, 410, 174 N.E.2d 499, 510, 214 N.Y.S.2d 405, 414 (1961). Justice Traynor, in his dissent in *Estate of Bristol*, 23 Cal. 2d 221, 236, 143 P.2d 689, 696 (1943), made the best defense possible for § 350 when he wrote: “[The legislature] has placed upon the testator the responsibility for the safekeeping of his will until his death.” In *Bristol* there was doubt as to whether the testamentary instrument was in existence at the
section 350 in the MPC, nor is there one in the UPC. The repeal of section 350 in California has been recommended repeatedly, but the code has not been changed.

Revival

CPC section 75 has been construed to provide that a revoked will can be revived only by reexecution. This section may not have been quite so drastic when first enacted: The meaning of revival by the “terms of such revocation” and whether “republication” could be by oral declaration, were unclear. Now, however, when a second will has been revoked with the intent to revive the first will, the only relief that might be afforded in California would be to avoid the revocation of the second will by application of the doctrine of dependent relative revocation, clearly unsatisfactory as a sole solution.

Because of the severity of section 75 the courts sometimes have strained to call the second will, if only partially inconsistent with the first, a codicil to the first, so that the revocation of the “codicil” would leave the first will in effect. For example, assume a first will giving a legacy to A, a legacy to B, and the residue to X, and a second giving a legacy to B, a legacy to C, and the residue to X. If the second instrument were destroyed, would the first will be completely effective? As Professor Evans has pointed out, at least the legacy to A should have been revoked, and not revived under section 75.

At common law, the revocation of a revoking will automatically revived the first. The ecclesiastical courts held that the prior will was revived if such an intention could be proved. The UPC, by adopting the latter rule, gives effect to the testator’s intention in a way which is no more informal than the proof permitted under the doctrine of dependent relative revocation.

testator’s death. In Cuneo and in the hypothetical case suggested, all the facts were known and the only issue was one of law; whether the will was revoked.

178. See, e.g., Evans, supra note 24, at 611; Turrentine, supra note 22, at 38; Note, Statutory Restrictions on Probate of Lost Wills: Judicial Inroads on Restrictions, 32 CALIF. L. REV. 221 (1944) (citing 9 J. WIGMORE, EVIDENCE § 2523 (3d ed. 1940)).


180. Turrentine, supra note 22, at 10; ATKINSON, supra note 30, at 478.


183. Evans, supra note 24, at 611-12.

184. ATKINSON, supra note 30, at 474.

185. Id. at 474; see Ferrier, Revival of a Revoked Will, 28 CALIF. L. REV. 265 (1940).

186. UNIFORM PROBATE CODE § 2-509, Comment.
The California anti-lapse statute, CPC section 92, also should be improved, at least to settle the law about its application to void and lapsed legacies in class gifts. The court of appeal decision in Matter of Steidl\(^{187}\) reaches a limited, albeit sound, result with respect to a lapsed legacy, but a comprehensive section like the UPC provision would settle the law as to both lapsed and void legacies.\(^{188}\)

A companion problem involves the residue of a residue rule: If a residuary devise is made to two or more named devisees and one pre-deceases the testator, his or her share, unless saved by section 92, passes by intestacy. CPC section 120 presumes that the testator intended to have all of the estate pass under a residuary clause, but the section has been construed to retain the ancient residue of a residue rule.\(^{189}\) Recent reform codes, including the UPC\(^{190}\) and some state court opinions,\(^{191}\) have abolished the rule.\(^{192}\)

**Conclusion**

Since the last major revision of the CPC in 1872 there have been many changes in the American family and in the attitudes and expectations of its members. Many more marriages end in divorce;\(^{193}\) more decedents have had plural families; more decedents leave adopted children, stepchildren, children born out of wedlock, relatives of the half-blood, and unmarried companions.\(^{194}\) Decedents who have been divorced are more likely to have separate property in their estates than

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188. Uniform Probate Code § 2-605, Comment.
190. See, e.g., Bennett Commission Reports, supra note 4, at 495-511; Uniform Probate Code § 2-606.
192. In addition to the problems with the CPC already discussed, scholars have suggested a provision for nonexoneration when mortgaged property is devised. Turrentine, supra note 22, at 40; see Uniform Probate Code § 2-609. The present case law is satisfactory so long as a testator is not personally liable on the bond. Estate of Brown, 240 Cal. App. 2d 818, 50 Cal. Rptr. 78 (1966). A statutory rule governing the inclusion in class gifts of adopted and illegitimate children also would be helpful. Uniform Probate Code § 2-611. On the other hand, scholars recommend deleting certain rules of construction in the CPC which do more harm than good. Turrentine, supra note 22, at 37-39. See also Estate of Russell, 69 Cal. 2d 200, 444 P.2d 353, 70 Cal. Rptr. 561 (1968); Estate of White, 9 Cal. App. 3d 194, 87 Cal. Rptr. 881 (1970); Comment, Extrinsic Evidence and the Construction of Wills in California, 50 Calif. L. Rev. 283 (1962).
194. See Cogswell & Sussman, Changing Family and Marriage Forms, 21 The Family Coordinator 505 (1972). According to this study, the normal families with children con-
decendents survived by their first spouses. More decedents have lived on inherited capital than in a pioneer society. More have moved to California with property acquired elsewhere and have left separate property or quasi-community property in their estates. Changes have resulted from the acceptance of equal rights for women, and from the emerging recognition that decedents have obligations to society to support an increasing number of dependents. In single family there is more of a tendency for a decedent to want an estate to pass to a surviving spouse than to be divided between a spouse and issue. The CPC has, of course, adapted to some changes, but not in a consistent, coordinated fashion.

A comparison of the two codes shows that to repeal most of Division I and II of the CPC and start anew would be far better than to change a number of individual sections. A simpler, more contemporary code such as the UPC could then be used as the basis for reform.

If changes in the existing code must be made section by section, however, a number of sections should be the subject of special study by the Law Revision Commission or by committees of the State Bar. Such a procedure has been recommended previously. Professor Evans suggested seventeen changes in the nonprocedural area after the revision in 1931, and Professor Turrentine suggested sixteen in 1956 in his Introduction to the Probate Code. Almost all of the suggestions have merit; very few have been adopted. The principal reason for the failure of the legislature to act is that most of the changes, standing alone, do not seem important enough to compete with more pressing demands. Notwithstanding these political realities, this author considers fifteen revisions essential:

1. A surviving spouse should be given a forced share of separate

stituted 44%; remarried, 15%; experimental marriage, 8% (increasing to 15% by 1980). See also Burgess, The Family in a Changing Society, 53 AM. J. OF SOCIOLOGY 417 (1948).

195. Abel, Barry, Halstead & Marsh, Rights of a Surviving Spouse in Property Acquired by a Decedent While Domiciled Outside California, 47 CALIF. L. REV. 211, 211 (1959) (citing COMMONWEALTH CLUB, THE POPULATION OF CALIFORNIA 130 (1946)).


198. See note 47 & accompanying text supra.


property and a right to recapture a share of such property disposed of inter vivos in the same way that quasi-community property can be recaptured under CPC section 201.8, or, better yet, the concept of the augmented estate in UPC section 2-202 should be adopted for both separate and quasi-community property.\(^{201}\)

2. CPC section 90 (pretermission) should be repealed and UPC section 2-302 or, preferably, a limited family maintenance act adopted.\(^{202}\)

3. CPC sections relating to the intestate share of a surviving spouse should be modified to provide that the devisable half of community property and quasi-community property shall not all pass to the surviving spouse where the decedent is survived by the issue of a prior marriage.\(^{203}\)

4. Inheritance after the issue of grandparents should be abolished as provided in UPC section 2-105.\(^{204}\)

5. CPC sections 220-226 relating to intestate succession should be repealed and the rules of succession and representation in UPC sections 2-101, 2-102A, 2-103, 2-106 adopted instead.\(^{205}\)

6. The remnants of the ancestral property doctrine should be abolished; CPC sections 227 and 229(b) should be abolished and section 254 recast to make half-bloods equal to full bloods, as in UPC section 2-107.\(^{206}\)

7. CPC sections 228, 229, and 230 should be repealed and a section added allowing inheritance by relatives of a predeceased spouse in default of relatives by blood, and reconsidering the status of stepchildren in an *in loco parentis* relationship.\(^{207}\)

8. CPC sections 50 (formal wills), 53 (holographic wills), and 54 (nuncupative wills) should be repealed and UPC sections 2-502, 2-503, and 2-505 adopted.\(^{208}\)

9. A section similar to UPC section 2-508, providing for revoca-
tion by divorce, and a section similar to UPC section 2-204, clarifying the law relating to the effect of marital property settlements, should be added.\textsuperscript{209}

10. CPC section 350 (lost or destroyed wills) should be repealed.\textsuperscript{210}

11. CPC section 75 (revival) should be repealed and UPC section 2-509 adopted.\textsuperscript{211}

12. CPC section 92 (anti-lapse) should be repealed and UPC section 2-605 adopted.\textsuperscript{212}

13. The residue of a residue rule should be abolished and UPC section 2-606 adopted.\textsuperscript{213}

14. A general provision for equitable prorationing and abatement such as UPC section 3-902 should be added, or at least the equitable apportionment provision of section 91 extended to cover section 70 together with recasting CPC sections 750-753.\textsuperscript{214}

15. CPC sections 105 and 106 (construction) should be repealed and sections similar to UPC sections 2-109 and 2-611 added.\textsuperscript{215}

Although the substantive provisions of the UPC could be adopted separately, and the CPC could be improved by a series of amendments, California should take a bolder course. There is a need for a complete reexamination of the substantive and procedural law relating to family property, succession, wills, and the administration of estates. The most effective way to proceed, as demonstrated in other states and countries, is for the legislature to appoint a temporary commission, perhaps along the lines of the Bennett Commission in New York.\textsuperscript{216} The commission might be directed, as a special commission recently was in Maine, to recommend, after due consideration of the probate laws of other states and the UPC, a revision and rearrangement of existing laws relating to estates and administration, with the purpose of presenting to the legislature “a fully modern, integrated and consistent Probate Code.”\textsuperscript{217}

\textsuperscript{209} See text accompanying notes 171-73 supra.
\textsuperscript{210} See text accompanying notes 174-77 supra.
\textsuperscript{211} See text accompanying notes 179-86 supra.
\textsuperscript{212} See text accompanying notes 187-88 supra.
\textsuperscript{213} See text accompanying notes 189-91 supra.
\textsuperscript{214} See, e.g., Estate of Buck, 32 Cal. 2d 372, 196 P.2d 769 (1948); Estate of Stevens, 27 Cal. 2d 108, 162 P.2d 918 (1945).
\textsuperscript{215} See note 192 text supra.
\textsuperscript{217} Godfrey, The Maine Commission on Revision of the Probate Code, UPC Notes, supra note 3, No. 20 at 3.
Such a commission, with an adequate budget, could finance studies, hold hearings, gather supporting data,\textsuperscript{218} publish drafts of proposed legislation, and develop public interest in reform. Its legislative members would be responsive to grassroots pressure for change.\textsuperscript{219} Further, practicing and academic lawyers on the commission would have the benefit of the vast literature which has accumulated from reform movements in other states and countries.

Most of the problems raised in this Article which relate to intestate succession and wills could be easily resolved by a special commission. A substantial consensus as to the preferable rules has developed and is embodied in the UPC. The difficulty is largely one of getting the right legislative sponsorship.\textsuperscript{220}

There are, however, some very difficult problems in the management and devolution of family property that have been only tangentially considered here. Many commentators would prefer a special legislative commission to undertake a major study of the California law of community property that has been developing since 1850.\textsuperscript{221} Now that retroactive changes are apparently permissible,\textsuperscript{222} questions are being asked about whether the community property system can be modified to accommodate the equal rights of women,\textsuperscript{223} whether separate control of community property is workable,\textsuperscript{224} and whether newer

\textsuperscript{218} Apparently it is not known how much of the property in decedents' estates consists of community property, quasi-community property, and separate property, and how the mix changes with the size of estates or has changed in recent years.

\textsuperscript{219} For accounts of political activities of the American Association of Retired Persons and other organizations, see UPC Notes, supra note 3, No. 20 at 7; No. 21 at 5-6.

\textsuperscript{220} See generally Cavers, supra note 2, at 214-15.


\textsuperscript{222} In re Marriage of Bouquet, 16 Cal. 3d 583, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976); Reppy, Retroactivity of the 1975 California Community Property Reforms, 48 S. CAL. L. REV. 977 (1975).


forms of marital property sharing might be better. Some commentators question whether reform of community property laws is not coming too late, as the complete equality of women may lead to more emphasis on separate property. Others claim that the flexible features of the family provision acts in British Commonwealth nations should be considered, at least as far as dependent children are concerned.

If a high-level commission would consider all of these problems with the same thoroughness that commissions have considered them in, for example, England, the contribution to California and to many other states would be timely and extremely valuable.


227. Macdonald, supra note 33, at 299-327; see also Gaubatz, supra note 33, at 551-54; Bennett Commission Reports, supra note 4, at 2004-06.

228. See generally Uniform Probate Code §§ 2-201 to 2-207.

229. Only a major state could be expected to finance a project of the required magnitude.