

LAW 258 LECTURE NOTES (Spring 2013)/Lecture Two

The relationships we examined in the last class involve questions that can more generally be characterized as “*status*” question--relating, in the T&E context, to the characterization of the relationship between a given individual to a given decedent and the inheritance rights to which such relationships can give rise.

--The sub-questions that come up in this context, are:

--To what extent does society define (and implicitly circumscribe and approve) “marital” relationships

--Is the parent/child relationship a biological or a social relationship (it's, actually both—with a an emphasis on one or the other aspect of the relationship that varies from state to state, context to context, and over time—e.g. the Michigan adoption cases [In re Lang 236 Mich App 129 (1999)] and the CA lesbian mom case)

--How much should society permit these relationships to be defined and governed by private contracts? A question that comes up particularly in the contexts of: (i) premarital agreements, (ii) technotots, (iii) unmarried couples (both same sex and opposite sex), (iv) family protection statutes [which we will take up at length in a later class]--particularly including “universal” or “forced share” inheritance rights

In addition to the “committed couple” (married, cohabiting, registered domestic partners--civil unions in other jurisdictions) and parent/child relationships we discussed last week, another significant “status” issue can arise with respect to:

4. **Half-blood relatives**

- a. Treated the same as full blooded relatives in California (***§6406 Probate Code***)
- b. Compare the “***Scottish Rule***” (adopted in Virginia) which gives a half-blood relative a half share and the “***Mississippi Rule***” which lets half-bloods inherit only if there are no full blooded relatives--***probably as a means of keeping the “Masters” children from having to share with their half-blood, half-slave siblings!***

So ends our brief exploration of family. We now return to the question of “***Who [in addition to one’s family] has an interest in the transfer of one’s wealth at the time of his/her death?***” The answer to that question in the last class was: “Other Interested Parties, the State and Creditors.” We’ll look at each of these groups very briefly in turn.

G. ***Other interested persons***: lovers, companions, extended family members (***dependent adult children/parents/siblings*** and others having some reasonable expectation of benefit)

H. ***The STATE***

1. ***Economic/political/social policy objectives***:

- a. ***Encourage the accumulation of wealth*** (by allowing transmission of maximum possible amounts of property)
- b. ***Require the concentration of wealth***--as with ***primogeniture***

- c. *Prohibit the transmission of wealth* by *confiscating* the same at death
- d. *Make sure debts are paid* (*Uphold the “sanctity of contract”*)
- e. *Revenue*: Taxes
- f. *Public Welfare*: Protect family
 - (i) Assure that social/cultural expectations are met
 - (ii) Keep close family off the public dole
- g. *Administrative Certainty*: Provide assurance to the populace that expectations will be met with respect to the transmission and distribution of wealth

A State’s political/economic system will tend to define its attitude toward, and system with respect to, the transmission of wealth. Since we live in what can arguably be described as a *democratic, socially conscious, capitalist society, our system* governing the transmission of wealth *tends to permit a decedent to do what s/he wishes with his/her property at death--subject to: (i) confiscation (through “progressive” taxation) of what is considered to be above average wealth* (with current [as of 12/12] tax rates equal to **35%** on amounts *in excess of \$5,000,000*) and (ii) statutory restrictions on testation designed to provide certain *minimum protections for a decedent’s surviving spouse and children*

I. **CREDITORS**

1. Obviously, they want to be paid
2. Talk about the urban myths that:
 - a. your debts are forgiven at death and
 - b. you could be responsible for your parents debts

3. Note *secured creditors* are protected
4. **Unsecured creditors** are not protected and have low priority

See §11420 PC. (a) Debts shall be paid in the following order of priority . . . :

- (1) Expenses of administration
 - (2) Obligations secured by a mortgage, deed of trust, or other lien, If the proceeds are insufficient, the part of the obligation remaining unsatisfied shall be classed with general debts.
 - (3) Funeral expenses.
 - (4) Expenses of last illness.
 - (5) Family allowance.
 - (6) Wage claims.
 - (7) General debts
- (b) Except as otherwise provided by statute, the debts of each class are without preference or priority one over another. No debt of any class may be paid until all those of prior classes are paid in full. If property in the estate is insufficient to pay all debts of any class in full, each debt in that class shall be paid a proportionate share.

5. As a practical matter, unsecured creditors often write off debts due at death--but they don't have to.

Having finished our investigations of the "right" to inheritance and family status questions, we'll now move on to an examination of "Intestacy"

II. INTESTACY (See generally D. & J. Chapter 2)

A. Definitions

1. **Intestacy** is defined as *dying without a will* (a "testament")
2. One can also die *partially intestate*--as would be the case if one died with a Will that failed to make a complete disposi-

tion of his/her property

3. It appears that as much as **60%** of the population dies without a Will--so these laws are not just window dressing. I read a recent study that breaks intestacy down by ethnicity: According to 2007 Harris Interactive survey: 48% of **Caucasians** did not have Wills, 68% of **Afro-Americans** lacked Wills and 74% of **Hispanics** lacked Wills.

http://wiki.answers.com/Q/What_percentage_of_people_in_the_US_die_without_a_Will

N.B. The study did not specifically report on Asians. Based on anecdotal evidence, there may be a large number of Asians who die intestate because of cultural taboos about discussing death.

4. Given the fact that if you have a Will, you can do pretty much what you want with your assets--and not be governed by the intestate statutes, ***why doesn't everyone have a Will?***
 - a. Distaste for dealing with the subject of death
 - b. Cultural aversion to the subject of death
 - b. No (or minimal) assets
 - c. Below a certain age it seems both costly and pointless
 - d. General apathy
 - e. Contentment with the intestate laws (if known)
3. The laws of intestate succession are intended to govern the distribution of the estate of a decedent who dies without a Will--or

that portion of the estate that is not governed by a Will if there is a Will.

4. *The laws of intestate succession are intended to mirror as much as possible what the State thinks the intestate would have done if s/he had had a Will. We spent as much time as we did on notions of family, since Intestate Statutes tend to direct estates to a Decedent's closest relatives--to-wit: families.*

B. Issues

1. Although it is easy to describe what intestate statutes are intended to accomplish, *because cultural values differ widely between societies and even within the same society over time, it can be difficult to formulate universal rules of intestate succession. Thus THERE IS NO SINGLE, UNIFORM SYSTEM FOR INTESTATE SUCCESSION--and there shouldn't be. The systems of intestate succession vary widely from place to place and over time.*
2. The corollary of this observation is that you can tell much about a society's values through an examination of its laws of intestate succession. For example, just as there are great *differences in social attitudes toward women, gays, first born children, "nonmarital" children, adopted children, spouses, in-laws, collateral relatives, half blood relatives and certain types of wealth (most notably land)*, so there are great differences in the intestate succession laws of various societies with respect to

these different groups. In this unit we will look more closely at some of those differences and try to fathom the attitudes that underlie them.

--Cf Iroquois Inheritance System:

Property of deceased persons passed to the other members of that person's clan; it had to remain in the clan. As an Iroquois had only things of little value to leave, the inheritance was shared by his/her nearest clan relations; in the case of a man, by his own brothers and sisters and maternal uncle; *in the case of a woman, by her children and own sisters, but not by her brothers. For this reason man and wife could not inherit from one another, nor children from their father.* [Taken loosely from **Frederick Engels Origins of the Family, Private Property, and the State**--based on Morgan. See:

<http://www.egs.edu/library/friedrich-engels/articles/the-origin-of-the-family-private-property-and-the-state/chapter-iii-the-iroquois-gens/>

--Also Cf. **Njal's Saga** for recitations of ancient Scandinavian jurisprudence

--Note: See Hues Question See p 29 in the Reader

3. Because laws of intestate succession attempt to define the norm of the society, and because deviations from that norm are legion, the intestate statutes must be arbitrary to some degree--they *can't deal with the subtle factual differences* that exist in

the myriad cases in which they must be applied. Cf. “Justice for American Women” excerpt in Halbach at pp 50-1 which notes that surviving spouses in general and wives in particular may or may not be treated “fairly” by intestate statutes which can apply automatically and without distinction to the surviving spouse regardless of: (i) the length of the marriage; (ii) the number of children; (iii) the relationship of the decedent’s children to the surviving spouse--i.e., stepchildren or natural children; or (iv) the *quality* of the marriage. Cf. UPC § 2-102 (D. & J. p 61 7t Ed/73 6th Ed)

C. **History**: First we’ll take a look at the origins of *our* laws of intestate succession--which, in our system primarily means a look at the laws of England.

--Also distinguish between *real* and *personal property* and *personal effects*

--Discuss the rules of *primogeniture* and talk about how those rules helped support the feudal economic system by concentrating ownership of large tracts of land in the hands of a few

--Cf. *biblical system* as reflected in the excerpts from the Book of Numbers reproduced in the Reader @ pp 24 ff

Distinguished between the descent of land (realty) and the descent of personalty in feudal societies

D. **Current U.S. Laws**

1. Varies somewhat dramatically from jurisdiction to jurisdiction

2. *Most states don't distinguish between realty and personalty*
3. Choice of Law Rules:
 - a. The law of the intestate's *domicile at death* governs succession of *personalty*
 - b. The law of the *situs of the property* governs succession of *realty*--although this rule is beginning to break down. *Cf. Calif. Prob. C. §120* (recognizes dower and curtesy rights of non-domiciliaries in Calif. realty)
4. *Illustrative Statutes* We'll look at the UPC [*explain*] and the Calif. Intestacy Laws--both of which, typically, distinguish between the rights of a surviving spouse and the rights of "others than the surviving spouse"
 - a. *The UPC* (D. & J. pp 60 ff 7th Ed/72ff 6th Ed)
 - i. *If spouse survives* the UPC varies the surviving spouse's share depending on what other relatives survive the decedent **§2-102 UPC**
 - (aa) Spouse gets *all* if: (i) no parent or descendant *other than* those who are also descendants of the surviving spouse (§2-102 [1])
 - (bb) Spouse gets a bit less (**\$200,000 plus 3/4 balance**) if a *parent but no descendant* survives the intestate (§2-102 [2])

--This rule seems a little odd to me. Clients don't generally leave parents anything

--Why should the parent get anything?

--TELL STORY OF HOLLY AXTELL's MOTHER

--Does a child have a duty to support a parent? Yes. See §§4400ff Fam C, see attached

(cc) Spouse gets even less (*\$150,000 plus 1/2 balance*) if the intestate had descendants (*all of whom were also descendants of the surviving spouse*) AND the *surviving spouse had one or more descendants who were not also descendants of the intestate* (§2-102 [3])

--Why should the intestate's kids (but not the surviving spouse's "other" children) get something here when they do not if the surviving spouse has no other children?

--Because the law assumes (I think correctly) that the decedent would favor his/her own children over his/her stepchildren and wants to protect that preference (which would not, presumably, be shared by the surviving spouse)

--N.B. The surviving spouse can always adjust his/her Will (if there is one) after

the deceased spouse's death to rebalance the distribution between the kids

--N.B. In blended families I generally find that the estate plans pretty much mirror the foregoing--like Logan/Wong where his 1/2 goes to his 4 kids (2 with W and 2 from prior marriage) and "her" 1/2 goes to her 2 kids (both with husband) BUT the kids generally do not inherit until the death of the surviving spouse--while under the UPC rule they receive their shares immediately!

(dd) Spouse gets the least (\$100,000 plus 1/2 balance) if the *intestate had descendants who were not descendants of the surviving spouse* (§2-102 [4])

--Is it fair to assume that all stepparents are wicked? This is a *Cinderella law*!

- ii. *The non-spousal share* passes per §2-103 UPC [D. & J. pp 61-2 7th Ed/73-74 6th Ed] in order to:
- (i) children of the decedent [and the descendants of deceased children];
 - (ii) parents--equally, *or to survivor*;
 - (iii) equally to descendants of parents, *or either of them* [thus including half-blood relatives on a par with whole blood relatives];
 - (iv) *equally* to paternal and maternal grandparents (or survivor of either set) and their descendants--or the survi-

vors on one side if all others on the other side are deceased; and then (v) escheat [per §2-105 UPC--on D. & J. p 62 7th Ed/74 6th Ed]

Questions:

- (aa) Why equally to parents if they survive?
(Because of the possibility of divorce)
- (bb) Why equally to the descendants of both parents? (Because of remarriage and blended families)
- (cc) Same Q's re: grandparents
- (dd) Why escheat after grandparents and their descendants? Why not more distant relatives?

b. **California Law** [See handout]--**Cf. with the UPC**

- i. Because California is a ***community property*** state, the intestate laws must (and do) deal with community property

--Find out how much the class knows about community v. separate property and note that it has significance primarily in the divorce and estate planning/administration contexts. Elucidate if necessary.

III. COMMUNITY PROPERTY (See pp 16 ff of Reader)

A. Origins/Background

1. Spanish Law (based on earlier pan-European law that developed after the fall of Rome) imported into California through Mexico.
See generally: http://en.wikipedia.org/wiki/Community_property
Also: D. & J. pp 469-71 and 508-515 8thEd; 417-7th Ed/471 6th Ed; and 455 ff 7th Ed/521 ff 6th Ed)
2. The system is *more favorable to women* than is the traditional common law system imported from England (“The husband and the wife are one, and that one is the husband!”)--and generally adopted in the U.S.
 - a. It recognizes that earnings of either spouse during marriage were really the result of the efforts of both (again viewing and supporting the family as a primary economic unit)
 - b. It permitted Spanish daughters greater control over their inheritance
3. California is one of *eight* states in the U.S. to have historically adopted a Community Property System--mostly Western (Mexican influenced) States
 - a. Arizona
 - b. California
 - c. Idaho
 - d. Nevada

- e. New Mexico
 - f. Texas;
 - g. Washington; and
 - h. Louisiana
 - i. In 1984 *Wisconsin* also adopted the *Uniform Marital Property Act*, which incorporates a “marital property” system very much like the comm. prop. system, but does not use the term “community property” It is, however, now considered to be a “Community Property State”
N.B. Alaska has an optional community property system which allows married couples to elect to treat their property as community if they explicitly agree to do so
4. Although these states all have “community property” laws, there are sufficient variances between the laws of the various states so that if you practice in one of these states outside California, you should check the law to make sure you understand the local rule.

Thus, in Calif. earnings on sep. prop. remain separate while in Idaho, Texas and La. (and under Uniform Marital Property Act--adopted in Wisconsin) such earnings are community

And, Calif.’s intestacy laws leave all one’s community property to the surviving spouse, while Texas’ gives it to the kids

5. Over time the property laws (especially relating to the division

of marital property in divorce) have tended to soften and have become much more favorable to wives than was historically the case--in part (I think) due to the influence of community property laws.

B. General Rules

1. The *general rules* of Calif. Community Property Law are *easily stated*
 - a. “real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property.” §760 Calif. Fam. C.
 - b. The *principal exceptions* to this rule are contained in §770 Calif. Fam. C. which defines *separate property* as:
 - (i) All property owned by the person before marriage;
 - (ii) All property acquired by the person after marriage by gift, bequest, devise or descent; and
 - (iii) The rents, *issue* and profits of the [foregoing] separate property.
 - c. “*Quasi-Community Property*” is defined as all real or personal property, wherever situated, acquired . . . by either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition.

C. **Incidental Rights**

1. One has total control over the *management* and disposition of *separate* property (see §770 [b] Calif. Fam C.)
2. Management and control over *community* property are generally shared equally between the spouses--who stand in a fiduciary relationship to one another with respect to the same (see §1100-3 Calif. Fam C.) and who have present equal, undivided interests in the property.

--BUT, in Texas each spouse has the right to manage his/her own earnings. Other community property is subject to joint management and control
3. One has the absolute *right to dispose* of one's separate property at death in any manner in which one wishes--and, absent a Will, the separate property will be split between the spouse and children (or other relatives) if one dies intestate
4. A decedent only has the right to dispose of his/her one-half share of the community property owned with the decedent's spouse in the event of death--and, absent a Will, one's interest in community property will pass in its entirety to the decedent's spouse in the event of death.
5. *If the requisite formalities* are met, spouses can modify their respective marital property rights by contract and own their assets and earnings in any manner they choose. See *Calif. Fam C §§1500 ff* and *Calif. Pro C. §§140 ff*.

--BUT NOTE, §1615(c) has recently been added to the Family Code to require competent representation [and to reverse the Barry Bonds case]

--N.B. Texas has a peculiar rule that permits spouses to convert community into separate property, but not to convert separate into community property. (See D&J p. 456 7th Ed/ 522 6th Ed)

D. Significant Contexts

1. *Death*

- a. Tax Consequences (stepped-up basis)
- b. Determines the decedent's rights of disposition
- c. Intestate Rights

2. *Divorce*

3. *Control during marriage*

- 4.** The apparent advantages of a couple's holding their property as community at death can easily be outweighed by the disadvantages of losing formerly separate property in the event of divorce (and by the sometime disadvantages of giving up management control during marriage)--this can create a ***malpractice risk*** for the practitioner