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WHAT'S MY SHARE? TWO PROBLEMS OF DISTRIBUTION OF DECEDENTS' ESTATES IN OKLAHOMA INTESTATE SUCCESSION

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When a person dies without a will, disposition of his property is determined by state statutes on intestate succession. Distribution of an intestate estate in Oklahoma is controlled by Chapter 4 of Title 84 of the Oklahoma Statutes.[1] If distribution were always to only one person, life would be simpler. Section 213 of Title 84 provides, however, for distribution of an intestate estate among a surviving spouse and numerous blood relatives of a decedent.[2] This section determines the order of preference among the spouse and designated blood relatives and describes the method for determining the fractional share of the decedent's property that each participant is to receive.[3] Among blood relatives, several classes of takers are identified, each class to participate only if there is no surviving member of any of the more preferred classes.[4]

Recently the Oklahoma legislature has taken steps to modernize and to clarify those Oklahoma statutes controlling procedure for handling both testate and intestate estates.[5] An area overlooked in this

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[1] 84 OKLA. STAT. §§ 211-61 (1971 & Supp. 1979).

[2] 84 OKLA. STAT. § 213 (1971).

[3] The spouse is to receive one-half of the estate if (1) decedent leaves one child or issue of one child or (2) decedent leaves no issue but leaves at least one surviving parent or sibling and none of the estate consists of property "acquired by the joint industry of husband and wife during coverture." 84 OKLA. STAT. § 213 First, Second (1971). If decedent leaves two or more children or issue of deceased children, the spouse takes one-third of the estate unless the decedent was married more than once, in which case the spouse takes one-third of the property acquired during coverture and shares equally with the children of decedent in all property not acquired during coverture. *Id.* § 213 First. The surviving spouse takes all property acquired by joint industry during coverture when decedent leaves no surviving issue, *id.* § 213 Second, and the whole estate when decedent leaves no surviving issue, parent or sibling, *id.* § Fifth. For discussion of coverture property and intestacy, *see* Lilly, *Oklahoma's Troublesome Coverture Property Concept*, 11 TUL. L.J. 1 (1975).

[4] The classes designated in section 213, in order of preference, are: children and issue of deceased children (descendants), parents, brothers and sisters (siblings) and children of deceased brothers and sisters, and next of kin. 84 OKLA. STAT. § 213 (1971). The chart, "Intestate Succession in Oklahoma," sets out the general scheme of distribution established by section 213, with the methods of apportionment applicable in various situations.

[5] 6 OKLA. STAT. § 901 (Supp. 1979); 58 OKLA. STAT. §§ 241, 331, 382, 384, 387, 388,

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INTESTATE SUCCESSION IN OKLAHOMA[1]

Closest Surviving Kin	Sub-Division	SURVIVING SPOUSE: Coverture Property[2]	SURVIVING SPOUSE: Non-Coverture Property	Sub-Division	NO SURVIVING SPOUSE: Coverture Property[2] Inherited Under Subdivision Second	NO SURVIVING SPOUSE: All Other Property
ONE CHILD (or issue of one child)	FIRST	½ - Spouse ½ - Child (or issue of child)		FIRST	½ - Heirs of predeceased spouse ½ - Children in equal share (or to issue of deceased children by right of representation)	All to children in equal shares (or to issue of deceased children by right of representation)
TWO OR MORE CHILDREN (or their issue)	FIRST	⅓ - Spouse ⅔ - Children in equal shares (or to issue of deceased children by right of representation)	Equal shares to spouse[3] and children (or to issue of deceased children by right of representation)			
BOTH PARENTS	SECOND	All to Spouse	½ - Spouse ¼ - Father ¼ - Mother	SECOND	½ - Heirs of predeceased spouse ¼ - Father ¼ - Mother	½ - Father ½ - Mother
ONE PARENT			½ - Spouse ½ - Parent		½ - Heirs of predeceased spouse ½ - Parent	All to Parent
ONE OR MORE BROTHERS & SISTERS			½ - Spouse ½ - Brothers and sisters equally (and children of deceased brothers and sisters by right of representation)	SECOND & THIRD	½ - Heirs of predeceased spouse ½ - Brothers and sisters equally (and children of deceased brothers and sisters by right of representation)	All to brothers and sisters equally (and children of deceased brothers and sisters by right of representation)
NIECES AND NEPHEWS OR MORE REMOTE KINDRED	FIFTH	All to Spouse		SECOND & SIXTH	½ - Heirs of predeceased spouse ½ - Next of kin in equal degree[4] equally	All to next of kin in equal degree[4] equally
NO SURVIVING KINDRED	FIFTH	All to Spouse		SECOND & NINTH	½ - Heirs of predeceased spouse ½ - Escheat to State	All - Escheat to State

[1]Based on 84 OKLA. STAT. § 213 First - Sixth, Ninth (1971). Excludes subdivisions Seventh & Eighth [inheritance by a minor child of decedent who then dies underage, not having been married] and part of subdivision Third [the estate of a minor child whose parents are not living together goes to "the parent having had the care of said deceased minor"].

[2]For discussion of coverture property, *see* Lilly, *Oklahoma's Troublesome Coverture Property Concept*, 11 TUL. L.J. 1 (1975).

[3]Applies only if the surviving spouse is not the decedent's first spouse. If decedent was married only once, and leaves a surviving spouse, non-coverture property is distributed in the same manner as coverture property among the surviving spouse and issue of the decedent.

[4]For the method of determining degrees of kinship in Oklahoma, *see* 84 OKLA. STAT. §§ 217-221 (1971).

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admirable project is the need for amendment of the substantive statute controlling intestate succession. The current procedural reforms are designed to make the administration of decedents' estates clear, fair, simple, and consistent. These goals cannot be achieved fully if linguistic ambiguities and inconsistencies of philosophy are retained in the substantive scheme of intestate distribution.

There are two particularly glaring problems existing in the basic scheme of intestate distribution set out in section 213. This article discusses these problems and suggests appropriate amendments for their resolution.[6] To reinforce the philosophy of the procedural changes, section 213 must be amended to clarify the method of determining shares of multi-generational descendants[7] and to resolve a blatent inconsistency in the treatment of nieces and nephews of an intestate decedent.[8]

Part I of this article deals with an ambiguity in the language of section 213 First, which controls distribution to lineal heirs of a decedent.[9] When a decedent leaves as heirs grandchildren and children of deceased grandchildren, it is not clear whether the grandchildren take equal shares[10] or shares based on the portions their parents would have taken had they survived the decedent.[11] The solution most compatible with the philosophy and scheme of section 213 is distribution to grandchildren in equal shares as the primary objects of the decedent's affection and bounty. Although the question has never been decided by the Oklahoma Supreme Court, it is likely that a different and less equitable interpretation is applied today in Oklahoma. The absence of a decision on the question may be the result of an assumption among Oklahoma lawyers and probate judges that the less equitable rule ap-

391.1, 391.2, 412, 421, 423, 426, 673, and 676 (Supp. 1979); 58 OKLA. STAT. §§ 11, 240, 677, 859 [new], 281, 331, 391.1 [amendments] (Supp. 1980).

[6] An alternative to the changes suggested in this article might be to adopt the Uniform Probate Code provisions regarding intestate succession. The changes suggested here are necessary because there seems to be no willingness to adopt the Uniform Code in Oklahoma at present.

[7] See text accompanying notes 49-61 *infra*.

[8] See text accompanying notes 86-106 *infra*.

[9] The applicable portion of section 213 states: "but if there be no child of the decedent living at his death, the remainder goes to all of his lineal descendants; and if all the descendants are in the same degree of kindred to the decedent they share equally, otherwise they take according to the right of representation." 84 OKLA. STAT. § 213 First (1971).

[10] Per capita, or "by heads," "simply means that whoever takes *per capita*, either under a will or under the statutes of descent and distribution, share equally." White, *Per Stirpes or Per Capita*, 13 U. CINN. L. REV. 298 (1939). "When [children or other relatives] take *per capita* they take directly in their own right and not because they represent any one else." *Id.*

[11] "Taking *per stirpes* means taking by representation. When children, or other relatives, take *per stirpes*, they take because they represent their parents, or other ancestors." *Id.*

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plies because it is the rule applicable to a similar California statute, upon which the Oklahoma statute was based. Were an appropriate case to reach the Oklahoma Supreme Court, the California interpretation could easily be rejected on the basis of differences between the California and Oklahoma statutes and inconsistency between the philosophy of the California interpretation and that of the scheme of succession in Oklahoma. A better solution, however, is for the legislature to amend section 213 to provide clearly for equal distribution among surviving grandchildren whenever all of decedent's children predeceased him without regard to whether some predeceased grandchild of decedent left surviving children.

Part II of this article considers an inconsistency in the treatment of nieces and nephews under section 213. If a decedent leaves a surviving spouse, her nieces and nephews will share in her estate if at least one brother or sister of the decedent survives.[12] If no brother or sister survives the decedent, nieces and nephews are excluded entirely from participation in the estate.[13] This result is inconsistent with the whole pattern of intestate succession set up by section 213. If nieces and nephews are considered to be sufficiently close relations to a decedent to share in the estate when a decedent leaves a surviving spouse, they should share without regard to whether a sibling of the decedent other than their parent survives. Section 213 should be amended to resolve the inconsistency in its treatment of nieces and nephews.

I. *Dividing Up Grandmother's Estate: Apportionment Among Descendants of Deceased Children of an Intestate*

Grandchildren and more remote descendants of a decedent are eligible to participate in a decedent's estate by virtue of their blood relationship to decedent's children. The language used in the statute to identify them as heirs is "issue of deceased children."[14]

Section 213 sets out the method of computing the shares to be taken by individual members of each identified class of heirs. The statute uses the phrases "in equal shares," "equally," or "by right of representation" to designate how a portion is to be divided within a class. The identification of issue of deceased children as heirs is consistently accompanied by the command that they take "by right of representation."

[12] 84 OKLA. STAT. § 213 Second (1971).
[13] 84 OKLA. STAT. § 213 Fifth (1971); Hughes v. Bell, 55 Okla. 555, 155 P. 604 (1916).
[14] 84 OKLA. STAT. § 213 First (1971).

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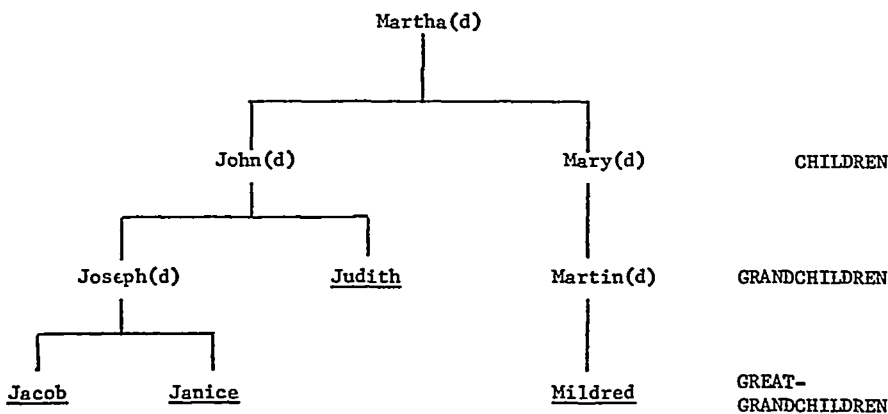
The phrase "by right of representation"[15] is defined in section 228: "inheritance or succession by right of representation takes place when the descendants of any deceased heir take the same share or right in the estate of another person that their parents would have taken if living."[16] Unfortunately, this definition is inadequate for resolving certain problems that may arise in applying the provisions of section 213 to distribute an intestate estate among descendants of decedent. To illustrate the problem, assume that Martha dies leaving no spouse and no children surviving. Her only surviving descendants are a grandchild and three great-granchildren. Two of the great-grandchildren are the children of Martha's deceased grandchild, Joseph; one is the child of a second deceased grandchild, Martin. The family relationships are set forth in the following chart:



Section 213 First provides that the whole estate is to go to the issue of the decedent if decedent leaves no surviving spouse but does leave issue.[17] There is no explicit statement as to how the estate is to be distributed among descendants should no child of decedent survive her, but it is reasonable to assume that the parallel provision for distribution among descendants where decedent left a surviving spouse should guide distribution where there is no surviving spouse.[18] Where a

[15] The phrase "by right of representation" appears nine times in section 213. It is used four times in § 213 First with reference to descendants of the decedent, twice in § 213 Second, and once in § 213 Third with reference to children of deceased brothers and sisters of the decedent. It is used once in § 213 Seventh and once in § 213 Eighth with reference to the children of a deceased parent of decedent from whom decedent has inherited property. Subdivisions Seventh and Eighth control the situation in which decedent is a minor child who first inherits property from a parent and then dies before reaching the age of majority or marrying.

[16] 84 OKLA. STAT. § 228 (1971).

[17] 84 OKLA. STAT. § 213 First (1971).

[18] *Id.*

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spouse survives, the two-thirds share to be taken by decedent's "children, and . . . issue of any deceased child . . . goes to all of [decedent's] lineal descendants; and if all the descendants are in the same degree of kindred to the decedent they share equally, otherwise they take by right of representation."[19]

In the illustration, Martha's heirs are clearly Judith (grandchild), Jacob, Janice, and Mildred (great-grandchildren). These heirs are not of the same degree of kinship to the decedent, Martha.[20] The command of the statute that "otherwise, they take according to the right of representation" clearly is applicable.

It is not clear, however, how that clause is to be applied in this case. Two very different answers have been given by courts called upon to construe that exact phrase in their own statutes of descent and distribution.[21] Under one view, the "root"[22] generation is the generation nearest to the common ancestor, regardless of whether there is a surviving representative of that generation.[23] Thus, in the example, the estate would be divided into two major portions, one-half to be divided among the descendants of each represented child of decedent. Mildred would take one-half the estate as sole representative of her grand-

[19] *Id.*

[20] The method of determining degrees of kinship in Oklahoma is controlled by statute. 84 OKLA. STAT. §§ 217-221 (1971). Section 220 provides: "In the direct line there are as many degrees as there are generations. Thus the son is, with regard to the father, in the first degree; the grandson in the second; and vice versa with regard to the father and grandfather toward the sons and grandsons." Judith is in the second degree of kinship to Martha; Jacob, Janice, and Mildred are third degree kin. For discussion of alternative methods of determining kinship, *see* ATKINSON, WILLS 45-49 (2d ed. 1953).

[21] See notes 23 and 24, *infra*. There is a third method of distributing an estate among kindred of varying degrees but the language of the Oklahoma statute precludes its use. *See* Estate of Poindexter, 221 N.C. 246, 20 S.E.2d 49 (1942). Under this method, an initial division is made based on the generation nearest to the decedent that has a living representative. The estate is divided into as many shares are there are members of that generation living or having living issue. Each living member of the nearest generation receives one of these shares. The remaining shares are added together and their sum is divided equally among all the participating members of the next generation of descendants. If three generations are represented, the division at the second generation is based on the number of members living or deceased leaving issue. Again, shares of the deceased members of this generation are combined and divided equally among the members of the next (third) generation. For further discussion of this method of distribution, *see* Waggoner, *A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants*, 66 NW. U.L. REV. 626 (1971); Comment, UNIFORM PROBATE CODE § 2-103.

[22] Source, or stock. The root generation is the generation at which the initial division of an estate is to be made in distributing that estate in representative shares.

[23] *See* Maud v. Catherwood, 67 Cal. App. 2d 636, 155 P.2d 111 (1945), discussed in text accompanying notes 26 to 34, *infra*. For a survey of the application of per stirpes distribution in England and America, *see* White, *supra* note 6. White concludes that the *Maud* application is against the weight of authority in American jurisdictions. *Id.* at 352-53.

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mother, Mary. Judith would take one-fourth as representative of one-half of the share of her father, John. Jacob and Janice would each take one-eighth, sharing equally as representatives of one-half of the share of their grandfather, John.

Under the opposing view, the "root" generation is the generation nearest to decedent in which there is a surviving member.[24] Under this approach, the estate would be divided into three major portions, based on the number of Martha's *grandchildren* living or represented. Judith would take a one-third share as grandchild of Martha; Mildred would take a one-third share as sole representative of her father, Martin; and Jacob and Janice each would take a one-sixth share[25] as representatives of their father, Joseph.

California and Massachusetts: Conflicting Views

In 1945, the California Court of Appeals adopted the first of these two methods of computing shares to be taken by descendants. In *Maud v. Catherwood*,[26] the California court was asked to interpret California Probate Code Section 222,[27] which is identical to Oklahoma's Title 84, Section 213 First. The question was the application of California succession statutes to distribution of a trust corpus among the settlor's grandchildren and children of the settlor's deceased grandchildren. The settlor, Judge S. Clinton Hastings, had provided for dissolution of the trust upon the death of the last beneficiary of the trust. The beneficiaries were the settlor, his wife, and his seven children. Upon dissolution of the trust, the corpus was to be distributed to "the then living lineal descendants of [S. Clinton Hastings] in fee, each of said descendants taking such parts or portions as they would have been entitled to as heirs at law of [S. Clinton Hastings] had he himself been the last survivor of the said beneficiaries last above enumerated."[28] Thus the corpus was to be distributed according to the provisions of California Probate Code Section 222.[29] The California court decided that the clause—"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"—required that division of the corpus begin with the generation of Judge Hastings' children. In a strict grammatical sense, the only antecedent available for the pro-

[24] *See* Balch v. Stone, 149 Mass. 39, 20 N.E. 322 (1889), discussed in text accompanying notes 35 to 44, *infra*.

[25] One-half of a one-third share.

[26] 67 Cal. App. 2d 636, 155 P.2d 111 (1945).

[27] Cal. Prob. Code § 222 (West 1956).

[28] 67 Cal. App. 2d 636, 638, 155 P.2d 111, 112 (1945).

[29] Cal. Prob. Code § 222 (West 1956).

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noun "they" in the last phrase of the clause is "all of the descendants."[30] Therefore, the *Maud* court reasoned that the statute must intend that each and every descendant take by representation whenever there are heirs in different degrees of kinship to the decedent.[31]

The court's interpretation was reinforced by the definition of "representation" found in California Probate Code Section 250: "Inheritance or succession 'by right of representation' takes place when the descendants of a deceased person take the same share or right to the estate of another *that such deceased person would have taken as an heir if living*."[32] The status of grandchildren and more remote lineal descendants of a decedent as heirs is based on their relationship to the children of the decedent. They are identified in the statutes by the terms "lineal descendants" or "issue of deceased children," not individually as "grandchildren" or "great-grandchildren." The California court concluded that the "deceased person" referred to in section 250 was the child of a decedent.[33] Combination of the definition of "right of representation" with the language of section 222 yielded the following: "the descendants of a deceased [child of a decedent] should take the same right or share in the estate of [decedent] as [that child] would have taken if living."[34]

A different result was reached in Massachusetts in *Balch v. Stone*,[35] which was decided in 1889. The Massachusetts statute contained language identical to that in the California statute in designating how distribution was to be made among lineal heirs in different degrees of kinship to the decedent.[36] However, the Massachusetts definition of "taking by representation" was different from the California definition. Massachusetts Public Statutes, Chapter 125, Section 6, provided: "inheritance or succession by right of representation shall be deemed to take place when the descendants of a deceased heir take the same share or right in the estate of another person *that their parents would have taken if living*."[37] The Massachusetts court acknowledged that a strict grammatical interpretation of the phrase

[30] 67 Cal. App. 2d 636, 642, 155 P.2d 111, 114 (1945).

[31] *Id.*

[32] CAL. PROB. CODE § 250 (West 1956) (emphasis added).

[33] 67 Cal. App. 2d 636, 645, 155 P.2d 111, 116 (1945).

[34] *Id.*

[35] 149 Mass. 39, 20 N.E. 322 (1889). The *Maud* opinion cites *Balch* but rejects it as wrongly decided without mentioning the differences in the definitions of "taking by representation" found in the two statutes. 67 Cal. App. 2d 636, 651, 155 P.2d 111 (1945).

[36] 149 Mass. 39, 40, 20 N.E. 322, 323 (1889).

[37] *Id.* at 43, 20 N.E. at 325 (emphasis added).

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"otherwise, they take by right of representation" would compel a holding that all heirs take by representation in any situation involving claims by heirs of differing degrees of kin to the decedent.[38] However, "upon consideration of the context and the history of the legislation . . . and of the spirit which pervades it,"[39] the court concluded that the strict grammatical construction could not control "without defeating the intention of the legislature."[40] After examining the history of the Massachusetts statute and its general scheme of distribution, the *Balch* court concluded that the policy of the statute was that heirs in equal degree of kinship to decedent take equally whenever possible, with representation being limited to those of more remote degree when several degrees of kinship were represented.[41] "[W]e cannot . . . believe that the legislature intended to destroy this equality among next of kin who are living, because one who would, if living, be in equal degree of kindred with them happened to die before the intestate, leaving children."[42] To reinforce this conclusion, the court turned to the statutory definition of representation, pointing out:

> Now, if . . . defendant be correct, that when there are descendants or issue of unequal degree the nearest descendants or issue who are living are to take *per stirpes*, and not *per capita*, the more remote issue would not take by representation as defined by the statute. If the estate is divided *per stirpes* they would get a different share from that which their parent would have taken if living.[43]

Thus the court concluded that the intended antecedent for the pronoun "they" in the phrase "otherwise, they take by right of representation" was "descendants in a more remote degree."[44]

Conflict Resolved

The results in *Maud* and *Balch* differ partly because of a different approach to analysis of the statute and partly because of the different statutory definitions of "right of representation" in California and Massachusetts. The California court felt bound by strict rules of grammar, while the Massachusetts court believed that grammatical niceties should bow to consideration of legislative policy underlying the distribution scheme as a whole. A major factor in each court's deci-

[38] *Id.*
[39] *Id.* at 40, 20 N.E. at 323.
[40] *Id.*
[41] *Id.* at 42, 20 N.E. at 324.
[42] *Id.*, 20 N.E. at 324-25.
[43] *Id.* at 43, 20 N.E. at 325.
[44] *Id.*

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sion, however, was the applicable statutory definition of "right of representation." This difference in definition was an important factor in each court's decision to adopt or to reject strict grammatical construction of the distribution statute.

The statutory definition of "right of representation" has two essential elements. The first is the identification of the situation in which it can be applied. In both California and Massachusetts, taking by representation can occur *only* "when the descendants of a deceased heir take"[45] some share in an estate. The second element is identification of the portion to be taken by one who takes by representation. That portion is the share "that such deceased person would have taken as an heir if living"[46] in California, but it is the share "that their parents would have taken"[47] in Massachusetts. Logically, the California version contemplates reference to the same ancestor (root) for identifying both the person eligible to take and the portion to be taken. The Massachusetts version allows one root to be used to identify a person as heir and another root to be used to determine the share that person takes.

Under either definition, read with the statute providing for inheritance by "issue of deceased children," the root used to identify heirs is clearly a child of the decedent. Under the California version, the share to be taken by representation should be determined with reference to the share that that root, the child, would have taken had he survived the decedent. Thus the initial division of the property would be made at the generation of children of decedent, as was ordered in *Maud*. Great-grandchildren take under the provision for "issue of deceased children" or "issue of decedent." If the grandchildren were allowed to take per capita and the great-grandchildren required to take per stirpes under the California definition of representation, the result would be not only illogical but also impossible of execution. In the example of Martha's estate, given above, the shares to be taken would be:

[45] See text accompanying notes 31 and 36, *supra*.

[46] CAL. PROB. CODE § 250 (West 1956).

[47] MASS. PUB. STAT. ch. 125, § 6, *cited in* Balch v. Stone, 149 Mass. 39, 20 N.E. 322 (1889).

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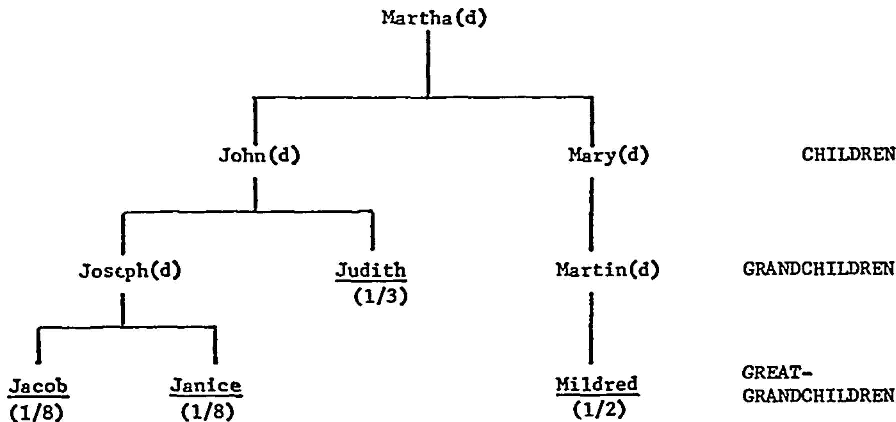

Judith, as surviving grandchild, would take a one-third share because there are three grandchildren surviving or leaving issue surviving. The three great-grandchildren, being required to take by representation, would be entitled to participate in the shares that would have been taken by their respective grandparents, children of decedent, had those grandparents survived decedent. Because each child of decedent would have taken one-half had he or she survived decedent, Mildred, as sole representative of Mary's line, would be entitled to one-half the estate. Jacob and Janice, as equal representatives of one-half of John's line, would each be entitled to one-eighth of the estate.

Unfortunately, 1/3 plus 1/2 plus 2/8 equals 1 1/12, or more than 100 percent of the estate. The sum of the shares to be distributed must always equal the whole. If the great-grandchildren are to take "by right of representation" a share determined by the share that their grandparents would have taken, the grandchildren must also take by representation so that the sum of the shares will equal the whole.

The Massachusetts definition of "right of representation" does not require that the share of one taking by representation be based on the share that would have gone to the ancestor who is the root for determining the eligibility of the taker to participate in the estate. By its terms, the share to be taken by a descendant of a deceased child is the share that the taker's *parent* would have taken had that parent survived the decedent. Thus great-grandchildren taking by representation should take the share that their parents, decedent's grandchildren, would have taken had they survived decedent. Unlike the California version, the plain wording of this definition can be applied to allow only great-grandchildren to take by representation when no child of decedent survives, with grandchildren taking per capita. Had all grandchildren of Martha survived, the estate would have been distri-

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buted to them in equal shares, one-third going to each grandchild. The great-grandchildren would thus be entitled to share in the one-third share their respective parents would have taken had they survived. Mildred would receive a full one-third share as the sole representative of the share Martin would have taken; Jacob and Janice would share equally the one-third share that would have been taken by their father, Joseph. Judith would, of course, receive her own one-third per capita share.

It is also possible to apply the Massachusetts definition to achieve a strict per stirpes distribution of the estate among *all* eligible heirs.[48] Judith would take one-fourth as representative of one-half the portion her father, John, would have taken had he survived his mother; Mildred would take a one-half share as sole representative of her father, Martin, who would have taken as sole representative of his mother, Mary, had he survived the decedent; and Jacob and Janice would each take a one-eighth share as equal representatives of the share that their father, Joseph, would have taken as representative of one-half the share his father, John, would have taken had he survived the decedent.

Conceptually, this method of applying the statute seems unnecessarily complicated. Additionally, it ignores the use of different referents for determining eligibility to take and the share to be taken in the statute defining right of representation. Faced with this language, the Massachusetts court was correct in abandoning strict grammatical analysis of the phrase "otherwise, they take by right of representation" in favor of an interpretation based on legislative policy and consistency among various provisions of the statute.

Which Rule for Oklahoma?

The Oklahoma statutes on succession were adopted from those in force in California.[49] Interpretation of a California provision usually is strong authority for interpretation of the parallel Oklahoma provision. However, the California interpretation is not binding on Oklahoma courts, particularly where the California decision interpreting the statute followed rather than preceded the adoption of that statute by Oklahoma.

Two circumstances make the *Maud* decision of less value in interpreting the parallel Oklahoma provision than might ordinarily be ex-

[48] Almost any combination of statute and result is possible. *See* Atkinson, *supra* note 20, at 41-49; Annot., 40 A.L.R.2d 263 (deeds); Annot., 19 A.L.R.2d 191 (distribution among collaterals); Annot., 13 A.L.R.2d 1023 (per stirpes and per capita distribution under wills.)

[49] *See* Lowrey v. LeFlore, 48 Okla. 235, 149 P. 1112, 1113-14 (1915).

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pected. First, although Oklahoma's Title 84, Section 228[50] was adopted from the original version of California Probate Code Section 250, the latter was amended in 1931, fourteen years before the decision in *Maud*.[51] Thus, at the time *Maud* was decided, the crucial statute defining "right of representation" in California was no longer identical to the statute defining that term in Oklahoma.[52] Second, the Oklahoma definition of "right of representation" found in section 228 is *identical* to the statutory definition of that phrase in Massachusetts at the time *Balch* was decided.[53] Because the phrase used to indicate the shares to be taken by descendants is identical in all three statutes, the fact that Oklahoma's definition of "right of representation" is *identical* to the Massachusetts definition, but different from the California definition, suggests that the Massachusetts decision is the more persuasive authority for interpretation of the Oklahoma statute.

Like the Massachusetts statute, Oklahoma's section 213 contains numerous provisions under which distribution is to be made in equal shares among takers of equal degree.[54] The *only* instances in which shares are to be taken "by right of representation" involve situations in which there are heirs of varying degrees of kinship designated to take, as where there are "children and issue of deceased children"[55] or "brothers and sisters and children of deceased brothers and sisters"[56] designated as heirs. In those instances, it is clear that those in the generation nearest decedent take per capita, with representation being applied only to those takers in the more remote degree of kinship to decedent. Why, then, should the pattern be varied in the single instance in which the group of heirs of various degrees of kindred contain only grandchildren or more remote descendants?

The purpose of providing for distribution to descendants per stirpes is either (1) to distribute an estate evenly among family lines created by the decedent during his lifetime or (2) to reflect a legislatively presumed preference of the decedent that the decedent's closest

[50] 84 OKLA. STAT. § 228 (1971).

[51] CAL. PROB. CODE § 250, Historical Note (West 1956).

[52] Compare the language of the California statute, quoted in text accompanying note 31, *supra*, with that of 84 OKLA. STAT. § 228 (1971): "Inheritance or succession by right of representation takes place when the descendants of any deceased heir take the same share or right in the estate of another person *that their parents would have taken if living.*" (Emphasis added.)

[53] Compare the language of the Massachusetts statute, quoted in text accompanying note 36, *supra*, with that of the Oklahoma statute, quoted in note 52, *supra*.

[54] 84 OKLA. STAT. § 213 First, Second, Third, Sixth, Seventh and Eighth (1971).

[55] 84 OKLA. STAT. § 213 First (1971).

[56] 84 OKLA. STAT. § 213 Second, Third (1971).

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surviving relatives be the primary beneficiaries of his estate.[57] The former purpose not only reflects an outdated view of family relationships but also conflicts with the specific provision of section 213 that "if all descendants are in the same degree of kindred to the decedent they share equally."[58] Under this provision, if all designated heirs are grandchildren, they take per capita. If it were intended that each family line be treated equally, grandchildren always should be required to take shares based on the portions their parents would have taken. They should never receive shares based on the number of surviving grandchildren.

Section 213 requires per capita distribution in every situation involving kindred of equal degree[59] The consistency of this approach indicates a legislatively presumed preference of the decedent that his closest surviving relatives be treated as the primary objects of his affection and benevolence. The interpretation of the language controlling distribution among heirs of varying degrees, which limits representation to those of more remote degree, harmonizes with this purpose and with the language of section 228 defining right of representation. As the *Balch* court pointed out, this rule "maintains the principle of equality among all descendants of the same degree, living and dead, and gives to the more remote descendants exactly the same share which their parent would be entitled to if living."[60]

The uncertainty in the Oklahoma statute should be resolved. If an appropriate case arises, the Oklahoma courts should resolve the question in favor of limiting representation to descendants of the more remote degree, rejecting the California rule on the basis of both policy and the crucial variation in the language defining "right of representation." Alternatively, the legislature could resolve the question by amending section 213, First to provide that "if all the descendants are in the same degree of kindred to the decedent they share equally, but if they are of unequal degree, those of more remote degree take by right of representation."[61]

[57] If the closest surviving kindred are considered the primary objects of decedent's benevolence, they will take per capita (equal shares). Only more remote kindred will be limited to representative shares.

[58] 84 OKLA. STAT. § 213 First (1971).

[59] *See* 84 OKLA. STAT. § 213 First ["the remainder in equal shares to his children . . ." and "if all the descendants are in the same degree of kindred to the decedent they share equally . . ."]; Second ["if he leave both father and mother, to them in equal shares . . ." and "in equal shares to the brothers and sisters of the decedent . . ."]; and Third ["in equal shares to the brothers and sisters . . ." and "to the parents equally . . ."].

[60] 149 Mass. 39, 43, 20 N.E. 322, 325 (1889).

[61] The language suggested here is derived from UNIFORM PROBATE CODE § 2-103(4).

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II. *Will My Sister's Children Share? Nieces and Nephews as Heirs of An Intestate*

Nieces and nephews as heirs of a decedent are mentioned specifically three times in section 213: Subsections Second and Third refer to "children of any deceased brother or sister"[62] and subsection Fourth refers to "issue, if any, of deceased brothers and sisters."[63] Subsection Second controls when the decedent leaves a surviving spouse but no surviving issue. In such a case, one-half the estate goes to the surviving spouse and the other half to decedent's parents or the survivor of them. If decedent left no surviving parent, then "said remaining one-half goes, in equal shares, to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation."[64] Subsection Third controls when decedent leaves no surviving spouse and no issue or parent. In such a case, the whole estate passes to brothers and sisters "and to the children of any deceased brother or sister, by right of representation."[65] Subsection Fourth purports to control when decedent leaves no surviving spouse, issue, father, or sibling by providing that the whole estate pass to "his mother to the exclusion of the issue, if any, of deceased brothers or sisters."[66] After subsection Second was amended to equalize the status of father and mother in the scheme of preference in intestacy, subsection Fourth was held to be surplusage, having no further function within the statute.[67] Before the amendment of subsection Second, the mother of a decedent shared equally in the estate with brothers and sisters of the decedent, participating only when decedent's father did not survive him.[68]

A question recently answered by the Oklahoma Supreme Court was whether nieces and nephews share in a decedent's estate under subsection Third or under subsection Sixth when decedent leaves no surviving spouse and no issue, parent, or sibling surviving. In *Brice v.*

[62] 84 OKLA. STAT. § 213 Second, Third (1971).

[63] 84 OKLA. STAT. § 213 Fourth (1971).

[64] 84 OKLA. STAT. § 213 Second (1971).

[65] 84 OKLA. STAT. § 213 Third (1971).

[66] 84 OKLA. STAT. § 213 Fourth (1971).

[67] Squint Eye v. Crooked Arm, 56 Okla. 69, 74, 155 P. 1147, 1149 (1916).

[68] Prior to the 1909 amendment, subdivision Second read as follows: "If the decedent leave no issue, the estate goes in equal shares to the surviving husband or wife, and to the decedent's father. If there be no father, then one-half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation; *if he leave a mother also, she takes an equal share with the brothers and sisters.* If the decedent leave no issue, nor husband nor wife, the estate must go to the father." WILSON'S REVISED AND ANNOTATED STATUTES § 6895 (1903), *quoted in* Squint Eye v. Crooked Arm, 56 Okla. 69, 72, 155 P. 1147, 1148 (1916).

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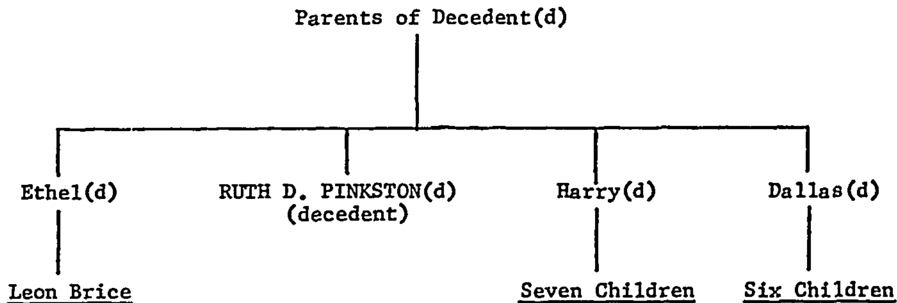
Seebeck,[69] the Oklahoma Supreme Court held that nieces and nephews of a decedent take under subsection Sixth as "next of kin" rather than under subsection Third as "children of deceased brothers and sisters" when no brother or sister or nearer kindred survived decedent.[70]

Brice involved the estate of Ruth D. Pinkston, who died leaving no surviving spouse, issue, parent, or sibling. The heirs were fourteen nieces and nephews of decedent, children of three predeceased brothers and sisters[71]:



The trial court granted the request of the administratrix, Muriel E. Seebeck (one of seven surviving children of decedent's brother, Harry), to distribute the estate in equal shares to the surviving nieces and nephews. Under this plan, each heir was to receive a one-fourteenth share of the estate.[72]

Leon Brice, the only surviving child of Ruth's deceased sister, Ethel, appealed, arguing that distribution should be made under subsection Third of section 213, which directs that distribution be made "in equal shares to the brothers and sisters of the decedent, *and to the children of any deceased brother or sister, by right of representation.*"[73] Appellant's contention was that, under subsection Third, the estate should be divided into three portions, each portion to then be divided among the children of the deceased brother or sister who would have taken that share had he or she survived the decedent.[74] Under this method of distribution, appellant would receive one-third of the estate as the sole representative of the share his mother, Ethel, would have taken had she survived Ruth. The seven surviving children of Harry and the six surviving children of Dallas would receive shares based on the one-third shares their parents would have received if liv-

[69] 595 P.2d 441 (Okla. 1979).
[70] *Id.* at 443.
[71] *Id.* at 442.
[72] *Id.*
[73] 84 OKLA. STAT. § 213 Third (1971) (emphasis added).
[74] 595 P.2d 441, 442 (Okla. 1979).

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ing, Harry's children each taking a one-twenty-first share and Dallas's children each taking a one-eighteenth share.

The issue as stated by the court was "whether the decedent's estate passes by intestate succession on a per capita basis as opposed to a per stirpes or by right of representation basis."[75] Although the *effect* of the decision was to give nieces and nephews equal shares of the estate, the basic question was not so much the method of apportionment as it was the basis of eligibility to participate in the estate at all. The real issue in the case was whether nieces and nephews participate in the estate of a decedent who left no nearer kindred because they are "children of deceased brothers and sisters" or because they are "next of kin."[76] The court decided that where decedent leaves no surviving brother, sister, or closer kin, and no surviving spouse, nieces and nephews take under subsection Sixth, which provides for inheritance by the next of kin when "decedent leave[s] no issue, no husband, nor wife, and no father or mother, or brother, or sister. . . ."[77] Having decided that the nieces and nephews derived their eligibility to take a share of the estate from subsection Sixth,[78] the court did not need to explore further the question of how the share of each was to be determined. Subsection Sixth does not make provision for taking by representation, providing only for participation limited to the next of kin of the decedent in equal degree.[79]

The approach taken in *Brice* was straightforward, the court relying upon the plain words of the statute in concluding that subsection Third can only apply where there is a surviving brother or sister of the decedent because subsection Sixth clearly states that *it* will apply when no sibling or closer kin survives. The opinion deals only briefly with prior Oklahoma decisions suggesting that subsection Third applies to give nieces and nephews a right to participate in the distribution of an intestate estate even where no brother or sister of the decedent survives. Referring to *Lowrey v. LeFlore*,[80] in which it was held that a nephew took to the exclusion of a grandniece by virtue of subsection Third, the *Brice* opinion merely points out that "[t]he same result

[75] *Id.*

[76] If subdivision Third controls, the identifying language making nieces and nephews eligible to participate is "children of deceased brother and sisters"; under subdivision Sixth, nieces and nephews would take because they are "next of kin." 84 OKLA. STAT. § 213 Third, Sixth (1971).

[77] 84 OKLA. STAT. § 213 Sixth (1971).

[78] 595 P.2d 441, 443 (Okla. 1979).

[79] *Id. See also* Felgar's Estate, 272 P.2d 453 (Okla. 1954); Humphrey's Estate, 193 Okla. 151, 141 P.2d 993 (1943).

[80] 48 Okla. 235, 149 P. 1112 (1915).

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could have been reached and possibly more appropriately under subdivision Sixth, since as the parties were kindred of unequal degree the nephew would have been preferred."[81] And, indeed, the court in *Lowrey* did not expressly address the issue of which subsection applied. It simply quoted several portions of section 213 and stated: "The third subdivision covers this case, and provides: 'If there be no issue, husband, wife, father, nor mother, then . . . to the children of any deceased brother or sister.' "[82]

Assuming without discussion that subdivision Third was applicable, the court in *Lowrey* then proceeded to a discussion of the meaning of the word "children" in that subdivision, concluding that the term was not equivalent to "issue" and that it did not include grandchildren of brothers and sisters.[83] The same assumption appears in three other cases that applied subsection Third to exclude grandnieces and grandnephews from participation.[84] The discussion in each case centered on the meaning of "children" under that subsection rather than on the question of which subsection controlled.

Brice indirectly reaffirms earlier decisions[85] construing subsections Second and Fifth of section 213 to exclude nieces and nephews from participation in an intestate estate where decedent leaves a surviving spouse but no surviving sibling or nearer kin. The language of subsection Second is parallel to that of subsection Third, giving one-half to a surviving spouse and the other half to parents or the survivor of them or, if no parent survived, to "brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation."[86] The introductory language of subdivision Fifth is identical to that of subdivision Sixth except that the former contemplates the existence of a surviving spouse while the latter does not. The language referring to children of deceased brothers and sisters as heirs under subdivision Second is identical to the language referring to them as heirs under subdivision Third. Thus *Brice* reinforces earlier decisions holding that nieces and nephews of a decedent may only take under subsection Second where at least one brother or sister of the decedent survives him.

[81] 595 P.2d 441, 443 (Okla. 1979).

[82] 48 Okla. 235, 239, 149 P. 1112, 1113 (1915) (omission in original).

[83] *Id.* at 242, 149 P. at 1114.

[84] Bruner's Estate, 125 Okla. 101, 256 P. 722 (1927); Burns v. Tiffee, 49 Okla. 262, 152 P. 368 (1915) (same estate as that involved in Lowrey v. LeFlore); Falter v. Walker, 47 Okla. 527, 149 P. 1111 (1914).

[85] McMahon v. Foley, 188 Okla. 552, 111 P.2d 1076 (1940); Hughes v. Bell, 55 Okla. 555, 155 P. 604 (1916).

[86] 84 OKLA. STAT. § 213 Second (1971).

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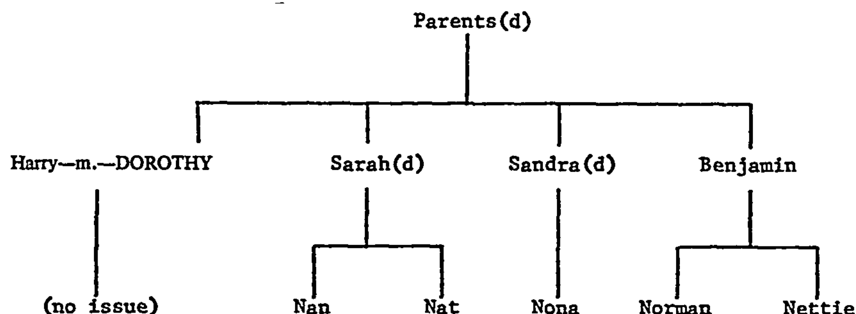
The effect on the nieces and nephews in this situation is far more serious than in the case involving no surviving spouse. Where decedent leaves no surviving spouse, the death of his last surviving sibling prior to decedent's own death merely affects the portion of the estate that will be distributed to the children of the other brothers and sisters of the decedent. Suppose, however, the decedent leaves a surviving spouse. By the death of the last surviving sibling of decedent, nieces and nephews who would have participated in the estate had that sibling survived are suddenly relegated to the position of having no interest whatsoever in the decedent's estate. For example, suppose the following family exists before Dorothy's death:



If Dorothy is the first to die of those shown as living on the chart, her estate will be distributed under subsection Second because she will leave no issue or parent but will leave a surviving spouse (Harry) and a surviving brother (Benjamin). Harry will receive one-half the estate as surviving spouse. The other half will be divided into three portions, based on the number of brothers and sisters surviving or represented. One portion (one-sixth of the estate) will go to Benjamin in his own right; one portion will go to Nona as sole representative of her mother, Sandra; and one portion will be divided equally between Nan and Nat as representatives of the mother, Sarah (each receiving one-twelfth of the estate).[87]

Suppose, however, that Benjamin dies before Dorothy does. Then her whole estate will go to Harry as surviving spouse under subsection Fifth. There will be no participation in the estate by any child of Dorothy's brothers and sisters.[88]

This result may be exactly what was intended, and it is inevitable under the present wording of the statute. It may be that there was a deliberate legislative assumption that a decedent would include nieces and nephews in the distribution of his wealth if he left both a surviving

[87] 84 OKLA. STAT. § 213 Second, 228 (1971).

[88] 84 OKLA. STAT. § 213 Fifth (1971) and cases cited in note 85, *supra*.

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spouse and a surviving brother or sister but would exclude them if he left only a surviving spouse. This seems unlikely, however. The history of the California legislation, from which the Oklahoma statute was derived, is enlightening on the question of probable legislative intent.

In 1889 the introductory language of the California provision paralleling Oklahoma's subsection Fifth read: "If the decedent leave a surviving husband or wife, and neither issue, father, mother, brother, nor sister, the whole estate goes to the surviving husband or wife."[89] The Supreme Court of California was presented with the question of whether this section operated to exclude nieces and nephews from participation as "children of deceased brothers and sisters" under a section parallel to Oklahoma's subsection Second.[90] In *Ingram's Estate v. Glough*,[91] the court decided that the quoted section controlled, excluding nieces and nephews from participation where no sibling or closer relative of the decedent survived him. In the course of this opinion, the California court stated:

> It is vain to argue against the injustice of the rule, or to contend that in a case like the one at bar the children of a deceased sister ought to have a share in the estate when there is not any surviving brother or sister, as well as when there is. Succession to estates is purely a matter of statutory regulation, which cannot be changed by courts.[92]

In 1905 the California statute on intestate succession was amended.[93] The language of the subdivision that, according to the *Ingram* court, controlled the situation where decedent left a surviving spouse but no issue, parent, or sibling, was amended to include in "the classes, the existence of which would forbid the surviving spouse from taking all of the estate 'the children or grandchildren of a deceased brother or sister.' "[94]

Although two California cases decided after this amendment followed the *Ingram* decision,[95] in the 1917 case of *Jepson's Estate*[96] the Supreme Court of California held that the 1905 amendment had so changed the statute that nieces and nephews were no longer excluded from participation in a decedent's estate merely because no brother or

[89] CAL. PROB. CODE § 220, Historical Note, p. 438 (West 1956).

[90] *Id.*

[91] 78 Cal. 586, 21 P. 435 (1889).

[92] *Id.*, 21 P. at 435.

[93] CAL. PROB. CODE § 220, Historical Note, p. 439 (West 1956).

[94] Jepson's Estate, 174 Cal. 684, 686-87, 164 P. 1, 2 (1917).

[95] Nigro's Estate, 149 Cal. 702, 87 P. 384 (1906); Carmody's Estate, 88 Cal. 616, 26 P. 373 (1891).

[96] 174 Cal. 684, 164 P.1 (1917).

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sister of decedent had survived. In reaching this conclusion the court pointed out that, under the prior language, the *Ingram* decision had been

> forced [on the court] in the sense that it was an inevitable and unescapable conclusion. The unreasonableness of it—even the injustice of it—was apparent and was recognized. No sound reason could be or ever was attempted to be abduced to support a law which said, as then did ours, that children of a deceased brother or sister could share in the estate if there was another living brother or sister, but could not share if there were none.[97]

The Oklahoma court, like the *Ingram* court, has been compelled by the words of the statute to hold that nieces and nephews are excluded entirely from participation in a decedent's estate unless at least one sibling of the decedent also survives. This result is indeed peculiar. This is the only situation created by section 213 in which a potential heir is *removed* from the class of persons eligible to participate in an intestate estate by the death of someone in a generation closer to the decedent. The normal pattern is that persons *enter* the class of persons who will receive some portion of the estate because some person more closely related to decedent predeceases him. For example, grandchildren only become eligible to participate in the estate of their grandparent by the prior death of their parent.[98] Great-grandchildren only become eligible to participate in the estate of their great-grandparent upon the prior deaths of both their parent and grandparent.[99] Parents of a decedent only become eligible to participate in the estate when decedent either dies childless or is predeceased by his children.[100] Brothers and sisters of a decedent only participate in the estate if decedent's descendants (if any) and parents all predecease decedent.[101] Only in the application of subsections Second and Fifth is it possible for one to enter the class of potential heirs through the death of one person (one's parent, a brother or sister of decedent) and later to be removed from that class through the death of another person (one's next-to-last surviving aunt or uncle).[102]

According to *Brice*, the language used in subdivisions Second and Third "reflects a legislative effort to treat the shares of predeceased

[97] *Id.* at 687, 164 P. at 2.
[98] 84 OKLA. STAT. § 213 First (1971).
[99] *Id.*
[100] 84 OKLA. STAT. § 213 Second (1971).
[101] 84 OKLA. STAT. § 213 Second, Third (1971).
[102] 84 OKLA. STAT. § 213 Second, Fifth (1971).

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brothers and sisters of decedent who are survived by children, equally with those of brothers and sisters who have survived the decedent by permitting the children of such pre-deceased brothers and sisters of decedent to stand in the pre-deceased brothers' and sisters' position by right of representation."[103] Although this statement explains the method provided by the legislature for determining the shares to be taken by brothers and sisters and children of deceased brothers and sisters when representatives of each group survive, it does not sufficiently explain why, under subdivision Second, children of deceased brothers and sisters are included as heirs at all. If there is a legislative determination reflected in subsection Fifth that the decedent would have preferred that the estate go to the surviving spouse to the exclusion of nieces and nephews, why is that determination not reflected in subsection Second? The policy reflected in subsection Second would be consistent with that supporting subsection Fifth only if, under subsection Second, the shares which now go to nieces and nephews were to pass instead to the surviving spouse or to *surviving* siblings. This could have been accomplished by simply omitting the phrase "and to the children of any deceased brother or sister, by right of representation" from subsection Second, so that one-half would pass to the surviving spouse and one-half to surviving siblings of decedent in equal shares. Alternatively, the statute could have provided that the one-half currently designated for siblings and their children should be divided into as many shares as decedent had brothers and sisters, living or dead, each surviving brother or sister to take one share and the remaining shares to pass to the surviving spouse.

It is unlikely that the legislature intended that the eligibility of a niece or nephew of a decedent to participate in the decedent's estate should be controlled by the death or survival of someone not a direct ancestor of that niece or nephew. There is a clear inconsistency between the apparent policy of subsection Fifth, which gives preference to a surviving spouse to the exclusion of nieces and nephews, and that of subsection Second, which allows both a surviving spouse and nieces and nephews to share in the estate when at least one sibling of the decedent survives him.

This inconsistency is one that must be resolved by the legislature. The courts cannot change the wording of section 213, which is, at least after *Brice*, quite clear. The statute should be amended to reflect the view that nieces and nephews are to be considered primary objects of a decedent's affection and benevolence where no sibling or closer kin-

[103] 595 P.2d 441, 442-43 (Okla. 1979).

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dred survives him without regard to whether decedent left a surviving spouse.

This change could be accomplished quite easily by amending subsections Fifth and Sixth to include "children of deceased brothers and sisters" among the class of persons whose failure to survive triggers operation of the section. The introduction to subsection Fifth would then read: "If the decedent leave a surviving husband or wife, and no issue, and no father, nor mother, nor brother, nor sister, nor any child of any deceased brother or sister, . . ." The language of subsection Sixth would parallel the language of subsection Fifth, the only difference in the introductory language being the inclusion of "nor husband, nor wife" in the list of persons whose failure to survive leads to the application of the subsection.

At the same time, subsections Second and Third should be amended to provide that, where there is no surviving brother or sister or nearer relative of decedent, the share designated for children of deceased brothers and sisters should be divided among them per capita and not by right of representation. Without such amendment, the changes in subsections Fifth and Sixth will force the court to hold that nieces and nephews always take under subsection Second or subsection Third as "children of deceased brothers and sisters, by right of representation."[104] Under the current language of those subsections, nieces and nephews would always take a share based on the share their parent would have taken, and could never take on a per capita basis. It would be extremely difficult for a court to construe the present language to reach any other result. Yet to force apportionment by representation upon the nieces and nephews of a decedent even where no sibling of decedent survived would be contrary to the policy of treating heirs of equal degree of kinship to decedent equally.[105]

Language similar to that suggested for subsection First, dealing with descendants of a decedent,[106] could be used to clarify subsections Second and Third. The statute would then read: "then said remaining one-half goes to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, provided that if all those participating in this share are in the same degree of kindred to the decedent they share equally, but if they are of unequal degree, those of more remote degree take by right of representation."

[104] 84 OKLA. STAT. § 213 Second, Third (1971).
[105] See text accompanying notes 57 to 59, *supra*.
[106] See text accompanying note 61, *supra*.

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Conclusion

The two problems of distribution of intestate estates discussed above both require resolution. The question of distribution among grandchildren and more remote descendants of a decedent could be resolved by the Supreme Court of Oklahoma if an appropriate case were presented to it. If such a case arises, the court should adopt the construction that limits representative taking to decendants of the more remote generation, allowing the descendants of the generation closest to decedent to share per capita.

Alternatively, the question of distribution among descendants could be resolved quite easily by the legislature. Resolution of the inconsistent treatment of nieces and nephews under the current statute can only come from the legislature. The legislature should resolve both problems at the same time through an amendment of section 213 incorporating the recommended changes.

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