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DESCENT AND DISTRIBUTION IN CALIFORNIA

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(This is the Fifth article in the series being written especially for Dicta by Mr. Lieberman of the Los Angeles Bar, formerly of the Denver Bar, bearing upon the similarities and differences between Colorado and California law and procedure.)

WHILE lawyers both in California and in Colorado refer to the laws relating to the distribution of the property of intestate decedents, this law in California is technically referred to as the Law of Succession.

Distribution of intestate estates in California is made in the following order:

1. If decedent leaves a surviving husband or wife and only one child or the lawful issue of one child, the estate goes half to the surviving spouse and half to the surviving child, or issue of such child.

2. If decedent leaves a surviving spouse and more than one child living (or the lawful issue of such children, or either or any thereof) the one-third of the Estate goes to the surviving spouse, and the remainder in equal shares to the children (or their issue).

3. If decedent leaves no surviving spouse but leaves issue, the whole estate goes to such issue.

4. If decedent leaves no issue, the estate goes half to the surviving husband or wife, and the other half to the decedent's father and mother in equal shares, and if either of said parents is dead, the whole of said half goes to the surviving parent, and if there is no such parent, then such half goes in equal shares to the brothers and sisters of decedent, and to the children or grandchildren of any of deceased's brothers or sisters. (How different this is from Colorado's law!)

5. If the decedent leaves no issue, nor husband nor wife, the estate goes to decedent's father and mother in equal shares or to the survivor of them.

6. If there is neither issue, husband, wife, father nor mother, then in equal shares to the brothers and sisters of de-

cedent (and to the children or grandchildren of any deceased brother or sister).

7. Only in the event decedent dies leaving neither issue nor parents nor brothers or sisters, nor the children or grandchildren of deceased's brothers or sisters, does the whole estate go to the surviving husband or wife.

8. In the event the relatives of all of the foregoing degrees are dead, the estate must go to the next of kin in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, then those who claim through the nearest ancestor must be preferred.

9. Where there are no heirs as fixed by the Statute, the estate, like elsewhere, escheats to the State, and in such event such escheated estate goes into a fund for the support of the common schools.

The foregoing succession, of course, relates only to property of the individual which belonged entirely to him or her as his or her separate estate. It does not relate to community property.

Community property is that property acquired by a married person within the State of California or brought to the State of California by a married person, which would have become community property in this State had it been acquired here during the married status, except the property acquired through gift, devise, bequest or inheritance. The theory behind the community property law, of course, is that any earnings or profits derived or acquired by a married person during the married state accrues to the benefit of both husband and wife because theoretically it is the result of the joint efforts of the married couple.

Since 1923 community property, in the absence of a will, goes by operation of law to the surviving spouse. This, therefore, constitutes the exception to the foregoing laws of succession. In other words, where community property is owned by the parties, one undivided half is that of the husband, and the other undivided half is that of the wife. Each has the absolute right to dispose of this undivided half as well as any other property which might, under the law, be separate prop-

erty by will, but in case this undivided half of the community property has not been disposed of by the will, it all goes to the surviving spouse.

Where decedent is a widow or widower leaving no issue, but his or her deceased spouse did have issue who are living at the time of the death of such widow or widower, and there is property in the Estate of such widow or widower which was community property when he or she and his or her spouse were living together, then such community property goes to the heirs of the deceased spouse in the same manner and in the same succession in which other property goes to such heirs. Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance came to the intestate by descent, devise or gift of some one of his ancestors in which case all those, who are not of the blood of such ancestor, must be excluded from such inheritance.

Illegitimate children are, in all cases, heirs of their mother and where they have been legitimated by a subsequent marriage of their parents or adopted by the father by acknowledgment of parenthood, in writing signed in the presence of a competent witness, then such illegitimate children are the lawful heirs of their father, the same as children legitimately born, with certain exceptions.

Considerable complication arises at times because of the fact that while community property may be disposed of by will, the husband (where the wife is the testatrix and decedent) nevertheless has the power, pending administration, to sell, manage and deal with the community's personal property, and for forty days after the death of the wife he has full power to sell, lease, mortgage or otherwise deal with or dispose of the community real property, unless a notice is recorded in the County in which the property is situated to the effect that an interest in the property is claimed by another under the wife's will.

The one-half of the community property which belongs to the surviving spouse is, by the way, specifically exempted from inheritance tax.

By express provision of the Code no person who has been convicted of the murder of the decedent is entitled to succeed to any portion of decedent's estate.

The Code refers to the succession by the children or issue of deceased's children as being a succession by representation and this is defined as taking 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". This term is held to be used in opposition to that of inheritance per capita.

There is no such restriction in California as there is in Colorado as to the proportion of ones estate which the Testator must leave in his will to his surviving spouse, unless waived.

Although the community property law, before referred to, prevails in California, there is nothing to prevent the owning and holding of separate property if acquired by gift, devise or inheritance, or if made separate property by the act of the married persons themselves. In other words, a husband may, by deed, convey property to his wife as her sole and separate property and vice versa, but neither spouse could by his or her own act, without the consent of the other party, make such separate property. On the other hand there is nothing to prevent the acquisition and holding of property in joint tenancy as distinguished from tenancy in common, or community property. Joint tenancy in this State, like in others, results in the passing of title to the surviving spouse by operation of law upon the death of either party.

Title vests in the heirs immediately upon the death of the intestate. This statement may be superfluous to a Colorado lawyer, but it has actually required rulings of court here to establish this principle of law in the State of California. However, while title immediately on such death vests in the heirs and not in the personal representative of the intestate, the personal representative, of course, is entitled to the possession and control thereof for purposes of administration.