Descendants of Deceased Brothers and Sisters of Decedent as Heirs at Law in California

OUR statute of succession[1] would seem to present some anomalies with respect to the right of descendants of deceased brothers and sisters of a decedent to inherit part of the intestate's estate where there are no living brothers or sisters of decedent at the time of his death.

Formerly, where decedent left surviving a husband or wife, but no issue, father, mother, brother or sister, the surviving spouse took all the estate to the exclusion of descendants of deceased brothers and sisters. This was established in In re Ingram[2] on the ground that subdivision 4 (at that time subdivision 5) of section 1386 of the California Civil Code governed the situation and did not mention descendants of a deceased brother or sister and that, therefore, they did not take. It was contended in that case that subdivision 2 was applicable, but the court held that said subdivision referred to the situation where there is a brother or sister of decedent alive at the time of his death. Some years later the legislature amended subdivision 4 so as specifically to include children or grandchildren of a deceased brother or sister[3] and the doctrine of In re Ingram[4] was thereby happily abandoned. It is the law under the statute as amended that the children or grandchildren of deceased brothers and sisters of a decedent share along with the surviving spouse, even in the absence of living brothers and sisters of decedent.[5] In as much as it is the general policy of our statute of succession that descendants of deceased brothers and sisters of the intestate should share in his estate (in the absence of issue, father or mother), the amendment of the statute in this respect accomplished a logical as well as a desirable result. The grandchildren of one deceased brother or sister are entitled to take along with the children of another deceased brother or sister, since each set represents its

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[1] Cal. Civ. Code, § 1386.

[2] (1888) 78 Cal. 586, 21 Pac. 435, 12 Am. St. Rep. 80. Followed in In re Carmody (1891) 88 Cal. 616, 26 Pac. 373, and Estate of Nigro (1906) 149 Cal. 702, 87 Pac. 384.

[3] Cal. Stats. 1905, p. 608.

[4] Supra, n. 2.

[5] Estate of Jepson (1917) 174 Cal. 684, 164 Pac. 1.

ancestor and it does not matter, therefore, that one set is nearer in degree to the decedent than another set. This has never been directly determined, but would seem to follow clearly from the wording of the statute.

On the other hand, take the case where decedent leaves neither issue, husband, wife, father, mother, brother or sister but children of a deceased brother or sister and grandchildren of another deceased brother or sister. The only difference between this case and the above one is that here there is no surviving spouse and all of the estate instead of one-half thereof is accordingly available for the descendants of deceased brothers and sisters. Logically, the grandchildren of a deceased brother or sister should be entitled to share with the children of other deceased brothers and sisters in this case as well as in the other. But it was held in the Estate of Nigro[6] that such a case was governed by subdivision 5 of the statute and that the children of deceased brothers and sisters, being nearer in degree to decedent, took all to the exclusion of the grandchildren of other deceased brothers and sisters. The contention of the latter that subdivision 3 governed was rejected by the court on the theory that it applies only to the case where there are living brothers and sisters (following in this respect In re Ingram[7] which had reached the same conclusion as to subdivision 2). The grandchildren are, in effect, deprived of their share because of the absence of a surviving spouse, a fact which obviously should not influence distribution in favor of any particular descendants of deceased brothers and sisters. The inconsistency becomes all the more striking when it is considered that if there were a living brother or sister the grandchildren of the deceased brother or sister would then take a part of the estate,[8] so that living brothers and sisters of decedent are required to share their inheritance with grandchildren of a deceased brother or sister, whereas their children are not required so to share it, but are allowed to take all.

Curiously enough, neither of the anomalies above mentioned has ever existed in the case of subdivision 8 of the statute which provides a system of inheritance for the special situation where a deceased intestate leaves property which was the common property of such deceased intestate and his or her deceased spouse while such spouse was living.

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[6] (1916) 172 Cal. 474, 156 Pac. 1019.

[7] Supra, n. 2.

[8] Under subdivision 3 of section 1386, which would govern if decedent left a living brother or sister.

Thus it has been held that in a case governed by subdivision 8 children of deceased brothers or sisters of decedent are entitled to take whether or not there are living brothers and sisters of decedent.[9] Further, in the recent case of Estate of Ross,[10] the Supreme Court has decided that the rule laid down in Estate of Nigro[11] does not apply to cases coming within subdivision 8 and that the grandchildren of a deceased sister share in the estate along with the children of another deceased sister.

This difference between subdivision 8 on the one hand, and subdivisions 2, 3, and 4 on the other, is in fact strikingly illustrated in the Ross case,[12] wherein decedent left both separate property and property which had been the common property of decedent and her deceased spouse while the latter was living. The court, following the Nigro case, held that the separate property should be distributed in toto to the children of a deceased sister of decedent, to the exclusion of the grandchildren of another deceased sister, but that the half of the common property which was allotted under the provisions of subdivision 8 to the heirs of the decedent should be shared in by the grandchildren of the deceased sister of decedent as well as by the children of the other deceased sister. There is clearly no basis or justification for such a result, except a badly drawn statute.

It is submitted that the doctrine of the Estate of Nigro[13] should be done away with by the adoption by the legislature of an amendment to the statute of succession. This could be accomplished by adding the phrase, "nor children or grandchildren or great-grandchildren of a deceased brother or sister" immediately following the word "sister" in subdivision 5 of section 1386 of the Civil Code. To remove all doubt, it might also be advisable to add a further provision to the statute to be numbered 10 and to read as follows: "The estate goes to the children or grandchildren or great-grandchildren of any deceased brother or sister of decedent by right of representation as herein provided, whether or not there is a brother or sister of decedent living at the time of his death."

There is another curious and obviously unwarranted difference between subdivisions 2, 3 and 4 on the one hand, and subdivision 8 on the other. In the former the phrase used is "children or

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[9] Estate of McCauley (1903) 138 Cal. 546, 71 Pac. 458.
[10] (Dec. 2, 1921) 187 Cal. 454, 202 Pac. 641.
[11] Supra, n. 6.
[12] Supra, n. 10.
[13] Supra, n. 6.

grandchildren of any deceased brother or sister," whereas we find in the latter the following: "descendants of any deceased brother or sister." If only for the sake of uniformity, they should all read the same. But furthermore, this difference in phraseology leads to at least one difference in substance. A great-grandchild of a deceased brother is a "descendant" and therefore is entitled to take in a proper case under subdivision 8.[14] On the other hand, a great-grandchild would not come in under subdivisions 2, 3 and 4 in view of the fact that they mention children or grandchildren only.[15] In furtherance of the policy of our statute of succession to enable descendants of deceased brothers and sisters to inherit in a proper case, great-grandchildren should in all instances (in the absence of children or grandchildren) be allowed to represent their ancestors; their remoteness in degree to decedent is immaterial.

If the statute were made to read "children or grandchildren or great-grandchildren of any deceased brother or sister" in each instance, the proper uniformity would be accomplished. It is believed that such a phrase is preferable to the phrase "descendants of any deceased brother or sister" as found in subdivision 8, because by use of the conjunction "or" it is made clear that, for instance, grandchildren do not take where there are children (parents of the grandchildren), and great-grandchildren do not take where there are either children or grandchildren, whereas, in the use of the general term "descendants" it might be contended that all were entitled to take. Apparently the point has never been raised in any reported case, but it would be best, in amending the statute, to leave no room for doubt. There is appended in a footnote herewith section 1386 of the Civil Code as it would read with the proposed amendments incorporated therein.[16]

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[14] Jewell v. Jewell (1865) 28 Cal. 232, approving Bouvier's definition of descendants as: "those who have issued from an individual, and includes his children, grandchildren and their children to the remotest degree. . . ." See also Tompkins v. Verplanck (1896) 10 App. Div. 572, 42 N. Y. Supp. 412; Lich v. Lich (1911) 158 Mo. App. 400, 138 S. W. 558; Bates v. Gillett (1890) 132 Ill. 287, 24 N. E. 611; Huston v. Read (1880) 32 N. J. Eq. 591.

[15] Estate of Curry (1870) 39 Cal. 529 is analogous. At the time that case was decided our statute of descent and distribution mentioned specifically children of any deceased brother or sister of decedent, and stopped there, and the court held that grandchildren of a deceased sister of the decedent could not take. On the same principle great-grandchildren would not take under subdivisions 2, 3 or 4. See also Stetson v. Eastman (1892) 84 Me. 366, 24 Atl. 868.

[16] The statute, with the amendments suggested herein, would then read as follows:

"Sec. 1386. SUCCESSION TO AND DISTRIBUTION OF ESTATE OF DECEASED PERSON. When any person having title to any estate not otherwise limited by marriage contract, dies without disposing thereof by will, it is succeeded to and must be distributed, unless otherwise expressly provided in this code and the Code of Civil Procedure, subject to the payment of his debts, in the following manner:

1. If the decedent leaves a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband, or wife and child, or issue of such child. If the decedent leaves a surviving husband or wife, and more than one child living, or one child living and the lawful issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to his children and to the lawful issue of any deceased child, by right of representation; but if there is no child of decedent living at his death, the remainder goes to all of his lineal descendants; and if all of the descendants are in the same degree of kindred to the decedent, they share equally, otherwise they take according to the right of representation. If the decedent leaves no surviving husband or wife, but leaves issue, the whole estate goes to such issue; and if such issue consists of more than one child living, or one child living and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living and the issue of the deceased child or children by right of representation;

2. If the decedent leaves no issue, the estate goes one-half to the surviving husband or wife and the other half to the decedent's father and mother in equal shares, and if either is dead the whole of said half goes to the other. If there is no father or mother, then one-half goes in equal shares to the brothers and sisters of decedent and to the children or grandchildren *or great-grandchildren* of any deceased brother or sister by right of representation. If the decedent leaves no issue, nor husband nor wife, the estate must go to his father and mother in equal shares, or if either is dead then to the other;

3. If there is neither issue, husband, wife, father, nor mother, then in equal shares to the brothers and sisters of decedent and to the children or grandchildren *or great-grandchildren* of any deceased brother or sister, by right of representation;

4. If the decedent leaves a surviving husband or wife, and neither issue, father, mother, brother, sister, nor children or grandchildren *or great-grandchildren* of a deceased brother or sister, the whole estate goes to the surviving husband or wife;

5. If the decedent leaves neither issue, husband, wife, father, mother, brother, sister *nor children or grandchildren or great-grandchildren of a deceased brother or sister,* 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, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote;

6. If the decedent leaves several children, or one child and the issue of one or more children, and any such surviving child dies under age and not having been married, all the estate that came to the deceased child by inheritance from such decedent descends in equal shares to the other children of the same parent and to the issue of any such other children who are dead, by right of representation;

7. If, at the death of such child, who dies under age, not having been married, all the other children of his parents are also dead, and any of them has left issue, the estate that came to such child by inheritance from his parent descends to the issue of all other children of the same parent; and if all the issue are in the same degree of kindred to the child, they share

the estate equally, otherwise they take according to the right of representation;

8. If the deceased is a widow, or widower, and leaves no issue, and the estate, or any portion thereof, was common property of such decedent and his or her deceased spouse, while such spouse was living, such property goes in equal shares to the children of such deceased spouse and to the descendants of such children by right of representation, and if none, then one-half of such common property goes to the father and mother of such decedent in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such decedent and to *the children or grandchildren or great-grandchildren* of any deceased brother or sister by right of representation, and the other half goes to the father and mother of such deceased spouse in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such deceased spouse and to the *children or grandchildren or great-grandchildren* of any deceased brother or sister by right of representation.

If the estate, or any portion thereof, was separate property of such deceased spouse, while living, and came to such decedent from said spouse by descent, devise, or bequest, such property goes in equal shares to the children of such spouse and to the descendants of any deceased child by right of representation, and if none, then to the father and mother of such spouse, in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such spouse and to the *children or grandchildren or great-grandchildren* of any deceased brother or sister by right of representation;

9. If the decedent leaves no husband, wife, or kindred, and there are no heirs to take his estate or any portion thereof, under subdivision eight of this section, the same escheats to the state for the support of the common schools.

10. *The estate goes to the children or grandchildren or great-grandchildren of any deceased brother or sister of decedent by right of representation as herein provided, whether or not there is a brother or sister of decedent living at the time of his death.*"