STUDENT GUIDE TO PROBATE

IN CALIFORNIA

Alan D. Davis, 2004, 2012

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FOREWORD

I wrote *Student Guide to Probate in California* over many years, starting in 1981 or 1982. I was teaching probate law at Santa Ana College. There were no books available to students, so we used a variety of other materials: The Rutter Group, CEB, Witkin, etc. But none of them was aimed at the student, legal secretaries, or paralegals. The voluminous nature of these books, not to mention the cost, made them unsuitable. Somewhere in the late 1990's I started compiling my class notes into a looseleaf form. The SAC bookstore copied and sold them to the students at a reasonable price (none of which went to me!). Problem solved - for the time being. But over the next few years, the cost of the notes increased to what I considered out of the reach of many students. At the same time, computers and the internet became available everywhere. I decided to upload the book to a class website and provide my students with as much material as I could for no cost. Hence, the download-able version (available as a *pdf* at *www.alanddavis.com*. I still make absolutely nothing from this venture, which was my intention. I only ask that if someone downloads or copies the book or any part of it, that it be only for scholastic purposes. It would also be nice if I got credit, but that's up to the end user.

I try to update the guide every year - typically around January 1st, when changes in the law go into effect. But as I tend to be lazy about these things, I often don't get around to the changes until March or April. The user is encouraged to check the California State forms website for any updates. Forms are amended and revised often, but the new ones aren't always available on the first of the year. I try to include the most up-to-date forms in the guide. If any user discovers an antiquated form, or any other matter that he or she feels needs correcting, please let me know at: *alan@alanddavis.com*.

I would like to thank Pam Everett for encouraging me to write this book. Pam got me my first teaching job at SAC and did paralegal work for me early in my career. Also, thanks to Christine DeBoer, who was the paralegal department chair at SAC for a long time and was always there for me when I needed help with something. And, of course, I'd like to thank my wife, Lenda, and my kids, Christopher and Courtney, who had to put up with me being gone every Thursday evening for 30 years while I taught.

Alan D. Davis, 2012

WILLS AND INTESTATE SUCCESSION

An understanding of probate law requires a study of wills, the lack of wills (intestate succession), and trusts. After all, when we probate an estate, we deal with at least one of these topics, and sometimes all three.

In ancient times, real property couldn't be passed from parent to child by Will. Personal property could, however, and church courts (Chancery courts) enforced those Wills because money and personal property were relatively insignificant. The real power lay in the land, and the king owned all of it. However, in order to stay in good graces with his powerful dukes and earls (who supplied him with tax money and knights), he was required to dole out vast tracts of land. These nobles, in turn, desired to pass their estates to their children. But under the law, only the king could make a grant of land.

Some testamentary ("passage by Will") control of land was possible until the 13th cent., but ended for several reasons:

First, English common law dictated that transfers of land required a physical act - "livery of seisin". Since few people could read, the concept of a Grant Deed was unknown. If the king wanted to give property to someone, he would indicate this by, for example, handing a branch from a tree located on the property to the new owner. In return, the new owner (a duke, earl, or other noble) would have certain feudal duties to the king, as supplying him with military men, money, and the like. Also, every year, the noble would be required to repeat the physical act by giving the king a similar branch from a tree on his property. When the noble died, the king invariably allowed the land to pass to the eldest son (see below), who also inherited the title.

Second, a Will could be used to defeat the common law rights of the feudal lord (the king, for example). At the death of the landholder, the king received certain benefits (relief, wardship, escheat).

Finally, in the absence of a Will, the land would usually go in one piece, by the law of primogeniture, to the eldest son, as already indicated. This allowed the property to remain whole. A Will, on the other hand, might mean that the land would be divided up among several heirs. Although the Statute of Wills in 1541 provided for some validity to Wills, the first modern Will statute didn't become law until 1837 when England passed Lord Langdale's Act.

If a man wanted to provide for offspring other than his eldest son, he had to use another device. Someone hit upon the idea of transferring land **during** one's lifetime to a friend (by livery of seisin) on the promise of the friend that he would hold only bare legal title and give the use and profit of the land to the person's son or daughter on the death of the person (the trustor).

Thus was born the "use", or "trust". In equity, the chancellor, who was the king's

"conscience", could order the trustee (the "friend") to perform if the friend proved to be false, and decided to keep the land for himself. Since there was no law of contracts at this time, there could be no lawsuit for breach of contract. The chancellor, however, was almost always a high churchman (a bishop, for example), and assumed that the transaction was a solemn one, that the promise of the trustee was based on faith, and that the beneficiaries were holy people. The trustee's failure to perform was, therefore, considered a breach of faith, and the chancellor, who was accustomed to punishing breaches of faith, had no problem in enforcing the promise.

Trusts later came to be used to evade creditors. But, in 1536, the Statute of Uses was passed which abolished uses of land. If you conveyed land to a trustee, he was deemed to be the owner. But, the chancellor, whose court rivaled that of the king's, ruled that the Statute didn't apply in certain cases. Finally, during the Restoration in the 17th century, unrestricted Trusts of land resumed.

WILLS

Under our modern statutes, a Will is defined as a document in writing by which a person disposes of his property at the time of his death. We say that a Will "speaks at death" because until the writer of the Will (the testator) dies, the Will has no meaning. In California, oral Wills are no longer valid, though just a few years ago, nuncupative (soldiers' and sailors') Wills were recognized under certain limited conditions.

Anyone who is competent and 18 years of age (pc 6100) can make a Will. Therefore, persons who have been adjudged to be incompetent (including some people who are subject to conservatorships) are not capable of executing Wills. Minors are obviously excluded, but it is questionable as to whether an emancipated minor (one who, though under age 18 has been declared by a court to free of parental control) is competent to make a will. It would appear that such a person can act in most respects as an adult, but this is one area that the courts have not ruled on. However, a mentally competent conservatee can make, amend, or revoke a will. See PC 6100.5 for incompetency.

Although a Will does **not** actually have to bequeath property in order to be valid, Wills are generally written with that purpose in mind. However, a Will that names only an executor can still be probated. And, keep in mind that a Will can pass only certain property to one's friends and relatives; specifically, all of a person's separate property, and one-half of a person's community and quasi-community property (PC 6101). Community and quasi-community property is property that one acquires during marriage with community funds (or property that would have been community property if the marital partners had lived in California at the time the asset was purchased). Separate property is property, on the other hand, that is obtained outside of the marital state, or is purchased with separate funds.

A Will cannot pass property that has been disposed of in any other method. An insurance policy, for example, typically names a beneficiary, so that on death, the proceeds automatically pass to the named person or persons. Other examples include IRA's, pay-on-death

(POD) bank accounts (also called Totten Trusts), pension benefits, and property held in joint tenancy. Joint Tenancy is a particularly useful way of holding property, and married persons typically hold title to real estate in this form. On the death of one joint tenant, the other (the survivor) automatically becomes the sole owner.

While only adults can write Wills, **anyone** can be a beneficiary of a Will (PC 6102), although residents of a foreign country may be limited by U.S. treaty. If no treaty exists, or the rights of inheritance are limited, the foreign beneficiary may get nothing.

When a person inherits property, we say that the property "vests" at the time of the decedent's death (P.C. 6153). That means that when a person dies, the property is considered owned by the one who inherits it, although it's still subject to probate administration and the claims of creditors. Actual transfer of the property may be delayed in the probate process while various statutes determine when the property can finally pass to the beneficiary.

While we're at it, let's discuss a few definitions. An "heir" is a person who is related by blood (and sometimes marriage) to the decedent, and is entitled as a matter of law to inherit (unless "disinherited" by a Will). An heir might also be (at least under California law) someone who can establish a parent-child relationship, such as an adopted child or a foster child.

A "beneficiary", on the other hand, is someone who is bequeathed ("left") or devised property in a Will. A beneficiary, naturally, does not have to be related to the testator. Historically, the words "give", "devise", and "bequeath" were specific in their context; that is, you "devised" real property and "bequeathed" personal property. "Give" was a general word, but was often applied to "legacies" - gifts of money. Modernly, we tend to blur these distinctions, so we use these words interchangeably.

Formal Wills in California are governed by Probate Code Section 6110. First, they must be signed by the testator, or signed at his direction and in his presence, or by a person's conservator pursuant to court order under PC 2580. Typically, a person goes to his attorney's office and signs his will. The attorney and his secretary act as the disinterested witnesses. However, if the testator is unable to sign (for instance, he has arthritis), he can ask someone to sign for him. The signer then should sign his name underneath and indicate that he was asked to sign for the testator.

Second, the witnesses must be two competent adults, and both must be present when the Testator signs the will ("executes" it), or they must later be present when the testator acknowledges that he previously signed the Will. Finally, the Testator must understand that the document he or she is signing is his or her Last Will and Testament.

If any of the formalities are missing, the Will could be challenged in court by way of a Will Contest. Regardless of the will's validity, if there's the mere **appearance** of incompetence or impropriety, there could be a challenge from some heir who feels slighted. (Remember, greed can be a very strong motive.)

Holographic, or Informal, Wills, under Probate Code Section 6111, are wills that are entirely in the decedent's handwriting. They need not be witnessed. Holographs are often written on scraps of paper, sometimes personal or hotel stationery, and also on will form that can be purchased at office supply stores. While the requirement that the will be written entirely in the decedent's hand is important, courts have liberalized this rule lately so that "surplusage", that is, extraneous matter printed on the paper, is disregarded. In other words, if a testator writes out his will on stationery bearing the caption "Hotel California, San Francisco", the will is not invalidated because of the printing.

Neither a formal or holographic Will need be dated, but of course an undated Will could lead to problems. Suppose a person executes five or six different wills, each giving contradictory and conflicting bequests. If the order of execution (signing) of the Wills cannot be determined because the date is omitted, all of the person's Wills could be admitted to probate. That could be disastrous to the beneficiaries. In that case, outside evidence may have to be presented to the court in order to determine in what order the wills were signed.

As mentioned above, witnesses can be any competent adult. However, if a witness is an interested person, that is, receives an inheritance under the Will, it's presumed that the witness obtained the Will by duress, menace, fraud, or undue influence, unless there are two other disinterested witnesses. If, however, the interested witness can't rebut the duress presumption, the witness can take only his or her intestate share (that is, the amount of property that the person would have gotten anyway had there been no Will). (See also *Limitations on Transfers to Drafters and Others; PC 21350.)*

Wills typically name someone to act on behalf of the deceased person's estate (the "executor" or "personal representative"). However, a Will is not invalid if it fails to name an executor. Generally speaking, a testator names a close relative (spouse, son or daughter) or close friend as executor, but occasionally the decedent will have named a bank or trust company.

A Will is not invalid merely because it was executed outside the State of California. A Will is valid if it complies with the rules for formal or informal Wills set out above, or if it complies with the law in effect at the place where executed, or complies with the law of the place where the Testator resided. Therefore, if a person makes a Will in New York, and then moves to California, the Will is valid as long as it was valid in New York at the time it was executed. See PC 6113.

People who write Wills often decide to make changes. Sometimes they merely amend the Wills, rather than draw up entirely new Wills. Amendments to Wills are called "Codicils". It is possible to have many codicils to a Will, but in practical terms, it is better to re-do a Will if the changes are considerable, since confusion could cause a Will to be misinterpreted. Regardless, codicils, whether formal or informal, must follow the rules of execution just like Wills.

REVOCATION (PC 6120-6124)

Just as a Will can be made, a Will can be revoked. Probate Code Section 6120 contains some of the rules of revocation. In general, a Will may be revoked by a subsequent Will ("I hereby revoke all former Wills made by me..."), or by burning, tearing, canceling, or otherwise destroying the Will, as long as the Testator does so with the intent to revoke it. The Will may also be revoked by someone other than the Testator if the destruction takes place in the Testator's presence and at his direction. Therefore, if one of the decedent's heirs sneaks into his house, finds and steals his Will, the Will is not revoked merely because it can't be found. The law **does** presume that the Will has been revoked; however, if it can be proved that the Will existed at the time of the decedent's death, but was subsequently lost (or stolen), a copy of the Will can be probated instead. In proving up a "lost" will in court, the attorney must have his witness (usually one of the beneficiaries) testify that he saw the will recently, perhaps in a place near the testator's bed, and that went he went to look for it after the death, it was gone. Under PC 6124, if a will that was in the testator's possession at death is lost, it is *presumed* that the testator destroyed or revoked it.

Under P.C. 6122 an annulment or divorce revokes a disposition in a Will to a former spouse, and also revokes a nomination of the other spouse as executor, trustee, conservator, or guardian. The property then is distribute as if the former spouse predeceased the testator. Remember, however, that legal separations under California law are not included in this statute. However, it is common in California family law upon dissolution of a marriage, or legal separation, that any property settlement agreement revoke a testamentary gift to the other spouse and the nomination of the other as executor.

Occasionally, a testator draws up a new Will and revokes the former Will. Then, having a change of heart, he revokes the second will. However, the act of revoking a later Will does not revive the prior will, unless the testator makes a declaration to the contrary. However, if the testator destroys the first Will thinking the second Will is valid, but which proves later to be invalid, the law invokes the Doctrine of Dependent Relative Revocation to revive the first Will on the reasoning that the testator would never have destroyed the first Will had he known the second Will was invalid.

REFERENCE TO MATTERS OUTSIDE WILL

A Will may dispose of all kinds of property in the document, like real property, automobiles, money, etc. A Will may also incorporate by reference any written document in existence when will is executed, as long as the document is described sufficiently (PC 6130 and 6132). Examples of this are trust documents, deeds, bank books, pinks slips, etc. In addition, under the doctrine of "Acts of Independent Significance" (PC 6131), a will may dispose of property by reference to acts and events that have significance independent of the Will, whether the events occur before or after execution of the will or the Testator's death. For example, the will may include a provision making reference to the execution or revocation of another person's will or trust, or the birth of future children, just to name a few acts.

RULES OF CONSTRUCTION OF WILLS (PC 21101 - 21700)

Wills, particularly holographic wills, are often written so badly that courts are called upon to interpret them when the meaning is not clear. Will Contests, usually based on allegations of fraud, undue influence, or ignorance by the writer, require a set of rules so that the trier of fact (the judge) can rule consistently in every case. The basic rule of construction is that the Testator's intent (PC 21102) controls, unless it is not indicated by the will. In other words, the court will not suppose what the testator meant if the meaning is clear. If, and only if, a will is ambiguous will a court provide its own meaning to a will and interpret it as it supposes the testator would have had he been alive to testify.

A will passes all property (PC 21105) owned by the decedent, including after-acquired property, even if the will fails to mention it. So, if a person purchases a new car prior to death, but makes no mention of it in his will, the will still disposes of it, though the item may pass by the rules of intestate succession.

Often wills pass property to a number of people as a group (a class - PC 21114). Unless otherwise stated in the will, the devisees (persons inheriting property) take the object as owners in common. That means that each person will own a fractional interest.

In order for a person to inherit, he or she must survive the testator. If we can't determine who died first, the testator or the devisee, it is presumed that the devisee did not survive the Testator. In that event, the gift to the devisee will fail and will be distributed according to another set of rules. If the devisee who fails to survive the testator was related to the testator or his spouse, the Anti-Lapse statute (PC 21110) comes into play. In that event, the issue (lineal descendants of the person - children, or possibly grandchildren) take the person's share by "right of representation". That means that the children stand in the shoes of the deceased beneficiary and represent his share.

If the devise fails (because the devisee was not related to the decedent or had no issue), it becomes part of the residue of the estate. If the Will contains a residue clause, the item is distributed pursuant to that directive. The residue of the estate is that property that is left for distribution after all of the specific bequests of property have been made. The residue is "what's left over".

A Class gift is a devise to a group of people. If the devise is one of a present interest, that is, the property exists at the time of the testator's death, the class includes all persons existing at that time. However, if the devise is one of a future interest, in other words, the property passes sometime after the decedent's death, the class includes all persons alive at the time the gift passes. Under this rule then, unborn children who were conceived prior to the decedent's death would inherit as part of the class.

Courts always try to interpret wills to avoid intestacy. Under the Doctrine of Integration, all of the various parts of a will are to be considered as a whole. No one part is more important

than the others; however, if parts of a will are inconsistent, the testator's more recent expressions is the will, that is, those things that appear later in the will rather than earlier, are given validity.

The words "heirs", "next of kin", "relatives", etc. mean those persons who take under laws of intestacy.

Words in a will are to be given their ordinary meaning. However, technical words should be used in their technical sense, unless the context of the will indicates a clear contrary intent or the will shows that the testator didn't know what they meant.

EXONERATION/ADEMPTION

Frequently, a person leaves specific items of property in his will, but at the time of death, the item is no longer in existence. In probate law we call this "ademption", or extinction of a property interest. For example, if a testator leaves his 1947 Buick to his nephew, but sells it prior to his death, the nephew gets nothing. Ademption can also take place by satisfaction, as when the gift is made during the testator's lifetime. However, the will must specifically provide for ademption, or must be acknowledged in writing by the beneficiary.

When a will gives a specific devise of property, the property includes the mortgage or liens that may have attached to the item, without the right of exoneration (being paid off), even if the testator says in his will that "all my just debts are to be paid off as soon as practicable", or words to that effect.

UNDUE INFLUENCE

An allegation of undue influence is a possible ground for setting aside a will. Will contests often allege that the testator was coerced into executing a will that he or she would not have signed but for the actions of some third person. This person usually ends up being the chief or sole beneficiary of the will. Any one of the following factors can indicate a possibility of undue influence, but typically a court would require several of these before a presumption of undue influence is found:

1. Unnatural provisions in the will: say, for example, the will leaves property to persons who are unknown to the family and cuts off the relatives;

2. Dispositions different than Testator's expressed intent: often a person will tell those close to him what his will contains, as, "When I die, Mary, you're going to get my house." Then, when the will is read, Mary is inexplicably ignored.

3. Testator's relationship with someone shows opportunity to be controlled. This situation sometimes occurs when a person is hospitalized, and a nurse or doctor shows great

empathy for the person. The relatives, who are not continuously present, are viewed as having forgotten the sick person. The nurse or doctor is seen as the kindly person who helped them in their hour of need. And just happens to end up as the sole beneficiary in the will.

4. Testator's mental/physical condition is weak: similar to number three above, though the testator could be at home with the kindly next door neighbor feeding him chicken soup. Again, the testator grows resentful at his children because they are not "there when I needed them".

5. The chief beneficiaries of the will are active in procuring the will: The person who later shows up as the primary recipient of the decedent's estate just happens to be the same one who arranged for the attorney to prepare the will, drove the decedent to the attorney's office, and paid for it. Although children often help their parents in this way, the next door neighbor shouldn't be involved in this type of situation.

6. Confidential relationship: Any person who is a fiduciary, that is, in a position of confidentiality or trust with the testator, is suspect if that person later shows up as the chief beneficiary in the will. This type of person could be a lawyer, doctor, bank officer, accountant, financial advisor, or just a close friend and confidant.

CLASSIFICATION OF DEVISES

Gifts of property, whether real or personal property, are classified in a number of ways:

1. A specific devise in a will refers to a particular item of identifiable property; e.g., "my 1963 Buick...".

2. A general devise, on the other hand, is not specific. "All of my personal property..."

3. Demonstrative gifts are devises in which the testator specifies the fund or property from which the devise is primarily to be made. For example, "My brother is to be given $10,000 from the account at Bank of America."

4. A general pecuniary devise is merely a certain sum of money given to an individual. In the above example, if the testator had merely said, "My brother is to be given $10,000," that would qualify as a general pecuniary devise. However, under
PC 21120, if a will authorizes an executor to satisfy a pecuniary gift wholly or partly by distributing property other than money, the property so distributed is valued at the time of distribution (unless the will says otherwise).

5. An annuity: is a type of general pecuniary gift that is payable periodically. "I authorize my executor to pay my son the sum of $10,000 per year, payable monthly."

6. A residuary devise is a gift of the decedent's property that remains after all of the

specific and general devises have been satisfied. Typically, a will contains the following sentence:

"All the rest and residue of my estate shall go to..."

ABATEMENT (PC 21400 - 21406)

What happens if the funds or assets are not sufficient to pay the devises? For example, the testator makes a number of specific bequests totaling $100,000, but when his estate is probated, there is only $90,000 to divide up. In that case, there is a proportional reduction (abatement) in each specific bequest. No one beneficiary gets his entire inheritance. If however, the will gave "the rest and residue of my estate to my children", and the estate totaled $100,000, the specific devisees would realize the full amount of their inheritance. The residual beneficiaries, however, would get nothing.

The order of abatement, that is, the rules that govern the pro rata distribution, are as follows:

1. Property not disposed of in the will. Any property that is not specifically designated for anyone is first used to divide up among the beneficiary.

2. Next, any residuary gifts are used to offset the distribution.

3. General gifts to persons other than the testator's relatives are then used to make up the difference, and if that's not enough,

4. then general gifts to testator's relatives are used.

5. Finally, when there is nothing else left to abate, the specific gifts themselves are distributed on a pro rata basis. First, those specific gifts not earmarked for the relatives abate, and then,

6. Specific gifts designated for the relatives are reduced are abated.

In the first instance, let's suppose that John is given $50,000, Bill is given $30,000, and Mary is given $20,000. But in our example, there is only $90,000 to divide up. Instead of giving John and Bill their entire bequests and giving Mary only $10,000 (that wouldn't be fair!), we give each beneficiary a proportional share. John's share, for instance, would be calculated by dividing his $50,000 by the total amount available ($100,000), and then multiplying by $90,000, which gives us $45,000. Similarly, then, Bill gets only $27,000 and Mary receives a mere $18,000.

NO CONTEST CLAUSES (PC 21310)

California recently revised its statutes regarding "no contest" clauses. Until this year, it was common to insert such a clause that said, in effect, that if anyone contested the Will, he or she would get nothing from the estate. The new sections define what exactly a contest is and what kinds of petitions are included. [Note: The sample Will at the end of this chapter now omits a "no contest clause". Many attorneys suggest that Will drafters either omit them or modify existing clauses to bring them in line with the new code.]

INTESTATE SUCCESSION

Now that we know how to make a Will, revoke a will, and interpret a will, we must next learn what happens to a person estate if he/she dies without a will. Although the rules may vary from state to state, the general rules of inheritance without a will, or intestate succession, are similar. Keep in mind that any part of a decedent's estate not passing by will passes by laws of intestacy (PC 6400). So if a person draws up a will, but neglects to distribute some of his property, that portion not mentioned in the will goes by way of intestate succession.

First of all, the rules are designed to pass a person's property to his/her heirs at law; that is, the close family members that the law determines should inherit a person's property. Obviously, then neither strangers nor distant kin can expect to inherit, though any relative stands in a better position than a non-relative.

The rules start with the basic presumption that a deceased person's spouse and/or children, those generally the closest people to him/her, would naturally be the ones that he/she would want to inherit. Therefore, the first basic rule, under PC 6401, says that the surviving spouse is entitled to the Decedent's one-half of the community property (remember, the survivor already owns the other one-half) and the quasi-community property (quasi-community property is property that would have been c/p if the parties had lived in California at the time they acquired the item). In addition, the surviving spouse *or domestic partner* (as defined in PC 37(b)) is entitled to a share of the decedent's separate property. If the decedent was not survived by issue (children, grandchildren, and so forth), parents, siblings, or issue of the siblings, then the spouse or domestic partner gets it all. However, if there are children (or issue), then the spouse or domestic partner gets only a portion of the separate property: one-half if the decedent was survived by one child (or issue); or if no issue, but there are parents, or their issue surviving, the same result holds true; only one-third, however, if the decedent was survived by more than one child or issue (or parents or their issue).

In the event that the decedent was not survived by a spouse or domestic partner, then the decedent's issue get everything. If neither spouse, domestic partner, nor issue survive the decedent, then the estate passes to the decedent's parents (or whichever survives) or their issue. If none of the above people survive the decedent, then the assets pass to the decedent's grandparents or their issue (aunts and uncles).

Finally, if none of the above exists, then the property passes to the issue of any predeceased spouse that the decedent may have had (PC 6402(e-g) and 6402.5). If that situation doesn't apply, then the decedent's estate goes to the next of kin "in equal degree", but when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those claiming through the nearest ancestor are preferred over the more remote relatives. (See Table of Consanguinity.) In the table of consanguinity, we see that each relative of a person is numbered according to how many "degrees" he or she is removed from that person. For example, your parents and your children are one degree removed from you, while your grandparents and grandchildren are two degrees removed. Some relative may be the same distance in terms of degree, but in terms of "closeness" to the decedent, one relative may be closer than another. (See Chart at end of chapter and PC 13.)

Because it is not uncommon for people to die in a common occurrence (such as an automobile accident), and because it is unwieldy to probate both a decedent's estate and the estate of his/her heir, California law (PC 6403) provides that an heir must survive the decedent by 120 hours in order to avoid predeceasing under the laws of intestacy. In other words, if the heir dies within 5 days of the decedent's death, he cannot inherit. In that situation, the law presumes that he has predeceased his ancestor. This rule is not applicable, however, if the property would "escheat" to the State under PC 6404. That means that if there are no heirs, the State of California would get the property. But the rule would avoid this result, so the heir, in this case only, would inherit.

Under PC 6406, heirs related by the "half-blood" take the same share if they were of the whole blood (see Fraley Estate example, where Decedent's father had been married twice and had children from each relationship. When the decedent died, she was survived by brothers and sisters only, and half-brothers and sisters. All shared equally.)

Heirs include unborn children that have been conceived (PC 6407). And pursuant to PC 6450-6455, a parent-child relationship exists, regardless of the marital status of the natural parents, in, for example, the case of adopted children. Therefore, adopted children are entitled to all of the rights of inheritance that natural born children are entitled to. In addition, step-children and foster children may be permitted to claim an inheritance on the grounds of a parent-child relationship if the person was a minor when the relationship began and it continued through their lifetimes, and there would have been an adoption but for a legal barrier. So, where a man marries a woman who has a young child from a previous marriage, and where that man decides to adopt the child but can't because the natural father won't consent, the child may

be able to assert that a parent-child relationship exists. Hence, on the man's death, the child may be able to inherit. Be wary, however, because if the man fails to pursue the adoption after the child becomes an adult, the child may be prohibited from inheriting on the theory that the legal barrier to the adoption (the natural father's consent, for example) is no longer there.

PRETERMISSION

Wills are often badly drawn, especially when written without the benefit of an attorney. To further complicate matters, people often fail to update their wills when circumstances change.

One of the problems associated with interpretation of wills is the situation that arises when a person marries or has a child after the execution of a will. In the case of an OMITTED (or PRETERMITTED) SPOUSE, if a Testator makes a will and then marries, forgetting to change his/her will, the new spouse receives his/her intestate share; that is, the share that the surviving spouse would have gotten had the will not existed in the first place. The spouse also receives any community property. (See PC 21610 - 21612.)

Naturally, if the will contains a clause intentionally omitting the spouse, the survivor receives nothing. But the will must be unequivocal; that is, the testator's intention must be clear.

And from what does this property come in order to satisfy the share? First, it comes from the estate not disposed of in the will. Second, it comes from all of the devisees in proportion to the value of their share (valued at Testator's death).

OMITTED (PRETERMITTED) CHILDREN are treated similarly. If child is omitted unintentionally, he/she is awarded his/her intestate share. The omitted child, of course, receives no share if the omission is proved to be intentional; or if the Testator gave almost all of his estate to the other parent of the omitted child; or if the Testator provided outside the will for the child. (See PC 21620 - 21623.)

If the testator believes that the child is dead, or is unaware of the birth of the child, the child will similarly take his share. In order to satisfy the gift, the rules are the same as in the case of a pretermitted spouse.

DISCLAIMERS

A disclaimer is a repudiation of a testamentary devise or an intestate gift. Under PC 260 - 295, anyone who inherits property may disclaim the gift. In addition, a conservator or guardian may disclaim for the incompetent person or minor child.

There are certain requisites in order for a disclaimer to be valid:

a. The person disclaimer must identify himself/herself and the person who created the

interest to begin with;

b. The disclaimant must also identify the property that is being disclaimed. A disclaimer may be as to all of the inheritance or only part of it. In any event, the disclaimer must be specific enough so that the item or items are identifiable;

c. Finally, the disclaimer must state without reservation that the person is disclaiming

.

A disclaimer must be filed (usually with the court where the probate has been filed) within a reasonable time after the person becomes aware that he has inherited property. The disclaimer is conclusively presumed to have been filed in a timely if it's filed within 9 mos. of the Decedent's death, or within 9 months after the interest vests, whichever is later.

The disclaimant should file the disclaimer with court, or he can mail it to the personal representative, or the trustee of any trust under which the property has passed. The disclaimer can be recorded if it affects the title to real property. Once filed or presented, it becomes irrevocable.

The effect of a disclaimer is that the property passes as if the disclaimant predeceased the decedent. The disclaimant has no right to direct where the property should go, or to whom. He merely has the right to accept or reject the asset or assets. Under both state and federal law, a disclaimer is not a fraudulent conveyance. In other words, a creditor of the disclaimant cannot allege fraud on the ground that the disclaimant should have accepted the property and thereby satisfy a claim by the creditor against the disclaimant. However, once a beneficiary has accepted benefits, he cannot disclaim.

Just as a person can disclaim, so can a person can also file a written waiver of his or her right to disclaim.

Whereas a disclaimer acts as if the disclaimant died before the decedent, an assignment is the act of assigning (giving or selling) property to some other person. Often an heir will not want the particular asset that he/she has been left, but wants it to go to a certain person. A disclaimer wouldn't work, because no one can designate who gets property once he/she has disclaimed. By accepting the benefit, however, any person can assign anything to anyone. The assignment must be specific and be in writing, and is generally delivered to the executor of the estate.

DIVISION BY REPRESENTATION: PER STIRPES vs. PER CAPITA PROBLEM

It is not uncommon for a testator to make a gift to "my children" or "my family". This is called a "class gift". The class of people who will inherit, in this example, are the children or the family of the testator. The question, then, is: Does the Testator intend to give the inheritance to the class of people existing at the time the will is **made**, or at the time of the Testator's death?

The General Rule of Thumb is that the property is distributed as of the Testator's death. All members of the class take equally, which is called "per capita", or by the head. In other words, each person takes one share. The beneficiaries do not take "per stirpes" (literally "by the roots"). When a gift is made to a class "per stirpes", it means the beneficiaries take their gift by "right of representation". Therefore, if one of the class dies and leaves issue, the issue will share their immediate ancestor's gift as though he were alive, thus taking the gift by representing that ancestor, and not as so many individuals.

The case of ***LOMBARDI vs. BLOIS (1964) 230 CA2d 191*** illustrates the difference between "per capita" and "per stirpes":

Henry Miller had amassed an estimated estate of $40,000,000 from land and cattle at time of his death in 1916. Prior to his death, he had drawn up a will with testamentary trust as follows:

1. The income of the trust would go to Miller's daughter, Nellie and her husband, J. Nickel, for their lives, or the survivor, in trust.

2. On their deaths, the income of the trust would be distributed to the children of Nellie and J. who were alive at Henry Miller's death, per stirpes. If any child of Nellie and J. died before Nellie or J., then the income would go to that child's issue; or if there were no issue, then to the other children or their issue per stirpes.

3. On the death of all of the Nickel children, the corpus (the main part of the property) and the income would be distributed to the issue of Nellie & J.'s children, "per stirpes and not per capita, absolutely and free of all trusts,..."

When the children of Nellie and J. finally died, there were two branches (roots) of the family left. Although Nellie and J. had four children, only two survived them with issue, George Nickel (the "Nickel" remaindermen) and Beatrice Nickel Bowles (the "Bowles" remaindermen). Mr. Nickel, on his death in 1962, was survived by three children and two grandchildren (the issue of his son John, who died in 1954). Mrs. Bowles, who outlived her brother by almost ten months, was survived by three children.

Mary Lombardi was one of the Nickel group. That branch asserted that the "stirpes" or family roots consisted of the seven grandchildren (or their issue by right of representation). The Bowles group, on the other hand, contended that there were only two "stirpes" - the two children of Nellie and J. Nickel. The trial court agreed with the latter contention, and the appellate court upheld that ruling. The two branches of the family split the corpus equally, which was then divided among the living heirs.

KILLER OF DECEDENT

We've all read stories, or seen movies, in which someone kills their father, mother,

brother, sister, uncle or aunt, with the hope of inheriting a fortune. Under the laws of most jurisdictions, however, a person cannot benefit by his own wrongdoing, especially where he/she has killed the ancestor that he/she will inherit from.

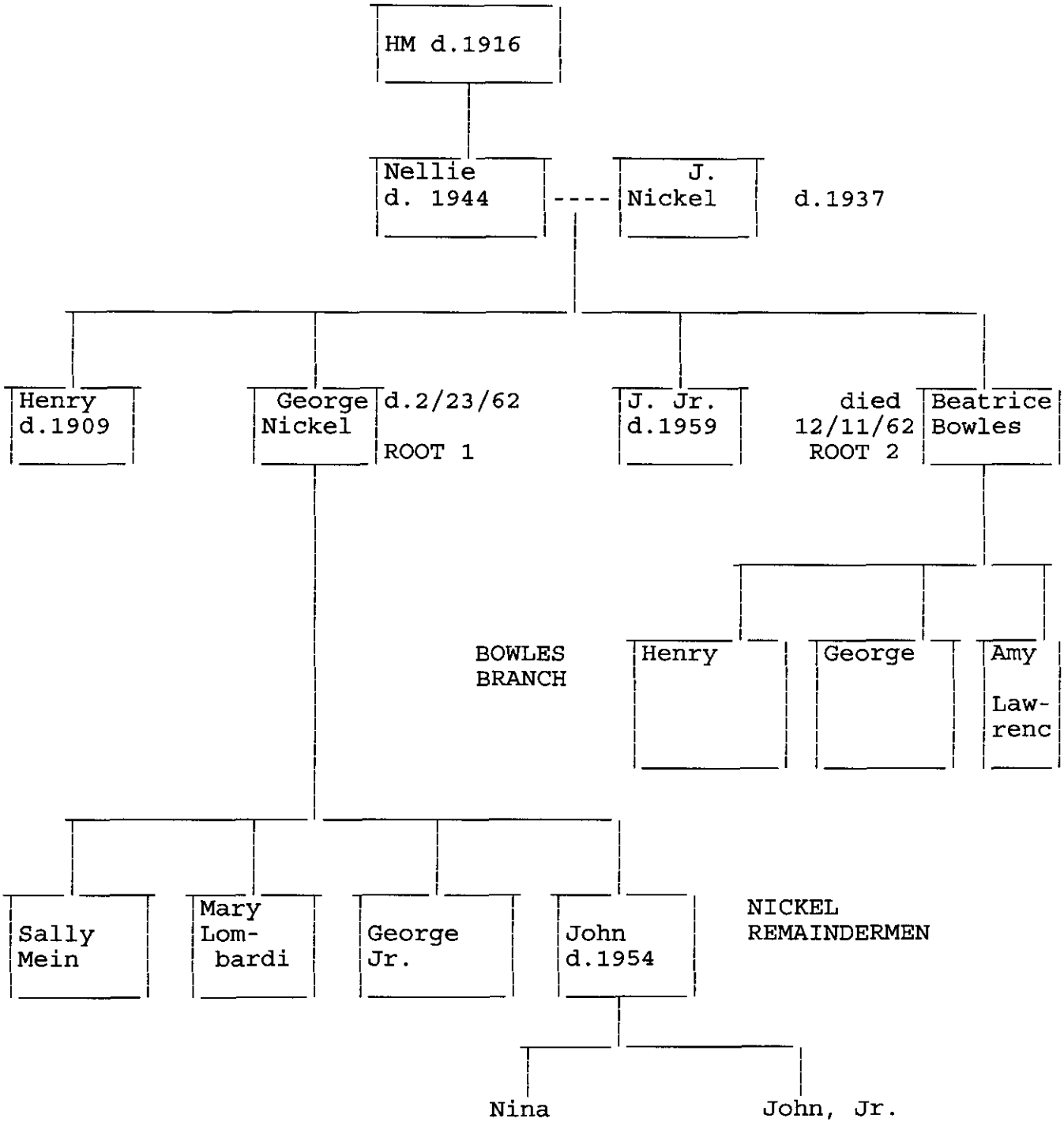
Under California law, the killing must be felonious and intentional. The killer, then, upon such a finding, is not entitled to receive any property from the decedent. Title to the property passes as though the killer predeceased the Decedent, without issue. The latter part of this rule is designed to prevent someone from hoping to benefit his/her children, while recognizing that he/she cannot benefit directly.

What does "felonious" and "intentional" mean? Well, courts have determined that felonious means the killing must be a felony under the law (as opposed to a misdemeanor). Intentional is defined as an act that one does purposely, with a specific state of mind. Obviously, then, a person who kills negligently (without intent) would not fall under this category. The rule would not apply to a person convicted, for example, of involuntary manslaughter. However, voluntary manslaughter, an intentional crime, would fall under the rule.

Likewise, a joint tenancy that is severed by the killing of the other joint tenant passes no property to the survivor. And under the statutes, other interests that would normally pass to the killer (life insurance, pension benefits, IRA's, etc.) are included in this rule.

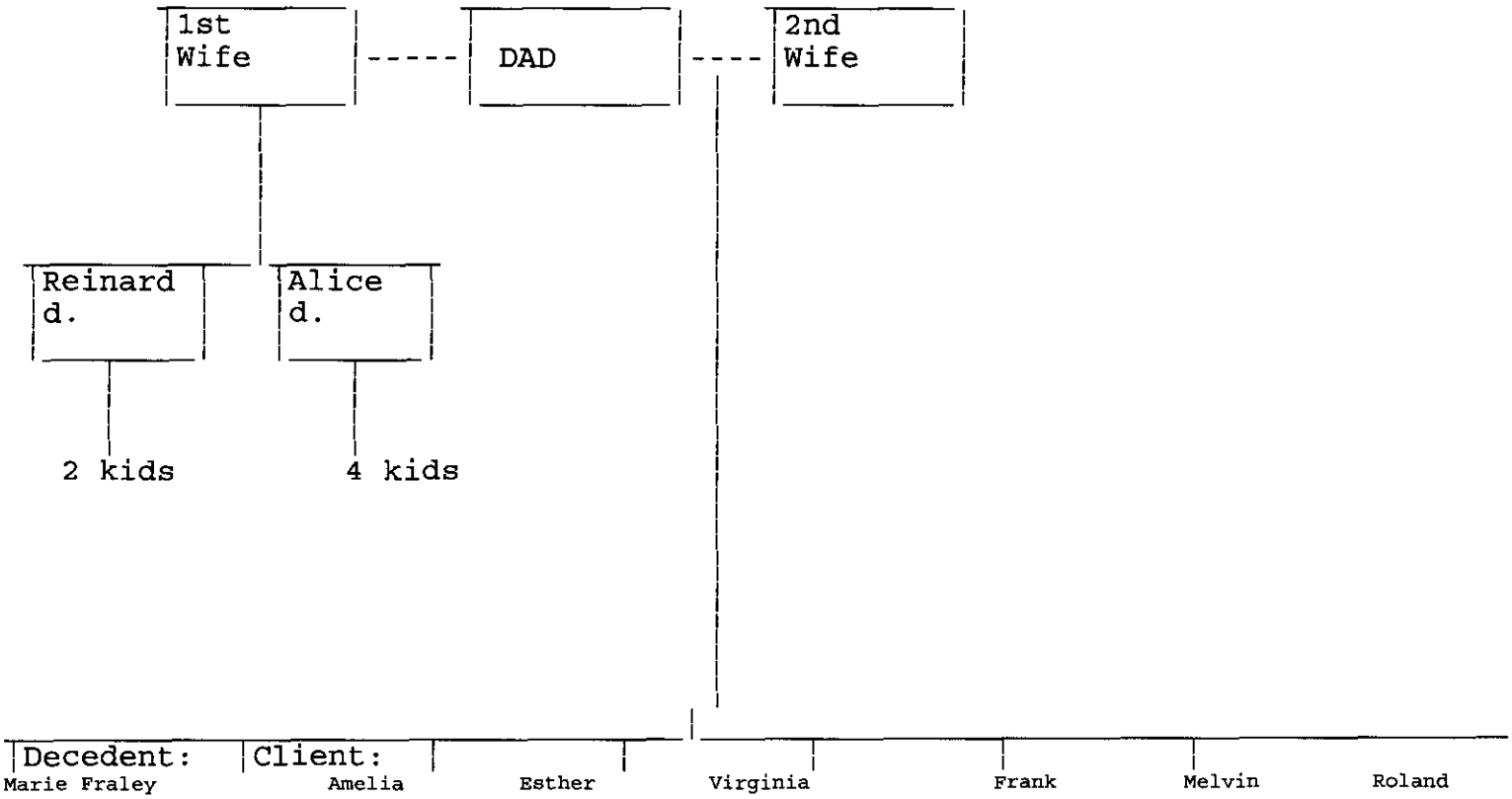
The probate court's determination that the killing was felonious and intentional is conclusive. If there was no conviction in the criminal court, the probate court has the power to decide if the killing was felonious and intentional.

ESTATE OF HENRY MILLER



The Nickels say that Nellie's 7 grandchildren are the roots, so there are 7 shares. The Bowles say the roots are Nellie's children, so there are only 2 shares. Marsden Blois was one of the 3 trustees of Henry Miller's Trust, along with George Nickel, Jr. & Henry Bowles. Mary Lombardi sued on her own behalf & for all Nickel remaindermen against the trustees & the Bowles remaindermen. The trustees sued the Bowles & Nickel remaindermen.

FRALEY ESTATE



LAST WILL AND TESTAMENT

OF

EMMA L. DOE

I, EMMA L. DOE, reside in the County of Orange, State of California, and declare that this is my Last Will and Testament. I further declare that I am of sound and disposing mind and memory.

I. ***REVOCATION OF PRIOR WILLS AND CODICILS***. I revoke all Wills and Codicils previously made by me.

II. ***MARITAL STATUS***. I am a widow and presently unmarried.

III. ***FAMILY HISTORY***. I have the following children, namely:

Felix Doe, an adult, and Roberta Doe, an adult.

IV. ***DISTRIBUTION OF PROBATE ESTATE***. I hereby will, give, devise, and bequeath all of my estate to my children, Felix Doe and Roberta Doe, share and share alike, by right of representation.

V. ***APPOINTMENT OF EXECUTOR(S)***. I appoint the following Executor(s), to serve in the following order of priority:

Felix Doe
Roberta Doe

Any Executor appointed by me during my lifetime, whether in this Will or a Codicil to this Will, shall serve without bond.

If, in this Will or any subsequent Codicil, I appoint Co-Executors and either appointee fails to qualify or ceases to act, I nominate the remaining appointee to serve as sole Executor.

Any successor Executor shall have all the rights and obligations with respect to my probate estate as any Executor originally named in this Item, except where otherwise provided. However, any acting Executor not appointed by me during life shall be bonded.

VI. ***PROBATE ADMINISTRATION POWERS AND DUTIES***. My estate may be administered under the California Independent Administration of Estates Act.

I authorize my Executor to invest and reinvest any surplus money in my estate in every kind of property, real, personal, or mixed, and in every kind of investment, specifically including, but

not limited to, interest bearing accounts, corporate obligations of every kind, preferred or common stocks, shares of investment trusts, investment companies, mutual funds or common trust funds, including funds administered by the Executor, and mortgage participation, that persons of prudence, discretion and intelligence acquire for their own account.

I authorize my Executor to sell, with or without notice, at either public or private sale, any property belonging to my estate that my Executor shall deem appropriate for the proper administration and distribution of my estate.

My Executor shall have absolute discretion in selecting property to be allocated to any trust or share created by this Will or to be distributed in satisfaction of any bequest provided for in this Will, without regard to the income tax basis of the property. My Executor shall be specifically excused from any duty of impartiality with respect to the income tax basis of the property; provided, however, that my Executor shall not exercise this discretion in a manner that will result in the loss of, or decrease, any marital or charitable deductions otherwise allowable in determining my federal estate tax.

VII. PAYMENT OF ANY DEATH TAXES FROM RESIDUARY ESTATE. I direct that all inheritance, estate or other death taxes that may, by reason of my death, be attributed to my probate estate or any portion of it, or to any property or transfers of property outside my probate estate, shall be paid by my Executor out of the residue of my estate disposed of by this Will, without adjustment among the residuary beneficiaries, and shall not be charged against or collected from any beneficiaries of my probate estate or from any transferee or beneficiary of any property outside my probate estate.

VIII. GENERAL PROVISIONS.

The masculine, feminine or neuter gender, and the singular or plural number shall be deemed to include the others whenever the context dictates.

No successor Executor or Appointee shall be liable or responsible for any losses and expenses resulting from or occasioned by anything done or neglected to be done in the administration of this Will prior to the date of acceptance of appointment by such Appointee, unless otherwise indicated in my Will.

If any provision of this Will is unenforceable, the remaining provisions shall nevertheless be effective.

Except as otherwise provided herein, I have intentionally omitted to provide for any of my heirs living at the time of my death.

The terms "my child" and "my children" as used in this Will shall include any child hereinafter born to or adopted by me. The term "my issue" shall refer to my lineal descendants, and the lineal descendants of any child adopted by me, and specifically includes my children.

IN WITNESS WHEREOF, I have hereunder set my hand on this Will on _____, in Orange County, California.

_____

EMMA L. DOE

****

THE FOREGOING INSTRUMENT, consisting of three pages, including this page, was executed by Emma L. Doe on the date hereof, signed as and declared to be Testator's Last Will and Testament in our presence. We, at the Testator's request and in the presence of the Testator, and in the presence of each other, have subscribed our names as witnesses thereto.

Each of us observed the signing of this Will by Emma L. Doe and by each other subscribing witness, and know each signature to be the true signature of the person whose name was signed.

Each of us is now an adult and a competent witness and have provided addresses after each of our names.

We are all acquainted with Emma L. Doe. At this time the Testator is over the age of eighteen (18) years, and to the best of our knowledge, the Testator is of sound mind, and not acting under any duress, menace, fraud, misrepresentation, or undue influence.

We declare under penalty of perjury that the foregoing is true and correct, and was executed on _____, in Orange County, California.

WITNESSES:

_____
John Smith

whose address is:
_____
_____

_____
Mary Jones

whose address is:
_____
_____

Table of Consanguinity

Showing Degrees of Relationships

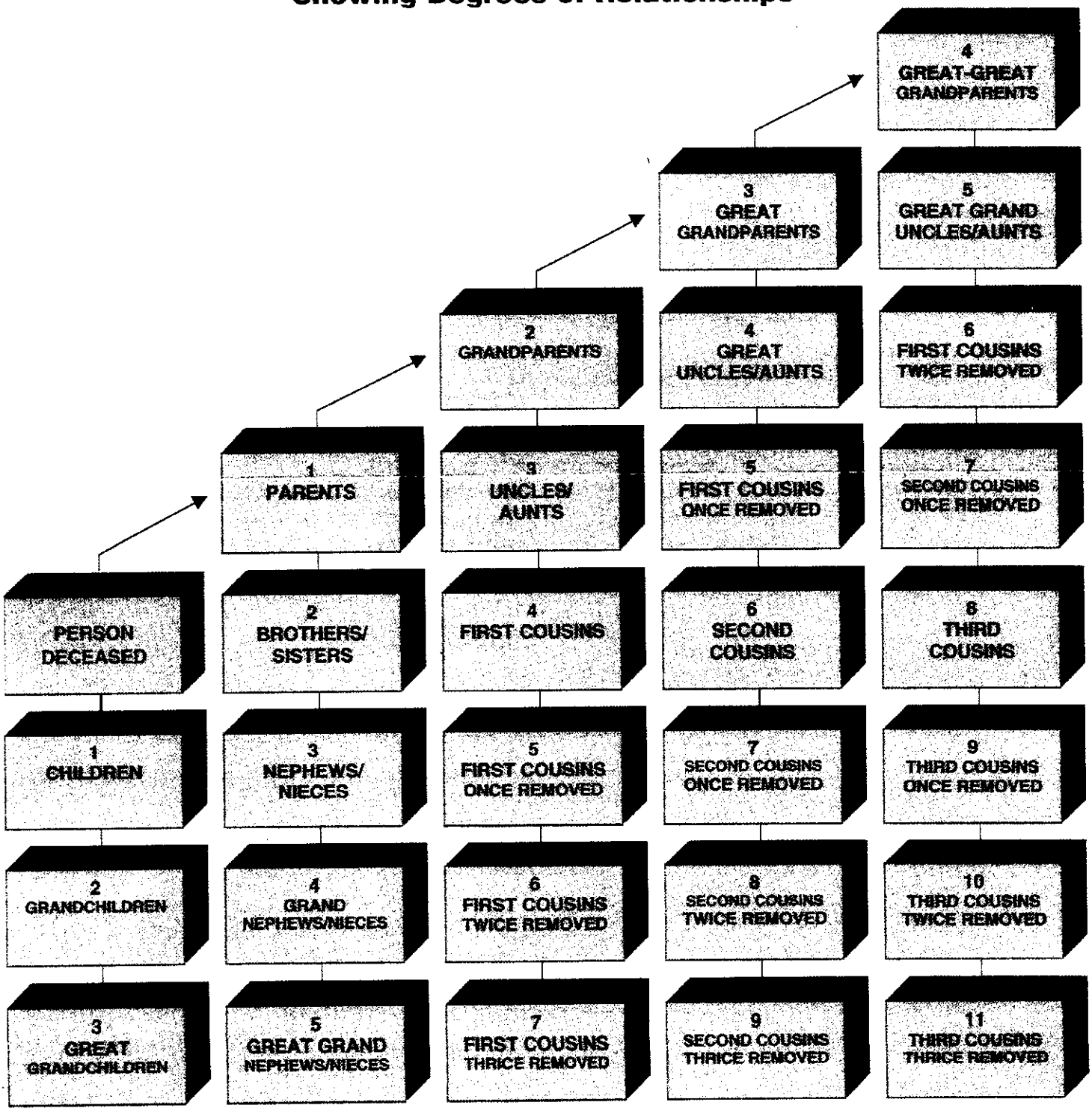


CHART OF RELATIONSHIPS

Through a Common Ancestor