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## THE LAW OF SUCCESSION: DEATH TESTATE OR INTESTATE

### DEATH WITH A WILL—TESTACY (HOWER 90)

#### Terminology Related to Wills (Hower 90)

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##### *Holographic Will (Hower 91)*

As noted in the text, California does recognize the validity of holographic wills. Prob 6111. To be valid, a holographic will must be signed by the testator and the will's material provisions must be in the handwriting of the testator, and such a document will constitute a valid holographic will whether it has been witnessed or not. Prob 6111(a). In addition, the entire will need not be in the testator's handwriting; statements of testamentary intent in holographic wills may be made either in the testator's handwriting or as part of a commercially printed form will. Prob 6111(c). A holographic will may be proved in the same manner as any other writing (Prob 8222) including through the use of extrinsic evidence (Prob 6111.5). A holographic will need not be dated to be valid; however, if not dated and the provisions of the holographic will are inconsistent with the provisions of another will, the holographic will is invalid to the extent of the inconsistency unless the date of execution of the holographic will is proven to be after the date of execution of the other will. Prob 6111(b)(1).

##### *Nuncupative Will (Hower 92)*

As noted in the text, California does not allow nuncupative wills.

##### *Statutory Will (Hower 92)*

Prob 6200, et seq., set forth the provisions regarding the statutory will authorized in California, including the California statutory will form itself (Prob 6240) and its mandatory clauses (Prob 6241).

## Types of Dispositions—Gifts Made in a Will (Hower 97)

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### *Bequest, Legacy, or Devise (Hower 97)*

In California, a **devise** is a gift, or real or personal property, in a will (Prob 32), and vests at the death of the transferor. Prob 21116. Prob 2117 defines the classes of testamentary gifts in California as:

**specific gifts**—transfers of specifically identified property;

**general gifts**—transfers from general assets that do not give specific property;

**demonstrative gift**—a general gift that specifies the fund or property from which the gift is to be made;

**general pecuniary gift**—a gift of a fixed dollar amount or in an amount determinable by the provision of the instrument giving the gift;

**annuity**—a pecuniary gift that is payable periodically;

**residuary gift**—a transfer of a gift that remains after satisfaction of all specific and general gifts.

### *Ademption, Lapses, and Abatement (Hower 99)*

Ademption (Hower 99)

The recipient of a specific gift has a right to any portion of the specific gift remaining at the time of transfer plus any balance owing or amount due by reason of the sale or transfer of the specific gift by the transferor. Prob 21133.

Lapses (Hower 100)

Gifts to devisees who do not survive the decedent **fail**. Prob 21109. **Failed** gifts become a portion of the residuary estate. Prob 21111(a). If a residuary gift or future interest is transferred to two or more persons, but the share of one transferee fails from any reason, then that share passes to the other transferee(s) in proportion to their interest in the gift or future interest. Prob 2111(b).

Abatement (Hower 101)

The overriding concern in abating gifts is to do so in a manner which will not defeat the transferor's plan or purpose. Prob 21400. No distinction is drawn between real and personal property for purposes of determining priority in abatement. Prob 21401. Gifts abate in the following order, pursuant to Prob 21402:

1. Property not disposed of by the instrument.
2. Residuary gifts.
3. General gifts not to the transferor's relatives.
4. General gifts to relatives.
5. Specific gifts to others than the transferor's relatives.
6. Specific gifts to relatives.

Within any class of gifts, shares of beneficiaries abate pro rata. Prob 21403(a). Annuities and demonstrative gifts are treated as specific gifts to the extent that they are given out of the identified fund, and general gifts to the extent that they may be satisfied out of property other than the specified source. Prob 21403(b). If a specific gift is subject to abatement, the recipient may satisfy the contribution for abatement out of other property to preserve the specific gift. Prob 21405. A specific gift is not subject to abatement to exonerate another encumbered specific gift. Prob 21404.

## DEATH WITHOUT A WILL—INTESTACY (HOWER 106)

### Intestate Succession Statutes (Hower 109)

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#### *General Rules of Distribution Under State Intestate Succession Statutes (Hower 116)*

The bulk of the intestate succession laws are set forth in Prob 6400, et seq. in California. As California is a community property state, the intestate succession laws take into account the distinction between community property and separate property and treat each differently. [Please note, as previously discussed, that community and quasi-community property are treated identically in California. Hence, all further references to community property in this supplement should be understood to include quasi-community property as well.]

In California, if a decedent dies survived by a spouse, all of the community property interest of the decedent passes to the surviving spouse. Prob 6401(a) and (b). This, combined with the surviving spouse's one-half interest, results in the surviving spouse being the sole owner of all of the community property.

The decedent's separate property is distributed in accordance with Prob 6401(c). The surviving spouse receives all of the separate property as well if the decedent is not also survived by any issue, parent, brother, sister, or issue of a deceased brother or sister. Prob 64901(c)(1).

The surviving spouse receives one-half (1/2) of the decedent's separate property if the decedent also leaves either: (a) one child or the issue of one deceased child, or (b) no issue, both a parent or parents or their issue, or the issue of either of them. Prob 6401(c)(2).

The surviving spouse receives one-third (1/3) of the decedent's separate property if the decedent is also survived by: (a) more than one child; (b) one child and the issue of one or more deceased children; or (c) issue or two or more deceased children. Prob 6401(c)(3).

That part of the intestate estate not passing to the surviving spouse, as above, or if there is no surviving spouse, is distributed (according to Prob 6402(a)) to the surviving issue of the decedent, in equal shares if of equal degree. If the issue are not of equal degree, then those of more remote degree take as provided in Prob 240 (per stirpes—those of the nearest generation to the decedent still living each get a share, and the issue of those of that generation who are deceased equally divide the share of their deceased ancestor of that generation). Prob 6402(a) and 240.

If there are no surviving issue, then the estate passes to the following categories of persons, per Prob 6402(c), either equally, if all of the same degree of kinship, or as provided in Prob 240, described above. If there are no surviving persons in the category identified, then the estate passes to the next category identified, in the order indicated:

- First, to the decedent's parents.
- Next, to the issue of parents or either of them.
- Next, to the grandparents or issue of grandparents.
- Next, to the issue of a predeceased spouse.
- Next, to the decedent's closest next of kin (if two or more kindred of equal degree claim through different ancestors, then those claiming through the nearest ancestor are preferred).
- Finally, to the parents of a predeceased spouse, or to the surviving issue of such predeceased parents.

Notwithstanding the provisions of Prob 6402, if there are no surviving spouse or issue of a decedent, and the decedent had a predeceased spouse who died less than fifteen (15) years before the decedent, then the real property of the decedent attributable to the decedent's predeceased

spouse passes, according to Prob 6402.5(a), to the predeceased spouse's issue, parents, issue of parents, and then kin. With regard to personal property having documents of title and an aggregate value in excess of \$10,000, if the predeceased spouse died less than five (5) years before the decedent, pursuant to Prob 6402.5(b), such personal property passes in a like manner.

In order to take by intestate succession, a person must survive a decedent by 120 hours. Prob 6403. Relatives of the halfblood, adopted persons, and those conceived before but not born until after the decedent's death take as if they were relatives of the whole blood or had been born prior to the decedent's death. Prob 6406, 6407, 6450, and 6451.

If a person is related to a decedent by two lines of relationship, he or she may take only a single share through the line of relationship resulting in a larger share. Prob 6413.

## **RIGHT OF REPRESENTATION (HOWER 111)**

In California, the phrase "by right of representation" may have one of two meanings, depending upon the circumstances under which it is used.

Whenever property passes by intestate succession, or a will specifies that property passes to the issue of a deceased beneficiary but does not specify by what method, distribution is made by dividing the property into as many equal shares as there are living members of the nearest generation of issue then living and deceased members of that generation with issue then living. Each living member of that generation receives one share and each deceased member's share is divided in the same manner among his or her then-living issue. Prob 240.

Whenever a will, trust, or other document specifies that property is to be divided "by right of representation" or "per stirpes," then the property is first divided into the number of shares equivalent to the total number of children living or deceased but having living issue, with each living child receiving a share and each deceased child's share divided in the same manner. Prob 246.

Escheat (Hower 115)

If there is no surviving person to whom a decedent's estate may pass pursuant to the laws of intestate succession, the estate escheats to the State. Prob 6404 and 6800, et seq.

## **RIGHTS OF FAMILY MEMBERS TO A DECEDENT'S ESTATE (HOWER 117)**

### **Rights of a Surviving Spouse (Hower 117)**

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#### *Surviving Spouse's Elective (Forced) Share (Hower 119)*

As previously noted, if a testator purports to devise the community property interest of a surviving spouse in his or her will, the spouse is put to an election to take either according to the provisions of the will, or to take his or her intestate share of the estate. Prob 141. If the surviving spouse elects his or her intestate share, that property is abated for purposes of distribution and only the balance of the estate is subject to distribution according to the will. This same right to an elective share arises whether or not the decedent or surviving spouse was a domiciliary of California, as long as the decedent left a will disposing of real property located in California. Prob 120.

## Effect of Divorce and Marriage on a Spouse's Rights (Hower 122)

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A final dissolution or an annulment of marriage terminates an ex-spouse's intestate succession rights (Prob 78) and revokes any disposition or appointment made in a will executed prior to the dissolution, unless the will expressly provides otherwise, or the parties subsequently re-marry. Prob 6122, 6227. However, a mere decree of legal separation which does not terminate the marriage does not affect the spouse's inheritance rights (Prob 6122(d), 6227(c)); however, being a party to an action for separate maintenance, annulment or dissolution and living apart from the decedent at the time of the decedent's death will affect the spouse's priority for appointment as or nomination of an administrator of the decedent's estate. Prob 8462, 8463.

If a testator fails to provide for his or her surviving spouse by will and the spouse and testator married after the execution of the testator's will, then (absent evidence that the testator failed to provide for the spouse intentionally, or that the testator otherwise provided for the spouse outside the will, or that the spouse made a valid agreement waiving any share in the estate—Prob 6561), the **omitted** ("pretermitted") **spouse** will receive the testator's one-half of the community and quasi-community property as well as the share of the testator's separate property that the spouse would have received had the testator died intestate. Prob 6560.

## Rights of Children (Issue) (Hower 125)

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### *Issue (Hower 125)*

Issue are all of a person's lineal descendants of all generations. Prob 50.

### Natural Children (Hower 126)

According to California law, a parent and child relationship exists for the purposes of determining intestate succession between a person and the person's natural parents, regardless of the marital status of the natural parents. Prob 6450(a).

### Adopted Children (Hower 126)

A parent and child relationship exists between an adopted person and the person's adopting parent or parents. Prob 6450(b). Adoptions sever the relationship of parent and child between an adopted person and a natural parent unless both: (1) the natural parent and the adopted person lived together as parent and child or both natural parents were living together before the person was conceived but one natural parent died before birth; and (2) the adoption was by the spouse of, or after the death of, either of the natural parents. Prob 6451. A natural parent cannot inherit from an adopted child (although the wholeblood siblings and issue of the adopted person may). Prob 6451.

### Nonmarital Children (Hower 127)

California no longer utilizes the term "illegitimate" in reference to children, since the marital status of natural parents has no legal significance on the parent and child relationship, except insofar as that a person may not inherit from a child born out of wedlock if no parent and child relationship has been established. Prob 6450, 6452, 6453; Fam 7602.

California has adopted the Uniform Parentage Act (Fam 7600, et seq.) for purposes of determining the existence of a natural parent and child relationship.

California also recognizes a parent and child relationship between a person and that person's foster parent or stepparent for purposes of intestate succession, where it is shown that: (1) the relationship began during the person's minority and continued throughout the joint

lifetimes of the person and the foster or stepparent; and (2) the foster or stepparent would have adopted the person but for a legal barrier to doing so. Prob 6454.

#### **Pretermitted (Omitted) and Posthumous Children (Hower 128)**

If a testator fails to provide in a will for a child born to the testator after the execution of the will, the child is entitled to receive a share of the testator's estate equal to that which the child would have received had the testator died intestate (Prob 6570), absent evidence that: (1) the failure to provide for the child was intentional and that intention appears from the will; (2) the testator had one or more children at the time of execution of the will and devised substantially all of the estate to the other parent of the omitted child; or (3) the testator provided for the child by transfer outside the will with the intent that the transfer be in lieu of a testamentary share. Prob 6571.

If a testator fails to provide for a living child in a will at the time of executing the will solely because of the testator's erroneous belief that the child was dead or because the testator was unaware of the birth of the child, the child is entitled to the share he or she would have received had the testator died intestate. Prob 6572.

## **Additional Rights or Protections for a Surviving Spouse and Children (Hower 129)**

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### ***Homestead Exemption (Hower 129)***

In addition to the declared homestead provisions (CCP 704.710, et seq.) which provide protection for the equity in real property held by an owner, California law provides for a single **probate homestead** which may be set aside by the court for the surviving spouse and children. Prob 6520, et seq. The probate homestead provides a surviving spouse with the right to stay in for a period up to the balance of the spouse's lifetime and the minor children with the right to reside in the homestead property until the age of majority. Prob 6524. The homestead property is selected from the community property of the estate, or property held jointly by the decedent and those entitled to the homestead, or from property the right to possession of which is vested in another, if the other consents to the homestead. Prob 6522. The homestead property may be used to satisfy the costs of administration, creditors' claims, and estate liabilities, subject to the homestead rights of the surviving spouse and/or children declared by the court. Prob 6526. The probate homestead is sought, declared, and amended by a petition process. Prob 6525, 6527.

### ***Exempt Property (Hower 131)***

The court may set aside to the surviving spouse or the minor children of the decedent, or both, all or any part of the property of the decedent exempt from enforcement of a money judgment, other than the family dwelling, on consideration of a petition filed by any interested person. Prob 6510, 6511.

In addition, until sixty (60) days after the filing of an inventory (or until such further time as the court may direct), the surviving spouse and minor children of the decedent may—upon order of the court or upon petition by any interested person and for good cause shown—remain in possession of the family dwelling, the wearing apparel of the family, the household furniture, and the other property of the decedent, exempt from enforcement of a money judgment. Prob 6500, 6501.

### ***Family Allowance (Hower 131)***

California law provides that the surviving spouse, the minor children, and the adult children of the decedent who are physically or mentally incapacitated and actually dependent upon the

decendent for support are entitled to such reasonable family allowance out of the estate as is necessary for their maintenance and support during the administration of the estate. Prob 6540(a). In addition, family allowance—in the court’s discretion—may also be given to other adult children and parents of the decedent actually dependent, in whole or in part, upon the decedent for support. Prob 6540(b).

A family allowance may be granted retroactively or prospectively from the date of the court’s order, for a time period specified by the court, but no earlier than the date of the decedent’s death and no later than the distribution of the property of the estate or, if the estate is insolvent, no later than one year after the granting of letters. Prob 6543.

Family allowances are sought by petition and may be granted or modified only after a hearing, with notice to all interested persons. Prob 6541.

ATTORNEY OR PARTY WITHOUT ATTORNEY <i>(Name, state bar number, and address):</i>  TELEPHONE AND FAX NOS.:	<b>FOR COURT USE ONLY</b>
ATTORNEY FOR <i>(Name):</i> <b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF</b> STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
ESTATE OF <i>(Name):</i>  <div style="text-align: right;">DECEDENT</div>	
<b>PROOF OF HOLOGRAPHIC INSTRUMENT</b>	CASE NUMBER:

1. I was acquainted with the decedent for the following number of years *(specify)*:
  
2.  I was related to the decedent as *(specify)*:
  
3. I have personal knowledge of the decedent's handwriting which I acquired as follows:
  - a.  I saw the decedent write.
  - b.  I saw a writing purporting to be in the decedent's handwriting and upon which decedent acted or was charged. It was *(specify)*:
  
  - c.  I received letters in the due course of mail purporting to be from the decedent in response to letters I addressed and mailed to the decedent.
  - d.  Other *(specify other means of obtaining knowledge)*:
  
4. I have examined the attached copy of the instrument, and its handwritten provisions were written by and the instrument was signed by the hand of the decedent. *(Affix a copy of the instrument as Attachment 4.)*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

..... (TYPE OR PRINT NAME) ▶ \_\_\_\_\_ (SIGNATURE)

..... (ADDRESS)

**ATTORNEY'S CERTIFICATION**

*(Check local court rules for requirements for certifying copies of wills and codicils)*

I am an active member of The State Bar of California. I declare under penalty of perjury under the laws of the State of California that Attachment 4 is a photographic copy of every page of the holographic instrument presented for probate.

Date:

..... (TYPE OR PRINT NAME) ▶ \_\_\_\_\_ (SIGNATURE OF ATTORNEY)