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Rights of a Pretermitted Heir in California Community Property--A Need for Clarification

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Attorneys[1] and courts[2] have generally assumed that a child unintentionally omitted from a parent's will—a pretermitted heir —cannot take post-1923 community property[3] under California's pretermitted heir statute.[4] That the courts have been unhappy with this conclusion is evidenced by a tendency in these cases to characterize the property as separate,[5] to find an agreement to hold the property as separate property,[6] or to use res judicata[7] to protect the claim of the pretermitted heir. While such judicial construction may be in the interest of rough justice in individual cases, the danger lies in the possibility that the law may be shaped fortuitously depend-

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1. See Estate of Abate, 166 Cal. App.2d 282, 333 P.2d 200 (2d Dist. 1958); Appellant's Opening Brief 28–29; Respondent's Brief.

2. See Estate of Smith, 86 Cal. App.2d 456, 195 P.2d 842 (1st Dist. 1948); Estate of Rawnsley, 106 Cal. App.2d 500, 503, 235 P.2d 223, 225 (2d Dist. 1951) (dictum). See note 7 *infra*.

3. See text between notes 21 and 28 *infra*.

4. CAL. PROB. CODE § 90.

5. See Estate of Abate, 166 Cal. App.2d 282, 333 P.2d 200 (2d Dist. 1958).

6. See Estate of Stahl, 54 Cal. App.2d 565, 129 P.2d 475 (3d Dist. 1942).

7. See Estate of Rawnsley, 106 Cal. App.2d 500, 235 P.2d 223 (2d Dist. 1951). In an earlier action between the same litigants the attorney for the surviving spouse conceded that the heir was entitled to one-third of the property but argued that she was precluded from taking because she had received advancements. No claim was made that the property was community even though the marriage had been in existence long enough that a daughter was married. The District Court of Appeals affirmed the trial court on the issue of the advancements without any discussion of the nature of the property. Estate of Rawnsley, 94 Cal. App. 2d 384, 210 P.2d 888 (2d Dist. 1949).

After this defeat, the spouse retained a new attorney and attempted in effect to relitigate the question by filing a new petition claiming the property to be community. The trial court held the question to be concluded by the prior judgment. On appeal, the spouse asserted that this had never been in issue in the first case. The district court answered this by stating: "Respondent [heir] in her original petition averred that she was entitled to one third of the estate. . . . When by his answer thereto appellant averred the estate consisted of only separate property he in effect conceded the allegation made by respondent as she was not entitled to one-third of all the property inventoried unless all of it was separate property. If all the property had been community property the respondent would not have been entitled to any part of it. Likewise, if only a part was community property she would not have been entitled to any portion of such community property. (Prob. Code, § 201.)" Estate of Rawnsley, 106 Cal. App.2d 500, 503, 235 P.2d 223, 225 (2d Dist. 1951).

ing on the specific facts and the equities of the first case requiring decision of the point by the California Supreme Court. The court has not yet passed on the question, nor have the courts of the three other community property states whose statutes pose the same problem.[8] In Idaho,[9] the reported cases contain no relevant decision, while New Mexico's and Nevada's statutes were only recently amended in such a way that the pretermitted heir's rights are placed in question.[10]

A recent California case, *Estate of Abate*,[11] would have had to decide the rights of the pretermitted heir, but despite a putative marriage[12] and an alleged ceremony in a World War II aircraft plant, the court found the property in question to be separate property. In this case the testator died fifteen days after the birth of his illegitimate son. The estate apparently was left by will to a woman named Pearl with whom the testator had lived for ten of the eleven years prior to his death, but the will did not mention the child.[13] The court resolved the legitimation issue in favor of the child,[14] but Pearl claimed that the property was community or

8. In addition to California, seven other states have the community property system in one form or another. With respect to intestate succession of community property, the statutes of Arizona, Texas and Washington provide that half the community property goes to the descendants of the decedent, and, if none, all of it goes to the surviving spouse. ARIZ. REV. STAT. ANN. § 14-203 (1956); TEX. PROB. CODE § 45 (1956); WASH. REV. CODE § 11.04.050 (1956). These statutes are similar to the situation existing in California prior to the 1923 change of § 201 of the Probate Code and no question arises as to the pretermitted heir's right to community property. See text following note 21. Louisiana, which uses the continental forced heir and the *legitime*, deals with intestate succession of community property by giving the property to the descendants, and, if none, to the parents and the surviving spouse. LA. CIV. CODE ANN. art. 915 (1952). The statutes of Idaho, New Mexico, and Nevada, where the problem arises in the same form as in California, are discussed in notes 9 and 10 *infra*.

9. Idaho's statute is similar to that of Cailfornia and was enacted in 1911. IDAHO CODE ANN. § 14-113 (1948).

10. New Mexico made its change in 1959. N.M. STAT. ANN. § 29-1-9 (Supp. 1959). Nevada changed to a California type statute in 1957. Nev. Laws, 1957, ch. 264, § 1, now codified in NEV. REV. STAT. § 123.250 (Supp. 1959). In New Mexico, the wife does not have the right to will away her half of the community property. If she dies first, testate or intestate, all goes to the husband. The problem presented in this article can arise in New Mexico after 1959 if the husband dies first with a will and in Nevada after 1957 if either the husband or the wife dies with a will.

11. 166 Cal. App.2d 282, 333 P.2d 200 (2d Dist. 1958).

12. California has developed a doctrine, as have several other community property states, which gives to a person who has in good faith entered into a marriage which is invalid because of some legal impediment almost all the rights of a married person with respect to community property. 1 ARMSTRONG, CALIFORNIA FAMILY LAW 856–70 (1953); 1 DE FUNIAK, COMMUNITY PROPERTY 124 (1943). See note 17 *infra*.

13. See 166 Cal. App.2d 282, 333 P.2d 200.

14. Pearl claimed that the child was illegitimate and that her consent was needed to legitimate him. The child through his guardian ad litem asserted that Pearl was not the lawful wife of the testator and that the property was separate, claiming the entire estate as his intestate share as a legitimated pretermitted heir. Section 230 of the California Civil Code provides that a father may legitimate his child by making a public acknowledgment of paternity, receiving it into his home with the consent of his wife, and treating the child as legitimate.

at least quasi-community.[15] Despite the "marriage" and the presumptions in favor of community property,[16] the court found the property to be separate and with Solomon-like wisdom, the trial judge held that the estate should be divided equally between them; the child thus received the same share to which it would have been entitled had the testator died intestate survived by a spouse and a child.[17]

Presumably, the rationale of the pretermitted heir statute is to give effect to the probable intention of providing for an heir whom the testator has inadvertently omitted from the will.[18] In *Estate of Abate*, had the court found the property to be community, one might suppose that the child would get an intestate share of the husband's half, or one-fourth of the total estate, while Pearl would take three-fourths. This would have been better for Pearl than the one-half which the trial court gave her but less than the entire estate which she claimed. But it is clear that Pearl's purpose in claiming that the property was community was not to get three-fourths but rather the whole estate under the widely accepted interpretation of

15. Under the California law relating to the rights of a putative spouse, the "spouse" may get certain rights she would have gotten had the marriage been valid. Strictly speaking, the property acquired during a putative marriage cannot be community property. See 1 ARMSTRONG, *op. cit. supra* note 12, at 858–61.

16. CAL. CIV. CODE § 164; 1 ARMSTRONG, *op. cit. supra* note 12, at 440.

17. The trial court found that Pearl was a putative spouse, but made an unusual use of the putative spouse doctrine. Usually that doctrine gives the putative spouse quasi-community property rights. See note 12 *supra*. But here it seems that the court used the doctrine to measure the intestate share of the pretermitted child. The intestate share if the testator dies with only one child is the entire estate. CAL. PROB. CODE § 222. When the trial court awarded only half to the heir, it must have assumed that for the purpose of determining the intestate share the testator died with a surviving spouse and a child. In such a situation, each would receive one-half of the estate. CAL. PROB. CODE § 221.

Unquestionably, the trend in the cases is to give the putative spouse almost all of the rights of a validly married spouse. In Kunakoff v. Woods, 166 Cal. App.2d 59, 332 P.2d 773 (2d Dist. 1958), the court allowed the putative spouse to bring a wrongful death action as "heir" of the deceased spouse. The cases cited in *Kunakoff* deal with the rights of intestate succession in community property under § 201. Mazzenga v. Rosso, 87 Cal. App.2d 790, 197 P.2d 770 (2d Dist. 1948); Estate of Krone, 83 Cal. App.2d 766, 189 P.2d 741 (2d Dist. 1948). Earlier the court had used the putative spouse doctrine in a Workman's Compensation case. Temescal Rock Co. v. Industrial Acc. Comm'n, 180 Cal. 637, 182 Pac. 447, 13 A.L.R. 683 (1919). This expansion has neared the point of recognizing common-law marriages if they are undertaken in good faith.

18. 1 PAGE, WILLS 967 (lifetime ed. 1941). For the most comprehensive study of this area see Mathews, *Pretermitted Heirs: An Analysis of Statutes*, 29 COLUM. L. REV. 748 (1929). See generally Bordwell, *The Statute Law of Wills*, 14 IOWA L. REV. 172, 174 (1929); Dainow, *Inheritance by Pretermitted Children*, 32 ILL. L. REV. 1 (1937); King, *The Statutory Status of Pretermitted Heirs*, 13 B.U.L. REV. 672 (1933). The most recent statement on this was made by Mr. Justice Peters of the California Supreme Court in Estate of Torregano, 54 Adv. Cal. 226, 352 P.2d 505, 5 Cal. Rep. 137 (1960), where he stated: "Since its origin as a state, California has continuously protected both spouse and children (and to some extent, grandchildren) from unintentional omission from a share in the testator's estate . . . . Thus the Legislature has indicated a continuing policy of guarding against the omission of lineal descendants by reason of oversight, accident, mistake or unexpected change of condition." *Id.* at 240, 352 P.2d at 513, 5 Cal. Rep. at 145.

sections 90 and 201 of the California Probate Code. Like most similar statutes, section 90 states that the pretermitted heir "succeeds to the same share in the estate of the testator as if he had died intestate."[19] But section 201 states: "Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse. . . ."[20] If sections 90 and 201 are *literally* interpreted the pretermitted heir will not be entitled to take any portion of community property, since if the husband died intestate all the community property would go to the surviving spouse. The application of this interpretation to *Estate of Abate*, assuming the property to be community would mean that the pretermitted heir, though presumably omitted from the will by inadvertence, would receive nothing while the putative spouse would receive the entire estate.[21]

Section 90 of the Probate Code states merely that the heir will succeed to an intestate share of the "estate" of the decedent without any reference to whether the estate consists of separate or community property. Certainly the husband's half of the community property which he may dispose of by will is part of his estate. The language "as if he had died intestate" could mean that the legislature believed, in 1923 when section 201 was passed, that this was sufficient to manifest its intention to exclude community property from the pretermitted heir statute without any modification of section 90.[22] However, in the light of the distortion and inequity which this literal reading of section 201 may cause, such an interpretation of legislative intent is unconvincing.

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19. CAL. PROB. CODE § 90 which in its entirety reads: "When a testator omits to provide in his will for any of his children, or for the issue of any deceased child, whether born before or after the making of the will or before or after the death of the testator, and such child or issue are unprovided for by any settlement, and have not had an equal proportion of the testator's property bestowed on them by way of advancement, unless it appears from the will that such omission was intentional, such child or such issue succeeds to the same share in the estate of the testator as if he had died intestate."

20. CAL. PROB. CODE § 201.

21. Another intriguing aspect of this problem is the absence of its mention in the secondary authorities with the exception of Page, who makes the brief remark that the pretermitted heir statute covers community property. 1 PAGE, WILLS 970 (lifetime ed. 1941). Moreover, four recent notes in California law reviews dealing with various aspects of the pretermitted heir statute have made no mention of the question. See 31 So. CAL. L. REV. 441 (1958) (adopted children); 45 CALIF. L. REV. 220 (1957) (no-contest clause); 8 HASTINGS L. J. 342 (1957) (no-contest clause); 29 So. CAL. L. REV. 126 (1955) (adopted children).

22. However, the supreme court has said in numberless comparable situations that if the legislature intended such a change, it could have been made clear. See, *e.g.*, DeBurgh v. DeBurgh, 39 Cal.2d 858, 863, 250 P.2d 598, 600 (1952).

That legislative changes in section 201 were enacted without reference to the effect on the pretermitted heir statute is suggested by history. The crucial language of section 90 has remained unchanged since its original enactment in 1850. But between 1850 and 1923, section 201 was modified a number of times.[23] For a time different results attached depending on whether husband or wife died first and whether there had been an abandonment by the husband. From 1874 to 1923, if the husband died intestate survived by his wife, half of the community property went to his wife while the other half went to his descendents. Thus in a situation similar to *Estate of Abate*, prior to 1923 the pretermitted heir's share would have been one-half of the community property. The problem which is the focal point of this article could not have arisen under the pre-1923 law. Prior to 1923, if the wife died first all of the community property went to the husband unless a portion had been set apart to her by judicial decree, in which case it was subject to her testamentary disposition, and if not so disposed it went to her descendants or heirs excluding her husband.

In 1923, several drastic changes were made.[24] First, the wife was given the right to dispose of half of the community property by will. Second, if either spouse died intestate all of the community property now passed to the surviving spouse to the exclusion of descendants or heirs. No corresponding change was made in the pretermitted heir statute or in the intestate succession of separate property. California cases until 1923 held that the pretermitted heir had a right to community property.[25] From the meager evidence available of any legislative intent, there is no indication of an intention to exempt community property from the claims of the pretermitted heir.[26] Both houses of the legislature

23. For the legislative history see CAL. PROB. CODE ANN. § 201 (West 1956).

24. Cal. Sess. Laws 1923, ch. 18, § 1.

25. *E.g.*, Painter v. Painter, 113 Cal. 371, 45 Pac. 689 (1896); *In re* Grider, 81 Cal. 571, 22 Pac. 908 (1889). *Accord*, Hill v. Hill, 7 Wash. 409, 35 Pac. 360 (1893) which also held that the pretermitted heir statute applied to community property. The latter case is the authority for the statement in PAGE that the statute applies to community property. 1 PAGE, WILLS 970 (lifetime ed. 1941).

26. There is no evidence that the 1923 changes were part of any study which might have included the consideration of the pretermitted heir rights. The session law dealt only with old §§ 1401 and 1402 of the Civil Code, now §§ 201 and 202 of the Probate Code. No other changes in the scheme of intestate succession or the rights of omitted heirs were dealt with.

The change which was made in 1923 was rejected in a referendum in 1920. Professor Kidd wrote a detailed article on the proposed change and did not mention the rights of the pretermitted heir. Kidd, *The Proposed Community Property Bills*, 7 CALIF. L. REV. 166 (1919). Eleven years after the enactment of the change in 1923 an article was published which stated: "A very apparent and significant element of the 1923 amendment . . .

dealt with other matters concerning wills and minors,[27] but apparently the pretermitted heir was not considered at all. Doubtless, the legislature did not realize the change that would result if the statute were to be literally applied. One would suppose that section 90 would have been changed as well if the legislature had wanted to assure the protection of community property from the claims of the pretermitted heir.[28]

It is readily apparent that a literal construction of the statutes would have caused a harsh result in *Estate of Abate* had the court been unable to characterize the property as separate. The heir obviously would not be cared for by Pearl. Moreover, if the pretermitted heir is a child by a prior marriage, giving all of the community property to the surviving spouse can cause hardship.[29] Yet

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would seem to be the change in the policy of the law in reference to the potential interest of the children in all community property. It would seem that in so far as the community property is concerned the legislature by this amendment intended to entrust the protection of the children of the marriage to the judgment of the surviving spouse *save as limited by the wishes of the other expressed in his or her final testamentary disposition of one-half of such property.*" Simmons, *The Interest of a Wife in California Community Property*, 22 CALIF. L. REV. 404, 416 (1934). (Emphasis added.)

In 1911 Idaho changed its intestate succession in much the same way that California did in 1923. Idaho Laws, 1911, ch. 13 § 1. In commenting on the reason for the change a federal court stated: "The undoubted general purpose of the act of 1911 was to reduce the number of cases where community estates would be dissolved (with the consequent confusion in business and uncertainty of titles) upon the death of one member of the community. . . . [T]he burden of dividing up the estate is imposed upon the husband or wife, in that his or her wishes can be given effect *only by affirmative action, namely, the execution of a will.*" Scott v. Scott, 247 Fed. 976, 983 (D.C. Idaho 1917). (Emphasis added.)

27. In the 1923 session of the legislature, Assembly Bills 296 and 720, both dealing with wills, were introduced. Neither was passed. 1923 CALIFORNIA LEGISLATURE, FINAL CALENDAR OF LEGISLATIVE BUSINESS: ASSEMBLY FINAL HISTORY 136, 238. Both were referred to the Judiciary Committee as was Assembly Bill 140, a bill almost identical to the one enacted in 1923 dealing with intestate succession of community property. *Id.* at 99.

The bill which ultimately was enacted was Senate Bill 228. *Id.* SENATE FINAL HISTORY at 117. The Senate Judiciary Committee which recommended passage also dealt with another bill on wills, Senate Bill 247, which was not passed. *Id.* SENATE FINAL HISTORY at 122.

The legislature in this session enacted an amendment which stiffened the penal sanction against a parent for failure to support a minor child. Cal. Sess. Laws 1923, ch. 284 § 1. In addition, both houses passed a bill, ultimately vetoed by the Governor, dealing with minors' estates. Both of these measures were recommended by the Judiciary Committees of both houses. *Id.* SENATE FINAL HISTORY at 111; *id.* ASSEMBLY FINAL HISTORY at 135.

With all these measures before the legislature, and especially before the Judiciary Committees, it is unlikely that the legislature thought about the fact that its amendment of § 201 would be derimental to the rights of heirs. This conclusion finds some additional support in the fact that most of the measures were favorable to the interests of minors.

28. See text at note 22 *supra*. Courts which might have discussed the question of legislative intent have either found the property to be separate or have decided the case without reference to the legislative history. See, *e.g.*, Estate of Smith, 86 Cal. App.2d 456, 195 P.2d 842 (1st Dist. 1948); Estate of Stahl, 54 Cal. App.2d 565, 129 P.2d 475 (3d Dist. 1942).

29. Professor Mathews states that there is an underlying purpose in these statutes of seeing to it that testators fulfill their social obligation not to disinherit their children. Mathews, *Trends in the Power to Disinherit Children*, 16 A.B.A.J. 293, 294 (1930). If

there can be distortions in the normal family situation. The literal interpretation can cause wide disparity in the treatment of the named child and the pretermitted heir.

Assuming that in a given case a court does want to give something to the heir, what can it do where the characterization of the property as separate property is not available as an escape? If so desired, the court could award a part of the property to the heir under a different theory. This theory, henceforth called the "liberal" interpretation, starts with the unquestioned premise that the death of one spouse terminates the community. However, at death the property must be classified as community or separate. The main purpose of this classification is to determine what portion is subject to testamentary disposition by the decedent and what portion belongs to the surviving spouse.[30] Once this classification is made, and assuming the property is found to be community, then for the purpose of the pretermitted heir statute the property which the decedent attempts to dispose of by will might be treated as separate.[31] There is no doubt that the pretermitted heir can take

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the estate goes to the mother there is little likelihood that she will not provide for her child. But if, as in *Estate of Abate*, the mother of the child is not a beneficiary of the will, there is a possibility that the child, if unprovided for, will ultimately depend upon the state for support.

30. There are other reasons for classifying property as community or separate *at the death of the spouse*. Section 202 of the Probate Code makes "community property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife" subject to the debts of the husband. Holding that the testator's half at his death testate is separate for the purpose of the pretermitted heir statute would not change this rule.

Also, § 228 of the Probate Code makes the classification control the ultimate devolution of community property under certain circumstances. The statute deals with property which "was community property of the decedent and a previously deceased spouse." Again the test is what the property was at the termination of the community. It would not affect this statute if the death testate were held to require a classification that the property, for the purpose of the pretermitted heir statute, was separate after the termination of the community by the death of one of its members.

31. In Estate of Bruggemeyer, 115 Cal. App. 525, 2 P.2d 534 (4th Dist. 1931), it appears that the counsel for the heir urged something approximating this theory. He contended that the property in question was separate, but he also urged that the heir should take even if the property were community. The court stated: "Contestant [heir] claims that even if said property should appear to the court to be community property, that one-half thereof has by said testatrix been taken out of the category of community property by the will of said decedent and should be distributed to the contestant under section 1307 of the Civil Code [now § 90 of the Probate Code]." *Id.* at 533, 2 P.2d at 538. The court did not have to pass on this contention, since it found that the property was the separate property of the surviving spouse. The court was troubled by the fact that the property in question was acquired before the amendment of 1923 which gave the wife testamentary power over one-half of the community property. See note 24 *supra*.

In this case the court did seem to say that if the property had been community, the child would not have been able to take. *Id.* at 536, 2 P.2d at 539. Perhaps counsel's argument was rejected. If so the reason for such a rejection might have been based upon the fact that the wife did not have a right to dispose of the property by will under then existing law. Or perhaps the court was simply not convinced of the logic of the contention. In

separate property. The difference in results gained by application of the two theories is readily seen by glancing at a few examples. We will assume that C^2 (the pretermitted heir) can qualify as such in every example, and that the value of the community property is 120,000 dollars. C^2's intestate share is 20,000 dollars—one-third of T's half of the community property. Example 1: T dies testate, leaving his half of the community property (CP) to his child (C^1). At his death, he is survived by his wife (W) *and two children* (C^1 and C^2).

Literal theory		*Liberal theory*	
W takes half the CP	$60,000	W takes half the CP	$60,000
C^1 takes half the CP	$60,000	C^1 takes the remaining ⅔ less C^2's intestate share	$40,000
C^2 takes nothing	0	C^2 takes an intestate share	$20,000

Example 2: T dies testate, leaving his half of the CP to W, and mentioning C^1 in the will so that C^1 cannot be a pretermitted heir. At his death, T is survived by W, C^1 and C^2.

Literal theory		*Liberal theory*	
W takes:		W takes:	
(a) her half of the CP	$60,000	(a) her half of the CP	$60,000
(b) the other half of the CP	$60,000	(b) the other half less C^2's intestate share	$40,000
C^1 takes nothing as he is mentioned in the will	0	C^1 takes nothing as he is mentioned in the will	0
C^2 takes nothing	0	C^2 takes an intestate share	$20,000

Example 3: Same as Example 2 except that C^1 is not mentioned in the will and could also qualify as a pretermitted heir.

Literal theory		*Liberal theory*	
W takes the same as in Example 2	$120,000	W takes:	
		(a) her half of the CP	$60,000
		(b) the other half less two intestate shares	$20,000
C^1 takes nothing	0	C^1 takes an intestate share	$20,000
C^2 takes nothing	0	C^2 takes an intestate share	$20,000

Example 4: T dies testate, leaving his half of the CP to W for her life, with remainder in fee to C^1. He dies survived by W, C^1 and C^2.

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any event, the court did not find the property to be community, and it is only possible to speculate on the reason for the rejection of the argument.

Literal theory
W takes:
(a) her half of the CP.. $60,000
(b) a life estate in the other half of the CP $60,000

C^1 takes a remainder in fee of *T*'s half of the CP...($60,000)

C^2 takes nothing 0

Liberal theory
W takes:
(a) her half of the CP.. $60,000
(b) a life estate in the other half less C^2's intestate share $40,000

C^1 takes a remainder in fee of *T*'s half of the CP less C^2's intestate share .....($40,000)

C^2 takes an intestate share. $20,000

Example 5: *T* dies testate, leaving his half of the CP to *W* and C^1. He dies survived by *W*, C^1 and C^2.

Literal theory
W takes:
(a) her half of the CP....$60,000
(b) one-half of the remaining half $30,000

C^1 takes one-half of the remaining half $30,000

C^2 takes nothing 0

Liberal theory
W takes:
(a) her half of the CP....$60,000
(b) one-half of the remaining half less half C^2's intestate share.....$20,000

C^1 takes one-half of the remaining half less half C^2's intestate share.....$20,000

C^2 takes an intestate share...$20,000

It is clear that the literal interpretation can cause wide disparity in the treatment of the named child and the pretermitted heir. The results will vary, of course, depending upon the provisions of the will. But in every case the omitted child, who presumably would have been put in the will if remembered, receives nothing while the named child receives:

Example 1: $60,000
Example 2: 0
Example 3: 0
Example 4: A remainder interest in $60,000
Example 5: $30,000

It is obvious that the children are treated quite differently in Examples 1, 4 and 5. Of course, it never was the purpose of the pretermitted heir statute to require equal treatment of all children. Very frequently this does not occur and one of the problems of the statute is that an omitted child may fare much better than a named child. The intestate share is chosen in an attempt to set a fair portion when omission is presumably unintentional and there is no indication of the provision the testator would have made for

the heir. But if grossly unequal treatment of children would result, a court may try to employ an approach which will permit the omitted child to take something.

Under the liberal theory, the pretermitted heir takes a fixed 20,000 dollars or one-sixth of the community property in the examples given. The named child receives:

Example 1:	$40,000
Example 2:	0
Example 3:	$20,000
Example 4:	A remainder in fee of $40,000
Example 5:	$20,000

The comparative results using the two interpretations show that both children will be treated equally in two out of five examples. In the other examples, using the literal interpretation results in the omitted child getting nothing while the named child gets between 30,000 dollars and 60,000 dollars. On the other hand, when the liberal interpretation is used, the omitted child gets 20,000 dollars while the named child gets between nothing and 40,000 dollars. Using the examples given—and they are by no means exhaustive—does show that *either* method can produce inequality[32] but that the greater disparity results from the literal interpretation. Couple this with the *Abate* situation or a case in which there is a child by a previous marriage, and it is clear that there are distinct possibilities of unfair treatment of the pretermitted heir and that, if a court in such a case cannot use the expedient of calling the property separate, it is certainly conceivable that the liberal theory would be used.

My purpose is not to campaign for freezing the law under a liberal construction. A distortion can result from the use of either interpretation, and in some cases the liberal construction can result in as much inequality as the literal construction. Nor am I dealing with the reform or critique of the pretermitted heir statute in general, since enough has been written on these points.[33] But I have

32. The problem in the splitting up of a modest estate to give shares to pretermitted heirs can be handled in a number of ways in California. See note 33 *infra*.

33. For able criticism of the pretermitted heir legislation and suggested changes see Evans, *Should Pretermitted Issue Be Entitled to Inherit?*, 31 CALIF. L. REV. 263 (1943); Laufer, *Flexible Restraints on Testamentary Freedom—A Report on Decedent's Family Maintenance Legislation*, 69 HARV. L. REV. 277 (1955) (Commonwealth legislation with emphasis on New Zealand); Touster, *Testamentary Freedom and Social Control—Afterborn Children*, 6 BUFFALO L. REV. 251 (1957), 7 BUFFALO L. REV. 47 (1957); *Legislation*, 26 FORDHAM L. REV. 372–77 (1957) (New York law); *Legislation*, 10 U. PITT. L. REV. 219 (1948). See generally, ATKINSON, WILLS 93–97 (1937); MODEL PROBATE CODE § 41

endeavored to demonstrate that the answer is not so pat as to preclude a court in the right kind of case from liberally construing the statutes.[34] A prediction of what the Supreme Court of California will do depends on the equities of the particular case and the general attitude of the court toward the pretermitted heir statute. The examples given earlier indicate that the equities are unpredictable. Without extraordinary facts favoring the heir, it is likely that the literal interpertation, plus the intermediate appellate cases cited previously, would control. The court's attitude toward the pretermitted heir statute seems to have shifted in the past one hundred years. At first the court construed the statute narrowly.[35] Then a period ensued when the pretermitted heir was favored by the court.[36] Despite an occasional detour, this trend toward liberal treatment of the heir has changed, as evidenced by cases holding that very broad no contest and disinheritance clauses satisfied the requirement of mention in the will.[37] This was done despite the

(Simes 1946) which covers only afterborn children and uses the Texas approach which does not apply the statute if at the time of the execution of the will the testator knew of his living children "and devised substantially all his estate to his surviving spouse."

For a short defense see von Briesen, *The Problem of the Pretermitted Heir*, 1948 WIS. L. REV. 475 (Wisconsin law).

One of the criticisms of the statute is that it may cause an expensive splitting up of the estate especially if the testator leaves the entire estate, to the surviving spouse. See LEACH, WILLS 9 (2d ed. 1949). If the testator leaves all to his wife, there are a number of methods by which a California court may avoid splitting up a small estate to carve out shares for pretermitted children. Assuming the supreme court does not adopt the liberal interpretation put forth in this article, of course there is the easy expedient of finding the property to be community. Even if the liberal interpretation were adopted, there are other methods. If the estate is less than $3,500 the entire estate may be given to the spouse. CAL. PROB. CODE § 640. If the bulk of the estate is the family dwelling, the widow may be given a probate homestead. CAL. PROB. CODE § 661. If a homestead has already been declared, the property generally goes to the widow as survivor. CAL. CIV. CODE § 1265; CAL. PROB. CODE § 663. In smaller estates property such as savings accounts or stock is frequently owned in joint tenancy. If the court finds the property to be jointly owned, all of it belongs to the surviving spouse.

34. It is hoped that a by-product of this article will be that neither attorneys nor judges will *assume* without further consideration, that there is but one possible solution to the problem. Also, it is hoped that this article will cause draftsmen to beware the pitfalls created by the pretermitted heir statute. Obviously, they can be avoided if the will contains a good omissions and disinheritance clause or a provision covering afterborn children. Attorneys would be well advised to work out a check-up system of keeping current on the family situation of clients.

35. See, *e.g.*, Payne v. Payne, 18 Cal. 291 (1861).

36. Page states, "Statutes of this sort are construed so as to protect the rights of the children of the classes indicated." 1 PAGE, WILLS 968 (lifetime ed. 1941).

In California the statute has been construed liberally. For example, an illegitimate child can take as a pretermitted heir from its mother. Estate of Wardell, 57 Cal. 484 (1881). A legitimated child can take as a pretermitted heir of its natural father. Estate of Loyd, 170 Cal. 85, 148 Pac. 522 (1915). In another case, mention of the grandchildren in a will was held to mean only children of living children, thus enabling the children of deceased children to take as pretermitted heirs rather than under the will. Estate of Van Wyck, 185 Cal. 49, 196 Pac. 50 (1921).

37. The leading case is Van Strien v. Jones, 46 Cal.2d 705, 299 P.2d 1 (1956), discussed in 45 CALIF. L. REV. 220 (1957), where the writer recommended that the decision not be

antipathy of the courts toward form wills. Perhaps recent cases will reverse this trend.[38]

Of course, the problem of the pretermitted heir's right to community property is one which should be resolved by the legislature as part of a general review of section 90. Preferably, the community property the testator attempts to dispose of by will should be treated as separate property for the purpose of determining the pretermitted heir's share.

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extended beyond the facts of the case, and 25 FORDHAM L. REV. 752 (1957). See Estate of Brown, 164 Cal. App.2d 160, 330 P.2d 252 (2d Dist. 1958); Estate of Fernstrom, 157 Cal. App.2d 380, 321 P.2d 25 (2d Dist. 1958). The cases prior to 1956, of which there were many, are collected in 45 CALIF. L. REV. 220 (1957). Some cases where more general language was used have gone the other way. The leading case is Estate of Price, 56 Cal. App.2d 335, 132 P.2d 485 (1st Dist. 1942). See Estate of Percival, 138 Cal. App.2d 494, 292 P.2d 63 (3d Dist. 1956).

38. See Estate of Torregano, 54 Adv. Cal. 226, 352 P.2d 505, 5 Cal. Rep. 137 (1960) which cites Estate of Price, *supra* note 37. The dissent cites Van Strien v. Jones, *supra* note 37. The case involved a situation where there were compelling equities for the child. The majority opinion by Mr. Justice Peters extensively reviews the history of and prior decisions on the rights of the pretermitted heir. Many of the principles he states are based upon a liberal construction of the statute which favors the pretermitted heir. He says: "Public policy requires that a testator remember his children at the time of making his will. . . . It is the policy of the law that wife and children must be provided for . . . ." 54 Adv. Cal. at 240, 352 P.2d at 514, 5 Cal. Rep. at 146.

In this regard, it is interesting to note that a month after *Torregano* a majority, speaking through Justice Peters, refused to decide a similar no contest, disinheritance clause case on the merits. Estate of Stickelbaut, 54 Adv. Cal. 405, 353 P.2d 719, 6 Cal. Rep. 7 (1960). The District Court of Appeals, following the *Van Strien* case, had held the broad clause adequate to constitute a mentioning of the heir. 1 Cal. Rep. 471 (1959). The supreme court did not have to decide the efficacy of the disinheritance clause since the parties had stipulated in the trial court that the respondent qualified as a pretermitted heir. Justices McComb and Schauer concurred on the ground given in the intermediate appellate court's decision.

It is evident that the court is treading carefully in this area. It did not overrule *Van Strien*, yet it would not generally approve these clauses. The *Van Strien* case was decided five to two, with Justices Shenk, Traynor, Spence, McComb, and Chief Justice Gibson making up the majority; Justices Carter and Schauer dissented. In *Torregano*, the majority consisted of Justices Gibson, Peters, Traynor, and White. In *Stickelbaut*, the majority included Justices Gibson, Peters, Traynor, White, and Dooling. Justices Peters, White, and Dooling were not on the court in the *Van Strien* case while Justices Gibson and Traynor, though voting in the majority in *Van Strien*, seemed to have veered away from the attitude expressed in that case. In any event, it is not at all certain that the body blow given the pretermitted heir statute in *Van Strien* would find continued approval among the members of the present court. Along this same line of reasoning, the present court might in the right kind of case hold that the pretermitted heir has rights in community property.