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DESCENT AND DISTRIBUTION

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DESCRIPT AND DISTRIBUTION

INTRODUCTION

There are two situations which tend to shorten the lives of persons who undertake to discuss specific legal problems. It is a nightmare when the speaker is unable to find any appreciable authority upon the subject of his discussion. It is a catastrophe when the speaker learns that his subject has been exhaustively and brilliantly covered by an eminent scholar in the field. You are now looking at a catastrophe!

When I accepted the invitation to speak on the law of descent and distribution I quickly discovered that Honorable Harry Meek of the Rose law firm in Little Rock had prepared an outstanding and comprehensive article on the subject. Most of the attorneys in the audience are familiar with this monumental work which appears in the Arkansas Desk Manual.

Before I would make an effort to improve Mr. Meek's article I would rather attempt to rewrite and improve the Gettysburg Address, and I would probably have more success in the latter than in the former. About all I can hope to do is to touch on some of the high points of Mr. Meek's discourse and perhaps to excite your curiosity enough to cause you to read his excellent work.
TALK FOR LANDMEN

In an Institute of this type it is difficult to decide whether to address primarily the landmen or the attorneys. In past years most discussions have been directed toward the attorneys, and I have decided to direct my remarks especially to the landmen.

However, so this part of the program will not be a complete loss for the attorneys I have requested and received permission from Mr. Meek to include his article in the printed program which will be published subsequent to this meeting and delivered to all who have attended. In other words I am trying to keep up with President Johnson and offer a little something for everyone.

LIMITED SCOPE

At the outset let me tell you what I shall not talk about. Obviously I shall not discuss the situation that exists when a decedent leaves a valid will, since his property will go under the terms of the will rather than under the law of descent and distribution.

Equally important, I shall not consider the dower, homestead, curtesy or statutory rights of the surviving spouse. However, if you are interested in these subjects you should read E. M. Anderson's article appearing in the proceedings of
the First Annual Oil & Gas Institute published by Murphy Corporation.

For purposes of this discussion let us assume, unless otherwise indicated, that the decedent died without a will and was either unmarried or his spouse predeceased him, or, let us recognize that what is to follow is subject to the statutory claims of the surviving spouse.

GENERAL RULES

The rules we shall consider apply to all real property interests, which will include fee ownership, mineral ownership, royalty ownership, and mineral leasehold ownership. Jones on Arkansas Titles, Section 405; Vol. 1, Williams and Meyers, Oil and Gas Law, Sec. 213.7, page 136.

There are a number of definitions and rules we need to keep in mind in any discussion of the law of descent and distribution. To begin with, the word "intestate" simply means a person who dies without leaving a will which is admitted to probate.

PER CAPITA AND PER STIRPES

"Per capita" and "per stirpes" are two terms which are encountered frequently in any discussion of the law of descent and distribution. Rather than attempting a dictionary type of definition of these terms I shall give two examples which illustrate their meaning.
Assume that the intestate had two sons, but the older son predeceased him, leaving three children. That is, the intestate is survived by a younger son and three grandchildren who are children of the older son who died prior to the intestate. In this situation the per stirpes rule would apply: the surviving son would inherit one-half of the intestate's real property and the three grandchildren would inherit the other one-half, each grandchild taking one-sixth.

Assume the same fact situation with these changes. Suppose
both of the intestate's children predeceased him, and the younger son had one child. Then the per capita rule would apply and the child of the intestate's younger son would inherit no more than each of the three children of the older son. Each of the four grandchildren would receive one-fourth of the real property.

The difference in the two situations is that in the first the inheriting class consisted of the intestate's two sons. Since one of them survived the intestate, he received his full one-half share. Since the other son predeceased the intestate the three children of this son represented their father under the per stirpes rule and collectively received his one-half.

In the second situation the entire first inheriting class ---the two sons---predeceased the intestate. Here the per capita rule came into play and the grandchildren, being the second inheriting class, took as principals rather than by right of representation. Thus each grandchild received one-fourth, the child of the younger son receiving exactly the same as each of the three children of the older son.

ANCESTRAL
NEW ACQUISITION AND ANCESTRAL PROPERTY

The next two terms we need to understand are "ancestral property" and "new acquisition". A property interest is ancestral from the father when it has come to the intestate by gift, will or descent from the intestate's father or from any relation of the blood of the father. It is ancestral from the mother when it has come to the intestate by gift, will or descent from the intestate's mother or from any relation of the blood of the mother.

NEW ACQUISITION

- FATHER, MOTHER AND BLOOD RELATIVES
- PURCHASE OF ALL OR PART
- NEW ACQUISITION

- STRANGER OR SPOUSE
- GIFT, WILL PURCHASE
- NEW ACQUISITION

Any property interest which is not ancestral is a new acquisition. Examples of new acquisitions would include property purchased by the intestate from anyone, including his parents, or acquired by will, deed or gift from a stranger, or from the spouse of the intestate.

We must recognize the difference between new acquisitions and ancestral property since, if the intestate is survived by no lineal descendants, there is a vast difference in the devolution of the two types of property.
Thus, if the intestate is survived by no lineal descendants, it is extremely important that a landman, in obtaining an affidavit of heirship, attempt to determine whether the property is a new acquisition or is ancestral. The same caveat is applicable to the attorney examining an abstract or handling an estate.

Later, we shall discuss this matter further. First, there are some additional rules we must keep in mind.

**RELATIVES OF HALF BLOOD**

Relatives of the half-blood inherit equally with those of the whole blood in the same class, with the sole exception that as to ancestral property a relative of the half-blood will not inherit if he is not of the blood of the transmitting ancestor.

**ADOPTED CHILDREN**

Adopted children inherit from their adopting parents and may also inherit from their natural parents and other relatives. Adopting parents, as well as their heirs and next of kin, inherit from the adopted child, except as to ancestral property coming to the child or its descendants through its natural parents.

**ILLEGITIMATE CHILDREN**

An illegitimate child will not inherit from the father or his blood kin, unless the father later marries the mother and recognizes the child as his (Sec. 61-103, Ark. Stats.).
but an illegitimate child will inherit from the mother or her blood kin. The same rule applies to inheritance by the father, mother and their kin from the illegitimate child.

**POSTHUMOUS CHILDREN**

Posthumous children of the intestate inherit but no other relatives inherit unless they are born at the time of the intestate's death.

**INHERITANCE BY SPOUSE**

In the total absence of all blood kin the intestate's spouse will inherit, or if the spouse is deceased the heirs of the spouse will inherit. In the absence of all of the above the property will escheat to the State.

Actually, it is estimated that a person has at least 270 million kindred in the 15th degree and it is doubtful that a person could die without any heirs. It is understandable, however, that in some cases relatives cannot be located.

When distant relatives have the good fortune to inherit they are called "laughing heirs". All my life I have been waiting for such a windfall--and if it ever comes, I won't just laugh--I'll be hysterical!

**SIMULTANEOUS DEATH**

Occasionally we will have a situation where two tenants by the entirety or two joint tenants die simultaneously. In this event the property is distributed 1/2 as if one of the
tenants had survived and 1/2 as if the other tenant had survived. With respect to all property not held as tenants by the entirety or as joint tenants, in the event of simultaneous death of two related persons the property of each person shall be disposed of as if he had survived.

**CHANGES IN LAW**

Most of our statutes on descent and distribution have been in effect since prior to 1835. About the only significant changes have been these. In 1933 the statute was amended to prevent preferential treatment of male heirs. Until 1933 as to new acquisitions the intestate's father was preferred over his mother as a life tenant and the father's brothers and sisters (and their line) were preferred over those of the mother.

The simultaneous death statute, which I referred to earlier, was adopted in 1941. In 1959 the escheat statute was amended to provide that in the absence of blood kin or spouse, the relatives of the spouse will inherit before the property will escheat to the State.

**INTERRELATION OF BASIC STATUTES**

To a lawyer unfamiliar with Arkansas law a frightening problem is presented by our basic statutes on descent and distribution. The first statute is digested as Section 61-101, Arkansas Statutes and, on its face, appears to be a complete
guide for the inheritance of real estate. For some reason the publishers of the statutes saw fit to place the other governing statutes as Sections 61-110 and 61-111.

Mr. Meek in his article states that the relationship between these three sections has obfuscated Arkansas lawyers for more than 100 years. If experienced Arkansas lawyers have such difficulty with these sections, it is little wonder that landmen and lawyers from other States have difficulty in understanding them.

In the event there should be anyone in the audience who is not familiar with this problem, I want to point out one pitfall which can be disastrous. Under the first statute, 61-101, in the absence of lineal descendants the property is inherited by the father and mother. If we go no further than this statute it would appear that the father and mother inherit the fee simple title.

However, nine sections later in 61-110 it is provided that as to new acquisitions the property ascends to the father and mother for life only. The tragedy of this situation is that if one takes a deed or an oil and gas lease from the parents of the intestate under the erroneous belief that they are the decedent's sole heirs he will be embarrassed to find that he has acquired only a life interest and his possession is not adverse to the remaindermen until both parents are
The point I am emphasizing is that we must read all the statutes in their entirety to determine the line of descent.

CONSANGUINITY AND AFFINITY

At this juncture let us take a look at two charts illustrating relationships and degrees of relationships. The first chart shows relationships through a common ancestor. This chart is particularly helpful if you have any difficulty in understanding the terms "first cousin—-once removed", "first cousin---twice removed", etc. (NOTE: See chart at beginning of Mr. Meek's article.)

The second chart is a table of consanguinity showing degrees of relationship. To determine the degree of relationship we must begin with the common ancestor and reckon downwards, and in whatever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. (NOTE: See chart at beginning of Mr. Meek's article.)

Thus, brothers and sisters are related in the first degree, since they are only one step removed from their common parent. Brothers and sisters are related to their nephews and nieces in the second degree, since the nephews and nieces are two degrees removed from the common ancestor.

While this is a table of consanguinity, it may also be
helpful to us in determining degrees of affinity. A man is related by affinity to each of his wife's blood relatives in the same degree that his wife is related to such relatives, and the converse is true with reference to the wife being related by affinity to the blood relatives of the husband.

As we have just noted brothers and sisters are related to their nephews and nieces in the second degree, and similarly the spouses of the brothers and sisters are related by affinity with the same nephews and nieces in the second degree.

Additionally, a husband is also related by affinity to the spouses of his wife's blood relatives. Relationship by affinity has no bearing on inheritance but can be extremely important in such matters as qualification of jurors. For example, jurors related to a party in the fourth degree by affinity or consanguinity are disqualified, and jurors related in the same degree to any attorney in the case may be challenged peremptorily. Section 39-102, Ark. Stats.

**DEVOLUTION**

Benjamin Franklin said that nothing is certain but death and taxes. It has also been said of a man's wealth and property that "you can't take it with you".

Let us suppose that a man has the good fortune to own a parcel of Arkansas real property, that he has the skill to protect it from the tax collector during his lifetime, that
he dies without a will, and that he is not able to take the property with him—regardless of his eternal destination.

What happens to his property? Let us take a look at some charts which illustrate the rules of descent and distribution.

**ANCESTRAL PROPERTY**
*(From Father)*

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<table>
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<th>INTESTATE</th>
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<td>CHILDREN, GRANDCHILDREN ETC.</td>
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<tr>
<td>FATHER</td>
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<td>BROTHERS AND SISTERS OR DESCENDANTS</td>
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<tr>
<th>PATERNAL UNCLE OR DESCENDANTS</th>
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<tr>
<td>PATERNAL GRANDPARENTS</td>
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**ANCESTRAL PROPERTY**

This chart shows the devolution of ancestral property.

The first takers would be the children, grandchildren,
great-grandchildren, etc. of the intestate. In the absence of this class the next taker would be the father if the property is ancestral from the father or the mother if the property is ancestral from the mother. For purposes of this chart we have assumed that the property is ancestral from the father.

If the father has also predeceased the intestate, the next takers are the intestate's brothers and sisters or their descendants. Absent this class, the next takers are the paternal grandparents, paternal uncles or their descendants, and paternal aunts or their descendants, this class taking per capita.

Descendants of the paternal uncles or aunts would not inherit unless predeceased by both their parents and the intestate. If this class is not in existence, the next takers are the paternal great grandparents, great uncles or descendants and great aunts or descendants. This line of succession continues ad infinitum.
This chart illustrates the devolution of new acquisition property. As in the case of ancestral property, the children, grandchildren, great grandchildren, etc. are the first takers. Absent such class, the parents of the intestate take a life estate only with the remainder going to the brothers and sisters or their descendants.

If the intestate leaves no brothers and sisters or their descendants, one-half of the property goes to the paternal
uncles and aunts or their descendants and one-half of the property goes to the maternal uncles and aunts or their descendants. If one of these lines is extinct, all of the property goes to the other line.

If both lines are extinct, there is a serious question under the Arkansas law as to where the property would devolve. Rather than attempt at this time to discuss this problem in detail, I suggest that you carefully study Mr. Meek's article in which he considers this matter in great depth.

**SPECIFIC FAMILY TREE**

Perhaps the law will be somewhat easier to understand if we deal with people having specific names and identities. It is a temptation to use some well known family name, but in view of the recent astronomical verdicts in libel and slander cases, I will resist this temptation and instead will use my own family name and invent some typical ancestors.

Let us suppose that I am an Arkansas dirt farmer and that a landman has come to me to obtain sufficient information to prepare an affidavit of death and heirship. Let us further suppose that I am the typical farmer who must tell my story in my own way and in my own good time regardless of whether or not the landman has had his dinner or is already late for another appointment.
Here is a chart showing my fictitious family tree. My great grandparents were Abe West who owned blackacre and Ida West who owned whiteacre. Before my grandparents met each of them had gotten into just a little bit of trouble and as a consequence each of them had an illegitimate child.

As a result each of them had a guilt complex and when they married they suffered from psychological impotence and went ten years without having any children born of their marriage. Finally they gave up hope of having children of their own and adopted a son, Ben West.

Apparently this adoption in some way relieved their anxieties because a short time later my great grandmother became pregnant. During this period my great grandfather was killed and the details of his death were printed in the local newspaper by a young reporter as follows:
Abe West looked up the elevator shaft to see if the car was on its way down. It was. Age 45.

My grandfather, Late West, was born two months after my great grandfather's death.

**ILLEGITIMATE, ADOPTED AND POSTHUMOUS CHILDREN**

A short time later my grandmother died of typhoid fever. At that time Abe West was survived by one illegitimate child, by his adopted son, Ben West, and by his posthumous son, Late West. Ida West was also survived by an illegitimate child, by the adopted son and by the posthumous son.

With reference to blackacre owned by my great grandfather, under the rules we have discussed previously the illegitimate child would inherit nothing and the adopted and the posthumous child would each inherit 1/2 of blackacre. With reference to whiteacre owned by my great grandmother, her illegitimate child would inherit 1/3 and her other two children would also each inherit 1/3.

Consequently, at this time Ben West owned 1/2 of blackacre and 1/3 of whiteacre; Late West owned 1/2 of blackacre and 1/3 of whiteacre; and my great grandmother's illegitimate child owned 1/3 of whiteacre.

**HALF-BLOOD**

One year later the illegitimate child of my great grandmother died of whooping cough, having no other known relatives,
and that child's interest in whiteacre was inherited in equal shares by the child's half-brothers, Ben West and Late West. At this time Ben West and Late West each owned 1/2 of blackacre and 1/2 of whiteacre.

GRANDCHILDREN

Ben West had two children, John and Jack, and John, in turn, had two children, Harry and Henry. John died first and was survived by his wife, Mr. John West, and his two children, Harry and Henry. Then Ben West died of tetanus and 1/2 of his property descended to his son, Jack West, and 1/4 each descended to his grandsons, Harry and Henry, per stirpes.

BROTHER - ANCESTRAL FROM FATHER

Harry then died of diptheria and his property was inherited by his brother, Henry. Since the property was ancestral from his father, his mother, Mrs. John West, acquired no interest in the property. If the property had been a new acquisition, his mother would have had a life estate.

NEPHEW TAKES BEFORE UNCLE

Jack West died of smallpox and his property was inherited by his nephew, Henry, who then owned 1/2 of blackacre and 1/2 of whiteacre. It should be noted here that even though the statute is not clear on this point, the case law makes it plain that the nephew would have precedence over the uncle, Late West.
ANCESTRAL - PATERNAL GREAT UNCLE

Henry West then died of polio and his property, being ancestral from the blood of his father, was inherited by Late West, his paternal great uncle, who now owns all of blackacre and all of whiteacre.

NEW ACQUISITION

In the meantime, Late West had two children, Joe and Bob, and each of them had one child. My father was Joe West and my cousin was Gene West. My uncle, Bob West, had a wife who had one brother and no sisters.

My cousin, Gene West, was a landman a few years ago and he bought a big lease for a dollar an acre and sold it to a major company for $10.00 an acre, and a big overriding royalty. With his profit he bought blackacre and whiteacre from our grandfather, Late West. Thus, the property became a new acquisition in the hands of my cousin, Gene West.

PARENT'S LIFE ESTATE

My grandfather died of a heart attack, and a short time later my cousin, Gene West, died of lung cancer. Upon his death his parents, Mr. and Mrs. Bob West, acquired a life estate in the property.

My aunt and uncle, Mr. and Mrs. Bob West, having had shots or been vaccinated for typhoid fever, diptheria, smallpox,
whooping cough, tetanus, and polio, and having given up smoking, lived to the ripe old age of 89, when one Sunday afternoon they were out viewing the scenery—driving twenty miles per hour—and they were hit from behind by a big trailer truck and both killed instantly.

MATERNAL UNCLE AND PATERNAL UNCLE

Upon their death and the consequent termination of their life estate, one-half of the property was inherited by my father, Joe West, and one-half was inherited by my aunt's brother. You will recall that my cousin owned the property as a new acquisition and thus one-half of his property, subject to his parents' life estate, was inherited by his paternal uncle (my father), and one-half was inherited by his maternal uncle.

SON

My mother died when I was young and a few years ago my father, who was 84, met a sudden death—he was shot by a jealous husband—and I then inherited his one-half of the property. I wanted to subdivide the property and make a big profit selling lots, but my aunt's brother wanted to raise cucumbers and sweet potatoes.

Since we could not agree upon the use of the land and did not want to go to the expense of a partition suit, I
finally agreed to buy his interest and I now own the fee title. I intend to subdivide the land into small lots, sell them for $5,000.00 each, retire at an early age, quit practicing law, and not have to worry any more about the law of descent and distribution.

**CLEAR TITLE BY DESCENT**

When I start selling my lots I hope I don't have as much trouble with my title as one of my lawyer friends had a while back in New Orleans. A New York law firm was trying to clear the title to a piece of property in New Orleans and it was satisfied with the title back to 1803. However, the New York law firm wanted more and requested the New Orleans attorney to have the title cleared further back. The New Orleans attorney wrote the New York attorney this letter:

"Please be advised that in the year 1803 the United States of America acquired title to the territory of Louisiana from the Republic of France by purchase, the Republic of France having first acquired title from the Government of Spain by conquest, the Government of Spain having acquired title by virtue of discovery of Christopher Columbus, a sailor, who, before setting out on his voyage of discovery, received the support of Isabella, Queen of Spain, she having first
secured the sanction of his Holiness, the Pope. The Pope is the Vicar of Christ on earth; Jesus is the Son of God; God made Louisiana."

**READ HARRY MEEK'S ARTICLE**

I suppose that is about as far back as we can go with the law of descent and distribution, and I also believe I have gone about as far as I can go in attempting to arouse your interest in the subject. In conclusion, I am sure you will little note nor long remember what I have said here, but if you will read Mr. Meek's article, you will never forget what you read there.
FOOTNOTES

1. Masterson, *A Survey of Basic Oil and Gas Law*, Southwestern Legal Foundation, 4th Annual Institute on Oil and Gas Law and Taxation (page 228), 1953;


Walker, *Recent Developments in Pooling and Unitization*, Southwestern Legal Foundation, 6th Annual Institute on Oil and Gas Law and Taxation (page 47), 1955;

Hoffman, *Some Problems in Pooling and Unitization*, Southwestern Legal Foundation, 7th Annual Institute on Oil and Gas Law and Taxation (page 219), 1956;

Byrd, *Contractual and Property Rights as Affected by Conservation Laws and Regulations*, Southwestern Legal Foundation, 10th Annual Institute on Oil and Gas Law and Taxation (page 1), 1959;

Hoffman, *Legal Problems in Pooling, Unitization, and Joint Operation of Oil and Gas Interests*, Southwestern Legal Foundation, 11th Annual Institute on Oil and Gas Law and Taxation (page 331), 1960;

Walker, *What is an Oil Well? What is a Gas Well? What Difference Does It Make?*, Southwestern Legal Foundation, 14th Annual Institute on Oil and Gas Law and Taxation (page 175), 1963;

Williams, *Compulsory Pooling and Unitization*, Southwestern Legal Foundation, 15th Annual Institute on Oil and Gas Law and Taxation (page ___), 1964;


Footnotes (con'd)


5. Petroleum Conservation, p. 6 (1951).

6. 177 U. S. 190 (1900).

7. See Williams, Compulsory Pooling and Unitization, 15th Annual Institute on Oil and Gas Law and Taxation, for an excellent historical background and discussion of compulsory pooling and unitization.


13. 360 S. W. 2d 444.


Footnotes (con'd)

16. (con'd) Superior Oil Co. v. Foote (Miss. 1952), 59 So. 2d 85; Green v. Superior Oil Co. (Miss. 1952), 59 So. 2d 100; Hutchins v. Humble Oil & Refining Co. (Miss. 1952), 59 So. 2d 103; Superior Oil Co. v. Griffith (Miss. 1952), 59 So. 2d 104, 60 So. 2d 505; Superior Oil Co. v. Morgan (Miss. 1952), 59 So. 2d 105; Superior Oil Co. v. Beery (Miss. 1952), 59 So. 2d 689; Griffith v. Gulf Refining Co. (Miss. 1952), 60 So. 2d, 518, 61 So. 2d 306; Gulf Refining Co. v. Griffith (Miss. 1952), 60 So. 2d 525; Hassie Hunt Trust v. Proctor (Miss. 1952), 60 So. 2d 551; Superior Oil Co. v. Beery (Miss. 1953), 63 So. 2d, 115, 64 So. 2d 357; Superior Oil Co. v. Foote (Miss. 1953), 63 So. 2d 137; Superior Oil Co. v. Foote (Miss. 1953), 64 So. 2d 355; Humble Oil & Refining Co. v. Hutchins (Miss. 1953), 64 So. 2d 733; Superior Oil Co. v. Magee (Miss. 1956), 87 So. 2d 280.

17. 205 Ark. 978, 167 S. W. 2d 492.

18. Supra note 17, p. 989.

19. 207 Ark. 266, 180 S. W. 2d 120.

20. Hoffman, Some Problems in Pooling and Unitization, 7th Annual Institute on Oil and Gas Law and Taxation, p. 262.


23. Supra Note 22, § 53-109-I

24. Supra Note 22, § 53-110

25. Supra Note 22, § 53-111-L

26. Supra Note 22, § 53-114-B

27. Supra Note 22, § 53-109-G

28. 67 So. 2d 93.

29. Supra Note 21.


33. Supra Note 26.


35. 239 P. 2d 1021 (1950); 239 P. 2d 1023 (1950); 268 P. 2d 878 (1953).


37. 306 P. 2d 305 (1956).

38. 299 F. 2d 680.