#L-625 10/25/82

Memorandum 82-110

Subject: Study L-625 - Probate Law (Disclaimers)

At the September meeting the Commission approved the Recommendation Relating to Disclaimer of Testamentary and Other Interests for printing, subject to several decisions made at the meeting. A copy of this recommendation is attached to this memorandum. We have also renumbered the sections in the recommendation for consistency with the Commission's decision regarding organization of the Probate Code. As this statute is now numbered, it will not be necessary to renumber it to accommodate the recommendation on wills and intestate succession.

The Commission also decided at the September meeting to continue this subject on the agenda for the November meeting so that additional comments might be considered. We have received a letter from Mr. Kenneth M. Klug which is attached as Exhibit 1. This letter contains further discussion of a point he raised in an earlier letter that was attached to Memorandum 82-94, considered at the September meeting.

Mr. Klug suggests that further consideration be given to disclaimers of joint tenancies. His concern is that a disclaimer permitted under California law would not qualify under federal law. He favors the Commission's proposal, but argues that the "California statute should make it clear that an acceptance of the creation of a joint tenancy is not an acceptance of the survivorship right." Mr. Klug is concerned with the position taken by the IRS in private letter rulings that found an acceptance by the joint tenant at the time the joint tenancy was created or by actions during the life of the tenancy. These rulings purport to depend upon the nature of joint tenancy under state law. Accordingly, the rulings might be avoided by providing that the joint tenants are not vested with the survivorship right upon the creation of the tenancy. The effectiveness of this approach is in some doubt, however. In both Arizona and Illinois, state statutes permitted surviving joint tenants to renounce the "accretive portion" of the property that would pass to the surviving joint tenant, and yet the IRS found acceptance prior to the death of the first joint tenant in cases arising in these states. See Uchtmann & Hartnell, Qualified Disclaimer of Joint Tenancies: A Policy and Property Law Analysis, 22 Ariz. L. Rev. 987, 997 (1980).

It is also interesting to note that Proposed Treasury Regulation § 25.2518-2(d)(3) provides:

> To have a qualified disclaimer under section 2518 in the case of an interest in a joint tenancy (other than a revocable joint tenancy, such as a revocable joint bank account) or a tenancy by the entirety, the disclaimer--
>
> (i) Must be made with respect to the entire interest in property which is the subject of the tenancy,
>
> (ii) Must be made within 9 months of the creation of the tenancy, and
>
> (iii) Must meet each of the remaining requirements enumerated in section 2518(b). [Section 2518 is set out in note 5 in the attached recommendation.]

The staff is unclear on the meaning of the "revocable joint tenancy" language in this proposed regulation, but it is arguable that California law is flexible enough to fall within it. Of course, the experience under the various IRS letter rulings on this issue indicates otherwise.

The confused state of federal law and the disfavor shown disclaimers of future interests and joint tenancies do not give the staff much confidence about achieving the desired goal by means of state legislation. However, the staff recommends that the attempt be made to avoid the impact of the recent letter rulings in this area. We propose the addition of the following subdivision to Section 285 in the attached recommendation:

> (d) The acceptance of a joint tenancy interest when the joint tenancy is created is not an acceptance of the interest created by surviving another joint tenant.

The Comment to this subdivision would read substantially as follows:

> Subdivision (d) makes clear that a joint tenant is not, during the life of the joint tenancy, to be considered as having accepted the interest that is taken by surviving the other joint tenant. This is consistent with Sections 263(b)(11) ("creator of the interest" defined with respect to joint tenancies) and 267(b)(11) ("interest" defined). Under this chapter there are two interests that may be disclaimed by a joint tenant--the interest created when the person becomes a joint tenant and the interest that is acquired by operation of the right of survivorship when the other joint tenant dies.

Two other points mentioned by Mr. Klug should be discussed. On the first page of his letter, Mr. Klug states that "the prohibition of acceptance in the Internal Revenue Code is much broader than the acceptance contemplated by present California law or the Law Revision Commission proposal." In support of this proposition, he notes that California law

refers to acceptance of an "interest" whereas federal law refers to acceptance of the interest "or any of its benefits." Apparently, Mr. Klug overlooked subdivision (b)(3) of Section 285 in the recommendation which provides that an acceptance occurs where the "beneficiary . . . accepts the interest or part thereof or benefit thereunder." (Emphasis supplied.)

Secondly, Mr. Klug states on page two of his letter that "before California enacts legislation authorizing a disclaimer of a joint tenancy right, the nature of the ownership right in joint tenancy should be studied very carefully, lest the proposed legislation create a tax trap for the unwary." Legislation has already been enacted permitting the disclaimer of joint tenancy interests. See 1982 Cal. Stats. ch. 41, § 1 (amending Prob. Code § 190). The Commission recommendation is an attempt to refine and clarify existing law in this area. It should also not be forgotten that there are other areas where current federal law relating to disclaimers conflicts with California law, not to mention the law of almost all the states. It is unfortunate that federal law remains confused and leads to some absurd results, but in an effort to avoid the "trap for the unwary" aspect of this statute, the Comments to Sections 275 and 279 have been written to provide a warning of the need to satisfy federal law if the disclaimer is made to avoid federal taxes.

Respectfully submitted,

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RECOMMENDATION

relating to

DISCLAIMER OF TESTAMENTARY AND OTHER INTERESTS

The California disclaimer statute[1] permits the recipient of an interest under a will, by intestate succession, or by some other mechanism[2] to disclaim the interest within a reasonable time, with the effect that the person is treated as if he or she never received the property.[3] The Commission has concluded that a new, comprehensive disclaimer statute is needed to improve the organization of the existing statute, to make clarifying and substantive changes in existing law, and to bring the California statute into closer conformity with federal law.

The new disclaimer statute would make the following significant clarifications or changes in existing law:[4]

(1) The new statute makes clear that a qualified disclaimer under federal law[5]

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[1] Prob. Code §§ 190-190.10. Disclaimers may also be termed renunciations. See Uniform Probate Code § 2-801 (1977). "Disclaimer" seems to be the preferred term. See I.R.C. § 2518; Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act (1978); Uniform Disclaimer of Transfers Under Nontestamentary Instruments Act (1978).

[2] Such as by inter vivos gift, as a surviving joint tenant, or as a beneficiary under an insurance policy or retirement plan. The disclaimer statute was amended in 1982 to expand the types of interests that may be disclaimed. 1982 Cal. Stats. ch. 41, § 1.

[3] Prob. Code § 190.6. But see the text at note 7 *infra*.

[4] The proposed disclaimer statute is drawn in part from a draft statute prepared by the Probate, Trust and Estate Planning Committee of the Beverly Hills Bar Association on file in the Commission's office.

[5] Section 2518 of the Internal Revenue Code provides:

(a) For purposes of this subtitle, if a person makes a qualified disclaimer with respect to any interest in property, this subtitle shall apply with respect to such interest as if the interest had never been transferred to such person.

(b) For purposes of subsection (a), the term "qualified disclaimer" means an irrevocable and unqualified refusal by a person to accept an interest in property but only if—

(1) such refusal is in writing,

(2) such writing is received by the transferor of the interest, his legal representative, or the holder of the legal title to the property to which the interest relates not later than the date which is 9 months after the later of—

(A) the day on which the transfer creating the interest in such person is made, or

(B) the day on which such person attains age 21,

(3) such person has not accepted the interest or any of its benefits, and

(4) as a result of such refusal, the interest passes without any direction on the part of the person making the disclaimer and passes either—

(A) to the spouse of the decedent, or

(B) to a person other than the person making the disclaimer.

is also valid under the California statute. This facilitates the primary purpose of disclaimers to minimize taxes.[6]

(2) Under the new statute, a disclaimer is not a fraudulent conveyance as against creditors of the person disclaiming. This adopts the majority rule and rejects the contrary California case-law rule[7] that pre-dates enactment of the California statute. The new statute permits the beneficiary to waive the right to disclaim a specific interest, and the creditor may require such a waiver as a condition to extending the credit. This protects the creditor who extends credit in reliance upon the beneficiary's anticipated acceptance of a disclaimable interest.

(3) The new statute liberalizes the requirements for filing disclaimers. This liberalization will avoid a disclaimer from being held ineffective because it was filed with the wrong person or in the wrong place. The new statute does not continue the existing requirement that a disclaimer of an interest in real property be acknowledged,[8] but acknowledgment is required in order to record the disclaimer under the laws relating to the recording of instruments affecting real property.

(4) The new statute rejects language in a recent case to

(c) For purposes of subsection (a)—

(1) A disclaimer with respect to an undivided portion of an interest which meets the requirements of the preceding sentence shall be treated as a qualified disclaimer of such portion of the interest.

(2) A power with respect to property shall be treated as an interest in such property.

(3) For purposes of subsection (a), a written transfer of the transferor's entire interest in the property—

(A) which meets requirements similar to the requirements of paragraphs (2) and (3) of subsection (b), and

(B) which is to a person or persons who would have received the property had the transferor made a qualified disclaimer (within the meaning of subsection (b)),

shall be treated as a qualified disclaimer.

[6] See Comment, *How to Look A Gift Horse in the Mouth– Disclaimers Under California Law and the Tax Reform Act of 1976*, 18 Santa Clara L. Rev. 217, 218-23 (1978). A disclaimer may meet the requirements of California law but fail under federal law, particularly where timeliness of filing is involved. See I.R.C. § 2518; Jewett v. Commissioner, 102 S. Ct. 1082 (1982).

[7] See *In re* Estate of Kalt, 16 Cal.2d 807, 108 P.2d 401 (1940); Bennett, *Using Disclaimers* § 5.9, in Using Disclaimers and Powers of Appointment 9-10 (Cal. Cont. Ed. Bar 1981). See also the Comment to Section 3 of the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act (1978). Since the disclaimed interest is treated in Probate Code Section 190.6 as never having belonged to the disclaimant, there is nothing for the creditor to reach.

[8] Prob. Code § 190.4.

the effect that the normal disclaimer rules are inapplicable to a devise conditioned on survival.[9]

(5) The provision of existing law permitting common law disclaimers[10] is not continued in the new statute. This avoids the possibility of litigation resulting from the uncertainty created under existing law when a disclaimer that fails to satisfy the requirements of the disclaimer statute is claimed to be a valid common law disclaimer. Moreover, common law disclaimers are no longer needed in view of the expansion of the scope of the disclaimer statute[11] and the provision of the new statute that makes a disclaimer valid under federal law also valid under the California statute.[12]

Proposed Legislation

The Commission's recommendations would be effectuated by enactment of the following measure:

An act to amend Sections 591.6 and 2580 of, to add Division 2.5 (commencing with Section 260) to, and to repeal Chapter 12 (commencing with Section 190) of Division 1 of, the Probate Code, relating to disclaimers.

The people of the State of California do enact as follows:

Probate Code §§ 190-190.10 (repealed). Disclaimer of testamentary and other interests

SECTION 1. Chapter 12 (commencing with Section 190) of Division 1 of the Probate Code is repealed.

Comment. Former Chapter 12 (commencing with Section 190) is superseded by Part 6 (commencing with Section 260). The disposition of former Sections 190-190.10 is indicated below.

§ 190. Definitions. The substance of the introductory clause of former Section 190 is continued in Section 260 (application of definitions). The substance of subdivision (a) is continued in Sections 262 ("beneficiary" defined) and 267 ("interest" defined). Subdivision (b) is continued in Section 267(a)

[9] See Estate of Murphy, 92 Cal. App.3d 413, 426, 154 Cal. Rptr. 859 (1979) (dictum).

[10] Prob. Code § 190.10. See also Estate of Murphy, 92 Cal. App.3d 413, 422, 154 Cal. Rptr. 859 (1979).

[11] See note 2 *supra*.

[12] See text at note 5 *supra*.

("interest" defined). Subdivision (c) is continued in Section 265 ("disclaimer" defined). Subdivision (d) is continued in Section 264 ("disclaimant" defined).

§ 190.1. Disclaiming interest; contents of disclaimer. The first sentence of former Section 190.1 is continued in Section 275 (right to disclaim interest). The substance of the second sentence is continued in Section 278 (contents of disclaimer).

§ 190.2. Disclaimer by guardian, conservator, or representative. The substance of former Section 190.2 is continued in Sections 276 (disclaimer on behalf of conservatee), 277(a) (disclaimer on behalf of minor), and 277(b) (disclaimer on behalf of decedent).

§ 190.3. Effectiveness of disclaimer. The introductory clause and subdivisions (a) and (b) of former Section 190.3 are superseded by Section 279 (time within which disclaimer must be filed). Subdivision (c) is not continued.

§ 190.4. Filing of disclaimer. Former Section 190.4 is superseded by Section 280 (filing and recording of disclaimers).

§ 190.5. Binding effect of disclaimer; waiver. The first sentence of former Section 190.5 is continued in Section 281 (disclaimer irrevocable and binding). The substance of the second sentence is continued in Section 284 (waiver of right to disclaim).

§ 190.6. Disposition of disclaimed interest. Former Section 190.6 is superseded by Section 282 (effect of disclaimer).

§ 190.7. Restriction on making disclaimer. The first sentence of former Section 190.7 is continued in Section 285(a) (no disclaimer after acceptance). The substance of the second sentence is continued in Section 285(c). The third sentence is superseded by Section 285(b).

§ 190.8. Right to disclaim not affected by spendthrift or other restrictions. Former Section 190.8 is continued in Section 286.

§ 190.9. Operative effect of chapter. The substance of former Section 190.9 is continued in Section 287 as revised for the operative date of the new statute.

§ 190.10. Savings clause. The substance of former Section 190.10 is continued in Section 288, except that the new statute is the exclusive method of making disclaimers after its operative date. A purported disclaimer made after the operative date must comply with the requirements of the new statute and, if it does not, it is not recognized as valid as a common law disclaimer or renunciation.

Probate Code §§ 260-295 (added). Disclaimer of testamentary and other interests

SEC. 2. Division 2.5 (commencing with Section 260) is added to the Probate Code, to read:

DIVISION 2.5. DISCLAIMER OF TESTAMENTARY AND OTHER INTERESTS

Part 6. Disclaimer of Testamentary and Other Interests

CHAPTER 1. DEFINITIONS

§ 260. Application of definitions

260. Unless the provision or context otherwise requires, the words and phrases defined in this chapter govern the construction of this part.

Comment. Section 260 is new.

§ 261. Account

261. "Account" means a contract of deposit of funds between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account, and other like arrangement.

Comment. Section 261 is new and is the same in substance as Section 6-101(1) of the Uniform Probate Code (1977).

§ 262. Beneficiary

262. "Beneficiary" means the person entitled, but for the person's disclaimer, to take an interest.

Comment. Section 262 continues the substance of the first portion of subdivision (a) of former Section 190. See also Section 268 ("person" defined).

§ 263. Creator of the interest

263. (a) "Creator of the interest" means a person who establishes, declares, creates, or otherwise brings into existence an interest.

(b) "Creator of the interest" includes, but is not limited to, the following:

(1) With respect to an interest created by intestate succession, the person dying intestate.

(2) With respect to an interest created under a will, the testator.

(3) With respect to an interest created under a trust, the trustor.

(4) With respect to an interest created by succession to a disclaimed interest, the disclaimant of the disclaimed interest.

(5) With respect to an interest created by virtue of an election to take against a will, the testator.

(6) With respect to an interest created by creation of a power of appointment, the donor.

(7) With respect to an interest created by exercise or nonexercise of a power of appointment, the donee.

(8) With respect to an interest created by an inter vivos gift, the donor.

(9) With respect to an interest created by surviving the death of a depositor of a Totten trust account or P.O.D. account, the deceased depositor.

(10) With respect to an interest created under an insurance or annuity contract, the owner, the insured, or the annuitant.

(11) With respect to an interest created by surviving the death of another joint tenant, the deceased joint tenant.

(12) With respect to an interest created under an employee benefit plan, the employee or other owner of an interest in the plan.

(13) With respect to an interest created under an individual retirement account, annuity, or bond, the owner.

Comment. Section 263 is new. See also Sections 266 ("employee benefit plan" defined), 267 ("interest" defined), 268 ("person" defined), 269 ("P.O.D. account" defined), 270 ("Totten trust account" defined).

§ 264. Disclaimant

264. "Disclaimant" means a beneficiary who executes a disclaimer on his or her own behalf or a person who executes a disclaimer on behalf of a beneficiary.

ÀComment. Section 264 continues subdivision (d) of former Section 190.

§ 265. Disclaimer

265. "Disclaimer" means any writing which declines, refuses, renounces, or disclaims any interest that would otherwise be taken by a beneficiary.

Comment. Section 265 continues subdivision (c) of former Section 190.

§ 266. Employee benefit plan

266. "Employee benefit plan" includes, but is not limited to, any pension, retirement, death benefit, stock bonus, or profit sharing plan, system, or trust.

Comment. Section 266 is new.

§ 267. Interest

267. (a) "Interest" includes the whole of any property, real or personal, legal or equitable, or any fractional part, share, or particular portion or specific assets thereof, or any estate in any such property, or any power to appoint, consume, apply, or expend property, or any other right, power, privilege, or immunity relating to property.

(b) "Interest" includes, but is not limited to, an interest created in any of the following manners:

(1) By intestate succession.

(2) Under a will.

(3) Under a trust.

(4) By succession to a disclaimed interest.

(5) By virtue of an election to take against a will.

(6) By creation of a power of appointment.

(7) By exercise or nonexercise of a power of appointment.

(8) By an inter vivos gift, whether outright or in trust.

(9) By surviving the death of a depositor of a Totten trust

account or P.O.D. account.

(10) Under an insurance or annuity contract.

(11) By surviving the death of another joint tenant.

(12) Under an employee benefit plan.

(13) Under an individual retirement account, annuity, or bond.

(14) Any other interest created by any testamentary or inter vivos instrument or by operation of law.

Comment. Subdivision (a) of Section 267 continues the substance of subdivision (b) of former Section 190. Subdivision (b) of Section 267 continues a portion of subdivision (a) of former Section 190 (as amended by 1982 Cal. Stats. ch. 41). See also Sections 266 ("employee benefit plan" defined), 269 ("P.O.D. account" defined), 270 ("Totten trust account" defined).

§ 268. Person

268. "Person" means an individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, or other entity.

Comment. Section 268 makes clear that artifical persons are included within the meaning of "person" as used in this part.

§ 269. P.O.D. account

269. "P.O.D. account" means an account subject to a pay-on-death provision as provided in Section 852.5, 7604.5, 11203.5, 14854.5, or 18318.5 of the Financial Code.

Comment. Section 269 is new. See also Section 261 ("account" defined).

§ 270. Totten trust account

270. "Totten trust account" means an account in the name of one or more parties as trustee for one or more beneficiaries where the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sums on deposit in the account. In a Totten trust account, it is not essential that payment to the beneficiary be mentioned in the deposit agreement. A Totten trust account does not include (1) a regular trust account under

a testamentary trust or a trust agreement which has significance apart from the account or (2) a fiduciary account arising from a fiduciary relation such as attorney-client.

Comment. Section 270 is new and is the same in substance as Section 6-101(14) of the Uniform Probate Code (1977). See also Section 261 ("account" defined).

CHAPTER 2. GENERAL PROVISIONS

§ 275. Right to disclaim interest

275. A beneficiary may disclaim any interest, in whole or in part, by filing a disclaimer as provided in this part.

Comment. Section 275 continues the first sentence of former Section 190.1. A disclaimer may be valid under this chapter but not meet the requirements of federal law. See I.R.C. § 2518; Jewett v. Commissioner, 102 S. Ct. 1082 (1982). Hence, if a disclaimer is executed to avoid federal taxes, the requirements of federal law must be met.

§ 276. Disclaimer on behalf of conservatee

276. A disclaimer on behalf of a conservatee shall be made by the conservator of the estate of the conservatee pursuant to a court order obtained under Article 10 (commencing with Section 2580) of Chapter 6 of Part 4 of Division 4 authorizing or requiring the conservator to execute and file the disclaimer.

Comment. Section 276 continues the substance of a portion of former Section 190.2 and adds a reference to the substituted judgment provisions of the guardianship-conservatorship law. This continues prior law which made the substituted judgment provisions specifically applicable to disclaimers. See paragraph (9) of subdivision (b) of Section 2580.

§ 277. Disclaimer on behalf of minor or decedent

277 (a) A disclaimer on behalf of a minor shall be made by the guardian of the estate of the minor if one has been appointed or, if none has been appointed, by a guardian ad litem of the minor. A disclaimer by a guardian is not effective unless made pursuant to a court order obtained

under this section.

(b) A disclaimer on behalf of a decedent shall be made by the personal representative of the decedent. Except as provided in Article 2 (commencing with Section 591) of Chapter 8 of Division 3, a disclaimer by an executor is not effective unless made pursuant to a court order obtained under this section.

(c) A petition for an order authorizing or requiring a guardian or personal representative to make a disclaimer shall be filed in the superior court in the county in which the estate of the minor or decedent is administered or, if there is no administration, the superior court in any county in which administration would be proper. The petition may be filed by the guardian, personal representative, or other interested person.

(d) The petition shall:

(1) Identify the creator of the interest.

(2) Describe the interest to be disclaimed.

(3) State the extent of the disclaimer.

(4) Identify the person or persons the petitioner believes would take the interest in the event of the disclaimer.

(e) Notice of the hearing on the petition shall be given as follows:

(1) If the petition is for an order authorizing or requiring the guardian of the estate of a minor to execute and file the disclaimer, notice of the hearing on the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1 of Division 4 to all of the persons (other than the petitioner or persons joining in the petition) required to be given notice under that chapter.

(2) If the petition is for an order authorizing or requiring the personal representative of a decedent to execute and file the disclaimer, notice of the hearing on the petition shall be given for the period and in the manner provided in Section 1200.5.

(3) If the petition is for an order authorizing or requiring a guardian ad litem of a minor to execute and file the disclaimer, notice of the hearing on the petition shall be given to the persons and in the manner that the court shall

by order direct.

(4) The court may require that additional notice be given in such manner as the court directs.

(f) After hearing, the court in its discretion may make an order authorizing or requiring the guardian or personal representative to execute and file the disclaimer if the court determines, taking into consideration all of the relevant circumstances, that the minor or decedent as a prudent person would disclaim the interest if he or she had the capacity to do so.

Comment. Subdivision (a) of Section 277 continues the substance of a portion of former Section 190.2 but adds a reference to a guardian ad litem and requires court approval. Subdivision (b) continues the substance of a portion of former Section 190.2 and requires court approval unless the personal representative is acting under the Independent Administration of Estates Act. Subdivisions (c), (d), (e), and (f) are new. Paragraph (1) of subdivision (e) is drawn from Civil Code Section 1388.3 (release of power of appointment on behalf of minor donee). Subdivision (f) adopts the standard provided by Civil Code Section 1388.3 for release of a power of appointment on behalf of a minor donee.

§ 278. Contents of disclaimer

278. The disclaimer shall be in writing, shall be signed by the disclaimant, and shall:

(a) Identify the creator of the interest.

(b) Describe the interest to be disclaimed.

(c) State the disclaimer and the extent thereof.

Comment. Section 278 continues the substance of the second sentence of former Section 190.1.

§ 279. Time within which disclaimer must be filed

279. (a) A disclaimer to be effective shall be filed within a reasonable time after the person able to disclaim acquires knowledge of the interest.

(b) In the case of any of the following interests, a disclaimer is conclusively presumed to have been filed within a reasonable time if it is filed within nine months after the death of the creator of the interest or within nine

months after the interest becomes indefeasibly vested, whichever occurs later:

(1) An interest created under a will.

(2) An interest created by intestate succession.

(3) An interest created pursuant to the exercise or nonexercise of a testamentary power of appointment.

(4) An interest created by surviving the death of a depositor of a Totten trust account or P.O.D. account.

(5) An interest created under a life insurance or annuity contract.

(6) An interest created by surviving the death of another joint tenant.

(7) An interest created under an employee benefit plan.

(8) An interest created under an individual retirement account, annuity, or bond.

(c) In the case of an interest created by an inter vivos trust, an interest created by the exercise of a presently exercisable power of appointment, an outright inter vivos gift, a power of appointment, or an interest created or increased by succession to a disclaimed interest, a disclaimer is conclusively presumed to have been filed within a reasonable time if it is filed within nine months after whichever of the following times occurs latest:

(1) The time of the creation of the trust, the exercise of the power of appointment, the making of the gift, the creation of the power of appointment, or the disclaimer of the disclaimed property.

(2) The time the first knowledge of the interest is acquired by the person able to disclaim.

(3) The time the interest becomes indefeasibly vested.

(d) In case of an interest not described in subdivision (b) or (c), a disclaimer is conclusively presumed to have been filed within a reasonable time if it is filed within nine months after whichever of the following times occurs later:

(1) The time the first knowledge of the interest is acquired by the person able to disclaim.

(2) The time the interest becomes indefeasibly vested.

(e) In the case of a future estate, a disclaimer is conclusively presumed to have been filed within a reasonable time if it is filed within whichever of the

following times occurs later:

(1) Nine months after the time the interest becomes an estate in possession.

(2) The time specified in subdivision (b), (c), or (d), whichever is applicable.

(f) If the disclaimer is not filed within the time provided in subdivision (b), (c), (d), or (e), the disclaimant has the burden of establishing that the disclaimer was filed within a reasonable time after the disclaimant acquired knowledge of the interest.

Comment. Section 279 supersedes former Section 190.3. See also Sections 263 ("creator of the interest" defined), 266 ("employee benefit plan" defined), 268 ("person" defined), 269 ("P.O.D. account" defined), 270 ("Totten trust account" defined). Section 279 provides a more liberal rule concerning time of filing than does federal law. See I.R.C. § 2518; Jewett v. Commissioner, 102 S. Ct. 1082 (1982). Federal law should be consulted if the disclaimer is executed to avoid federal taxes.

§ 280. Filing of disclaimer; recording of disclaimers affecting real property

280. (a) A disclaimer shall be filed with any of the following:

(1) The superior court in the county in which the estate of the decedent is administered or, if there is no administration of the decedent's estate, the superior court in any county in which administration of the estate of the decedent would be proper.

(2) The trustee, personal representative, other fiduciary, or person responsible for distributing the interest to the beneficiary.

(3) Any other person having custody or possession of or legal title to the interest.

(4) The creator of the interest.

(b) If a disclaimer made pursuant to this part affects real property or an obligation secured by real property and the disclaimer is acknowledged and proved in like manner as a grant of real property, the disclaimer may be recorded in like manner and with like effect as a grant of real property, and all statutory provisions relating to the recordation or

nonrecordation of conveyances of real property and to the effect thereof apply to the disclaimer with like effect, without regard to the date when the disclaimer was filed pursuant to subdivision (a). Failure to file a disclaimer pursuant to subdivision (a) which is recorded pursuant to this subdivision does not affect the validity of any transaction with respect to the real property or the obligation secured thereby, and the general laws on recording and its effect govern any such transaction.

Comment. Subdivision (a) of Section 280 supersedes the first paragraph of former Section 190.4 and is less restrictive than the former law. Subdivision (b) supersedes the second paragraph of former Section 190.4 and makes clear that acknowledgment of a disclaimer affecting real property is permissible but is not a prerequisite to the effectiveness of the disclaimer. However, acknowledgment of a disclaimer affecting real property remains a prerequisite to recording the disclaimer under subdivision (b).

§ 281. Disclaimer irrevocable and binding

281. A disclaimer, when effective, is irrevocable and binding upon the beneficiary and all persons claiming by, through, or under the beneficiary, including creditors of the beneficiary.

Comment. Section 281 continues the substance of the first sentence of former Section 190.5 and also makes clear the effect of a disclaimer on creditors of the beneficiary. See also Section 283 (disclaimer not a fraudulent conveyance). The binding effect of a disclaimer has no effect on the passing of the disclaimed interest pursuant to Section 282.

§ 282. Effect of disclaimer

282. Unless the creator of the interest provides for a specific disposition of the interest in the event of a disclaimer, the interest disclaimed shall descend, go, be distributed, or continue to be held (1) as to a present interest, as if the disclaimant had predeceased the creator of the interest or (2) as to a future interest, as if the disclaimant had died before the event determining that the taker of the interest had become finally ascertained and the taker's interest indefeasibly vested. A disclaimer relates

back for all purposes to the date of the death of the creator of the disclaimed interest or the determinative event, as the case may be.

Comment. Section 282 supersedes former Section 190.6. The introductory clause makes clear that a condition of survivorship is not a contingency otherwise provided in the will, disapproving dictum in *Estate of Murphy*, 92 Cal. App.3d 413, 426, 154 Cal. Rptr. 859 (1979).

Clause (2) of the first sentence is a new provision making clear that a disclaimer has the effect of accelerating the possession and enjoyment of subsequent interests. This provision is drawn from Section 3 of the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act (1978) and Section 3 of the Uniform Disclaimer of Transfers Under Nontestamentary Instruments Act (1978). The pertinent portion of the Comment to Section 3 of the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act explains the provision as follows:

> *Acceleration of Future Interests:* If a life estate or other future interest is disclaimed, the problem is raised of whether succeeding interests or estates accelerate in possession or enjoyment or whether the disclaimed interest must be marshalled to await the actual happening of the contingency. Section 3 provides that remainder interests are accelerated, the second clause specifically stating that any future interest which is to take effect in possession or enjoyment after the termination of the estate or interest disclaimed, takes effect as if the disclaimant had predeceased the event which determines that the taker has become finally ascertained and his interest indefeasibly vested. Thus, unless the decedent or donor of the power has otherwise provided, if T leaves his estate in trust to pay the income to his son S for life, remainder to his son's children who survive him, and S disclaims with two children then living, the remainder in the children accelerates; the trust terminates and the children receive possession and enjoyment, even though the son may subsequently have other children or one or more of the living children may die during their father's lifetime. The will or instrument of transfer may be drafted to avoid acceleration if desired.

§ 283. Disclaimer not a fraudulent conveyance

283. A disclaimer is not a fraudulent conveyance by the beneficiary under Title 2 (commencing with Section 3439) of Part 2 of Division 4 of the Civil Code.

Comment. Section 283 rejects the rule of *Estate of Kalt*, 16 Cal.2d 807, 108 P.2d 401 (1940), that the disclaimer of a legacy after the testator's death may be a fraudulent conveyance. See also Section 281 (binding effect of disclaimer).

§ 284. Waiver of right to disclaim

284. A person who could file a disclaimer under this part may instead file a written waiver of the right to disclaim. The waiver shall specify the interest to which the waiver applies. Upon being filed as provided in Section 280, the waiver is irrevocable and is binding upon the beneficiary and all persons claiming by, through, or under the beneficiary.

Comment. Section 284 continues the substance of the second sentence of former Section 190.5.

§ 285. Disclaimer not permitted after interest accepted

285. (a) A disclaimer may not be made after the beneficiary has accepted the interest sought to be disclaimed.

(b) For the purpose of this section, a beneficiary has accepted an interest if any of the following occurs before a disclaimer is filed with respect to that interest:

(1) The beneficiary, or someone acting on behalf of the beneficiary, makes a voluntary assignment, conveyance, encumbrance, pledge, or transfer of the interest or part thereof, or contracts to do so.

(2) The beneficiary, or someone acting on behalf of the beneficiary, executes a written waiver under Section 284 of the right to disclaim the interest.

(3) The beneficiary, or someone acting on behalf of the beneficiary, accepts the interest or part thereof or benefit thereunder.

(4) The interest or part thereof is sold at a judicial sale.

(c) An acceptance does not preclude a beneficiary from

thereafter disclaiming all or part of an interest if both of the following requirements are met:

(1) The beneficiary became entitled to the interest because another person disclaimed an interest.

(2) The beneficiary or other person acting on behalf of the beneficiary at the time of the acceptance had no knowledge of the interest to which the beneficiary so became entitled.

Comment. Section 285 supersedes former Section 190.7. Subdivision (b) is drawn in part from Section 4(a) of the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act (1978).

§ 286. Right to disclaim not affected by spendthrift or similar restriction

286. The right to disclaim exists regardless of any limitation imposed on the interest of a beneficiary in the nature of an expressed or implied spendthrift provision or similar restriction.

Comment. Section 286 continues former Section 190.8. As to the effect of a disclaimer, see Sections 281-283.

§ 287. Application of chapter to interest created before January 1, 1984

287. An interest created before January 1, 1984, that has not been accepted may be disclaimed after December 31, 1983, in the manner provided in this part, but no interest that arose before January 1, 1984, in a person other than the beneficiary may be destroyed or diminished by any action of the disclaimant taken pursuant to this part.

Comment. Section 287 is drawn from former Section 190.9 but provides a new operative date.

§ 288. Preexisting rights not affected

288. This part does not limit or abridge any right a person may have under any other law to assign, convey, or release any property or interest, but after December 31, 1983, an interest that would otherwise be taken by a beneficiary may be declined, refused, renounced, or

disclaimed only as provided in this part.

Comment. Section 288 continues the substance of former Section 190.10 except that this section makes ineffective a common law renunciation or disclaimer that does not satisfy the requirements of this part. See also Section 295 (disclaimers effective under federal law are effective under this part).

CHAPTER 3. DISCLAIMERS EFFECTIVE UNDER FEDERAL LAW

§ 295. Disclaimers effective under federal law effective under this part

295. Notwithstanding any other provision of this part, if as a result of a disclaimer or transfer the disclaimed or transferred interest is treated pursuant to the provisions of Title 26 of the United States Code, as now or hereafter amended, or any successor statute thereto, and the regulations promulgated thereunder, as never having been transferred to the beneficiary, then the disclaimer or transfer is effective as a disclaimer under this part.

Comment. Section 295 is a new provision intended to make disclaimers valid under federal law effective under California law even though the disclaimer would not otherwise be effective under this part. See I.R.C. § 2518 (qualified disclaimers for purposes of federal gift tax). Section 295 also makes clear that certain transfers qualifying as disclaimers under federal law are effective as disclaimers under California law. See I.R.C. § 2518(c)(3).

Probate Code § 591.6 (amended). Powers under Independent Administration of Estates Act

SEC. 3. Section 591.6 of the Probate Code is amended to read:

591.6. Unless restricted by the will, an executor or administrator who has been granted authority to administer the estate without court supervision shall have all of the following powers, in addition to any other powers granted by this code, which powers can be exercised in the manner provided in this article:

(a) To manage, control, convey, divide, exchange,

partition, and to sell for cash or on credit; to lease for any purpose, including exploration for and removal of gas, oil, or other minerals; to enter into community oil leases; and to grant options to purchase real property for a period within or beyond the administration of the estate.

(b) To invest and reinvest money of the estate in deposits in banks and insured savings and loan association accounts and in direct obligations of the United States maturing not later than one year from the date of investment or reinvestment; to invest and reinvest any surplus moneys in his or her hands in any manner provided by the will.

(c) To borrow; to place, replace, renew or extend any encumbrance upon any property in the estate.

(d) To abandon worthless assets or any interest therein.

(e) To make ordinary or extraordinary repairs or alterations in buildings or other property.

(f) To vote a security, in person or by general or limited proxy.

(g) To sell or exercise stock subscription or conversion rights.

(h) To hold a security in the name of a nominee or in other form without disclosure of the estate, so that title to the security may pass by delivery, but the executor or administrator is liable for any act of the nominee in connection with the security so held.

(i) To insure the assets of the estate against damage or loss, and the executor or administrator against liability with respect to third persons.

(j) To allow, pay, reject, contest and compromise any claim by or against the estate by compromise; to release, in whole or in part, any claim belonging to the estate to the extent that the claim is uncollectible; to institute, compromise and defend actions and proceedings.

(k) To pay taxes, assessments, and other expenses incurred in the collection, care and administration of the estate.

(*l*) To continue the operation of the decedent's business to such extent as he or she shall deem to be for the best interest of the estate and those interested therein.

(m) To pay a reasonable family allowance.

(n) To make a disclaimer.

Comment. Subdivision (n) is added to Section 591.6 to make clear that an executor or administrator may make a disclaimer pursuant to the Independent Administration of Estates Act. See Section 277 (disclaimer on behalf of decedent).

Probate Code § 2580 (technical amendment). Petition for conservator to exercise substituted judgment

SEC. 4. Section 2580 of the Probate Code is amended to read:

2580. (a) The conservator or other interested person may file a petition under this article for an order of the court authorizing or requiring the conservator to take a proposed action for any one or more of the following purposes:

(1) Benefiting the conservatee or the estate.

(2) Minimizing current or prospective taxes or expenses of administration of the conservatorship estate or of the estate upon the death of the conservatee.

(3) Providing gifts for such purposes, and to such charities, relatives (including the other spouse), friends, or other objects of bounty, as would be likely beneficiaries of gifts from the conservatee.

(b) The action proposed in the petition may include, but is not limited to, the following:

(1) Making gifts of principal or income, or both, of the estate, outright or in trust.

(2) Conveying or releasing the conservatee's contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety.

(3) Exercising or releasing the conservatee's powers as donee of a power of appointment.

(4) Entering into contracts.

(5) Creating for the benefit of the conservatee or others, revocable or irrevocable trusts of the property of the estate, which trusts may extend beyond the conservatee's disability or life.

(6) Exercising options of the conservatee to purchase or

exchange securities or other property.

(7) Exercising the rights of the conservatee to elect benefit or payment options, to terminate, to change beneficiaries or ownership, to assign rights, to borrow, or to receive cash value in return for a surrender of rights under any of the following:

(i) Life insurance policies, plans, or benefits.

(ii) Annuity policies, plans, or benefits.

(iii) Mutual fund and other dividend investment plans.

(iv) Retirement, profit sharing, and employee welfare plans and benefits.

(8) Exercising the right of the conservatee to elect to take under or against a will.

(9) Exercising the right of the conservatee to ~~renounce or~~ disclaim any interest ~~acquired by testate or intestate succession or by inter vivos transfer, including exercising the right of the conservatee to surrender the right to revoke a revocable trust~~ *that may be disclaimed under Part 6 (commencing with Section 260) of Division 2.5*.

(10) Exercising the right of the conservatee *(i)* to revoke a revocable trust *or (ii) to surrender the right to revoke a revocable trust*, but the court shall not authorize or require the conservator to exercise the right to revoke a revocable trust if the instrument governing the trust ~~(A)~~ *(i)* evidences an intent to reserve the right of revocation exclusively to the conservatee, ~~(B)~~ *(ii)* provides expressly that a conservator may not revoke the trust, or ~~(C)~~ *(iii)* otherwise evidences an intent that would be inconsistent with authorizing or requiring the conservator to exercise the right to revoke the trust.

(11) Making an election or an election and agreement referred to in Section 202.

Comment. Section 2580 is amended to correct the reference in subdivision (b) (9), to transfer a portion of subdivision (b) (9) (relating to revoking revocable trusts) to subdivision (b) (10), and to make other nonsubstantive revisions.

EXHIBIT 1

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October 12, 1982

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Re: Study L-625
Recommendation Relating to Disclaimer
of Testamentary and Other Interests

Dear Mr. Ulrich:

I would like to thank you and the Law Revision Commission for considering the comments made in my letter of August 18. I believe additional consideration should be given to the problem of disclaimers of joint tenancies.

Present California law, the Internal Revenue Code, and the Revised Recommendation all provide that a disclaimer may not be made after the beneficiary has accepted the interest to be disclaimed. California Probate Code Section 190.7; Internal Revenue Code Section 2518(b)(3); Law Revision Commission Proposal Section 285. In this connection, the prohibition of acceptance in the Internal Revenue Code is much broader than the acceptance contemplated by present California law or the Law Revision Commission proposal. California Probate Code Section 190.7 and the Law Revision Commission Proposal prohibit a disclaimer once the beneficiary "has accepted the interest" to be disclaimed. The Internal Revenue Code prohibition prohibits accepting the interest "or any of its benefits."

Thus, the threshold question is: What are the benefits of joint tenancy, and when are they accepted? One of the benefits of joint tenancy is the "right of survivorship," as distinguished from the survivorship, itself. Holding property in joint tenancy gives the owners benefits

that other forms of title do not give, not the least of which is the right to succeed to the property interest in preference to creditors of the deceased joint tenant.

On page 2 of Memorandum 82-94, you state, "If the grantee of an interest in joint tenancy wishes to eliminate the survivorship aspect, then the joint tenancy may be severed to create a tenancy-in-common, but this need not involve a disclaimer. If this is not desired, then the joint tenant may await the death of the other joint tenant and then disclaim." Emphasis added. The emphasized portion of your statement states the effect of the draft recommendation. But you do not address what I believe to be the more important question, to wit: Would such a disclaimer qualify under Federal law? In my opinion, the failure of the surviving joint tenant to have severed the joint tenancy during lifetime (by creating a tenancy-in-common) is probably an acceptance of the right of survivorship. Moreover, by not severing the joint tenancy, the joint tenant has continued to enjoy the benefits of the right of survivorship. To disclaim that right following the death of a joint tenant would appear to run afoul of IRC Section 2518(b)(3).

Of particular concern on this point, are two private letter rulings issued by the Internal Revenue Service. The first is letter ruling 7911005, which held that under Illinois law, a joint tenant is vested with an undivided interest in the property with a right of survivorship immediately on creation of the joint tenancy. Accordingly, a disclaimer did not take place prior to acceptance of any interest in the property, and the attempted disclaimer of the joint tenancy resulted in a taxable gift. Similarly, letter ruling 7940062 held that a wife's disclaimer of her survivorship interest in a contract was not a qualified disclaimer, because the wife accepted the survivorship interest upon execution of the contract. Both of these rulings turned on local law dealing with the ownership rights of the joint tenants, and not on the statutory right to disclaim the joint tenancy. It is my opinion that before California enacts legislation authorizing a disclaimer of a joint tenancy right, the nature of the ownership right in joint tenancy should be studied very carefully, lest the proposed legislation create a tax trap for the unwary.

In my experience, all disclaimers have been made solely to produce a desirable tax result. For California to enact a statutory scheme allowing disclaimers of joint tenancy survivorship once the survivorship right has been accepted would be akin to placing the cheese on the Federal Gift Tax trap: It would entice the citizenry into the same gift tax result as if the joint tenant took the property by right of survivorship and then gave it away.

I am not opposed to disclaimers of joint tenancy; indeed, I favor the proposal. But along with allowing disclaimers of joint tenancy, the California statute should make it clear that an acceptance of the creation of a joint tenancy is not an acceptance of the survivorship right.

Aside from the joint tenancy problems, I believe that the revised disclaimer recommendation is a workable plan, and is well thought out. You and the staff are to be commended for your very thorough job.

Very truly yours,

Kenneth M. Klug

cc: Mr. James D. Devine
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