#L-605 3/8/83

Memorandum 83-15

Subject: Study L-605 - Probate Law (Principles of Construction)

Attached is the material we have received from our consultant, Professor Edward C. Halbach, Jr. The material relates primarily to principles of construction and consists of:

(1) Comments concerning new statutory provisions recommended by consultant (pink pages).

(2) New statutory provisions recommended by consultant and related material (white pages).

(3) Uniform Parentage Act (for information only) (green pages).

You will need to study this material prior to the meeting. The consultant will be present at the meeting and we will go through the material in detail under his guidance.

Respectfully submitted,

John H. DeMoully
Executive Secretary

March '83 ECH -- Notes

1. Section 49 on "representation" is broader and, I think, more precise (even if uglier!) than its counterpart in AB 25; Section 6146 offers a simpler and broader (than AB 25) declaration that certain common law technical rules are not part of California law; Section 6155 modernizes the construction of "heirs," etc., in a way that might be more precise than your earlier (cf. Massachusetts) proposal and attempts to stay closer to the wording of comparable provisions of the "Statutory Will with Trust" and CEB models.

2. Section 6153 is new and not something discussed earlier: do you wish to tackle this area of numerous ambiguities that can, I think, be readily handled?

3. Section 6151(b) requires review (deletion or amendment) of narrower recent Civil Code provision on "lapse" and powers of appointment. On powers, also see last sentence of Section 6154.

4. Section 6154(a) restores the class-closing statute (modified).

5. There seemed to be a feeling at your last meeting that future interests should be subject to an implied requirement of survival until distribution, contrary to California, Restatement and general common law principles. The reasons for such a change go well beyond tax considerations, but the change also involves major dangers, which you seemed interested in fixing through a substitution of issue via an extension of the anti-lapse provision. The lapse and anti-lapse sections, §§6150-6152, have been broadened in this respect; it has also been broadened to cover devises to relatives of the testator's spouse, with the thought that the Commission might find that desirable.

6. On definitional matters, I have attempted as simply as possible (see especially Section 6156(b)), to inject a "loco parentis" requirement into the class gift cases to cover future interests created by person who are not parties to an adoption or illegimate birth. (Section

6156(c) is just a technical touch up.) The rest of the task on these terribly difficult definitional matters is handled in intestacy Section 6408.

7. In Section 6408 (especially on the existence and effects of parent-child relationships), I have set out suggestions for further revision of the staff's excellent recent job of reworking that section. I think the new features suggested for your consideration are important, if we really want to try to put this general matter to rest in both the intestacy and testacy areas (despite the severe constitutional uncertainties and inhibitions), and to produce a model other states can look to. I hope these changes at least come close: in (a)(3) the stepparent adoption and post-death adoption exceptions have been limited in order to distinguish in a permissible way between cases of essentially legitimate and illegitimate children; then (c)(1) deals with the "double shares" problem when there is an adoption following the natural parents' death by a sibling of one of the parents; other exceptional situations are touched up a bit in (c)(2); and certain problems of security and "fair warning" are treated in (b)(2) (cf. New York EPTL §4-1.2 approved in Lalli v. Lalli, 439 US 259 (1978), and wisely liberalized in 1979 and 1981). Finally, for the possibility that you may wish to tackle a difficult matter about which there has been some vague talk and complaining but (sofar as I know) never a proposal, I set out below in this Note language that might be added to §6408(a)(2) to provide for step- and foster children in very limited situations, with the necessary safeguards incorporated by treating the case like an adoption, for which qualifications, exceptions, etc. are elsewhere worked out. That added language might read: "The relationship of foster parent or stepparent to foster child or stepchild shall be treated as it were an adoptive relationship (i) if the relationship began during the child's minority and continued throughout the parties' joint lifetimes and (ii) if it appears by clear and convincing evidence that the foster parent or stepparent would have adopted the child but for a legal barrier." I am not necessarily suggesting such an innovation but attempting to show how such a new step might be taken into an area of occasionally perceived omission.

March '83 ECH

[Intestacy §6405 has some minor problems of its own, but it is generally too narrow; it may belong, with adaptation (see below), in §49 of the "Preliminary Provisions and Definitions" of Division 1; otherwise a counterpart would be needed for the construction material in "Wills".]

49. If representation is called for by this code, or if a will that expresses no contrary intention calls for distribution per stirpes or by representation or provides for issue or descendants to take without specifying the manner of distribution to them, the property is to be divided into as many equal shares as there are living issue [members] of the nearest degree [generation] of issue then living and deceased issue [members] of that same degree [generation] who leave issue then living. Each of (the) living issue [member] of that nearest degree [generation of issue] shall receive one share, and the share of each of (the) deceased issue [member] of that degree [generation] shall be divided among his or her living issue by representation in this same manner.

[Rules of Construction: Wills]

6140. [. . ."legal effect"? (substitute "meaning"). . .]

6141, 6142. [No suggestions]

6143-6145. [For better ordering, move §6144, §6150 and §6152 up here?]

6146. The law of this state does not include the common law rules in Shelley's Case, of destructibility of contingent remainders, and of worthier title, either testamentary or inter vivos branch. This Section applies to all cases in which final judgment has not previously been entered.

6150. A devisee who fails to survive the testator or until any future time required by the will does not take under the will. For this purpose, unless the will contains a contrary provision:

(a) A devisee of a future interest, including one in class form, is required by the will to survive to the time when the devise is to take effect in enjoyment; and

(b) A devisee's survival of the testator or until a required future time must be established by clear and convincing evidence.

6151. If a devisee who is kindred of the testator, or kindred of a surviving, deceased or former spouse of the testator, is dead when the will is executed or fails to survive the testator or until a future time required by the will, the issue of the deceased devisee take in his or her place by representation.

(a) A devisee under a class gift is a devisee for this purpose unless his or her death occurred before the execution of the will and that fact was known to the testator.

(b) [An object] [A permissible appointee] of power of appointment or one who takes by appointment or in default of appointment is also a devisee for this purpose.

(c) The issue of a deceased devisee do not take in his or her place if the will expresses a contrary intention or a substitute disposition; with respect to multiple devisees or a class of devisees, a contrary intention or substitute disposition is not expressed by a devise to the "surviving" devisees or to "the survivor or survivors" of them, or words of similar import, unless one or more of the devisees had issue living at the time of the execution of the will.

6152. Except as provided in §6151 or in the will:

(a) If a devise other than a residuary devise or a devise of a future interest fails for any reason, the property devised becomes a part of the residue.

(b) If the residue or future interest is devised to two or more persons and the share of a devisee fails for any reason, the share passes to the other devisee or to the other devisees in proportion to their other interests in the residue or future interest.

6153. In the absence of contrary provision in the will, a condition in a devise of a present or future interest that refers to a person's death "with" or "without" issue, or to a person's "having" or "leaving" issue or no issue, or a condition based on words of similar import, is construed to refer to that person's being dead at the time the devise takes effect in enjoyment and to his or her either having or not having, as the case may be, issue who are alive at the time of enjoyment.

6154. (a) A devise of a present interest to a class includes all persons answering the class description at the testator's death; a devise of a future interest to a class includes all persons answering the class description at the time the devise is to take effect in enjoyment.

(b) A person conceived before but born after the testator's death or time of enjoyment, as the case may be, takes if answering the class description.

6155. A devise of a present or future interest to the testator's or another's "heirs," "next of kin," "relatives", "family," or "intestate successors," or to persons described by words of similar import, is a devise to those who would then be the testator's or other designated person's heirs at law, their identities and respective shares to be determined under California statutes of intestate succession as though the testator or other designated person had died intestate at the time the devise is to take effect in enjoyment. This section does not apply to so limit the [objects] [permissible appointees] of a power of appointment among "relatives," "family," or terms of similar import, but it does apply in determining those who are expressly or impliedly to take in default of appointment.

6156. Unless otherwise provided in the will:

(a) Halfbloods, adopted persons, and persons born out of wedlock, and the issue of all such persons when appropriate to the class, are included in terms of class gift or relationship in accordance with rules for determining relationship and inheritance rights for purposes of intestate succession, except as provided in subdivision (b).

(b) In construing a devise by a testator who is not the adoptive or natural parent, a person adopted by or born to that parent shall not be considered the child of that parent unless the person lived while a minor (either before or after

the adoption in the case of an adopted person) as a regular member of the household of the adopting or natural parent or of that parent's parent, sibling, or surviving spouse.

(c) Subdivision (a) and (b) shall also apply in determining persons to beincluded as issue of a deceased devisee under Section 6151, persons who would be the heirs at law of a testator or other designated person under Section 6154, and persons who are [objects] [permissible appointees] of a power of appointment or who take property passing by or in default of appointment.

6408. (a) Subject to the provisions of subdivisions (b) and (c) of this Section, if a relationship of parent and child must be established for purposes of determining intestate succession by, through, or from a person:

(1) Except as provided in subparagraph (3), the relationship of parent and child exists between a person and his or her natural parents, regardless of the marital status of the natural parents.

(2) The relationship of parent and child exists between a person and his or her adoptive parent or parents.

(3) The relationship of parent and child does not exist between an adopted person and a natural parent, except if the natural parent in question lived with the adopted person in loco parentis and the adoption was by the spouse or after the death of either natural parent.

(b) For purposes of this code, the existence of a parent and child relationship:

(1) is established where that relationship is presumed and not rebutted pursuant to the Uniform Parentage Act, Part 7 (commencing with Section 7000) of Division 4 of the Civil Code; or

(2) may be established pursuant to other provisions of the Uniform Parentage Act, except that the relationship may not be established for these purposes by an action under subdivision (c) of Section 7004 unless either (i) a court order was entered during the father's lifetime declaring paternity or (ii) paternity is established by clear and convincing evidence that father has openly and notoriously held out the child as his own.

(c) Despite the existence of a relationship of parent and child as provided in this Section:

(1) An adopted person or his or her issue shall not inherit through an adoptive parent if the adopted person or issue inherits from the same decedent through the adopted person's natural or prior adoptive parent.

(2) Neither a parent nor a relative of that parent inherits from or through a child on the basis of the relationship of parent and child between that parent and the child (i) if the child has been adopted by another who is not the spouse or surviving spouse of that parent or (ii) if the child was born out of wedlock and has not been acknowledged or has not been supported by that parent.

(For Info)

UNIFORM PARENTAGE ACT

§ 7001. ["Parent and child relationship".] As used in this part, "parent and child relationship" means the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship.

§ 7002. [Marital status of parents irrelevant.] The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.

§ 7003. [Establishment of parent and child relationship.] The parent and child relationship may be established as follows:

(1) Between a child and the natural mother it may be established by proof of her having given birth to the child, or under this part.

(2) Between a child and the natural father it may be established under this part.

(3) Between a child and an adoptive parent it may be established by proof of adoption.

§ 7004. [Presumption of natural fatherhood.] (a) A man is presumed to be the natural father of a child if he meets the conditions as set forth in Section 621 of the Evidence Code or in any of the following subdivisions:

(1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court.

(2) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and,

(i) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; or

(ii) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.

(3) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and

(i) With his consent, he is named as the child's father on the child's birth certificate, or

(ii) He is obligated to support the child under a written voluntary promise or by court order.

(4) He receives the child into his home and openly holds out the child as his natural child.

(b) Except as provided in Section 621 of the Evidence Code, a presumption under this section is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise under this section which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

§ 7005. [Father of child conceived by artificial insemination.] (a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and retain the husband's consent as part of the medical record, where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.

(b) The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.

§ 7006. [Actions with respect to existence of father and child relationship.] (a) A child, the child's natural mother, or a man presumed to be his father under paragraph (1), (2), or (3) of subdivision (a) of Section 7004, may bring an action as follows:

(1) At any time for the purpose of declaring the existence of the father and child relationship presumed under paragraph (1), (2), or (3) of subdivision (a) of Section 7004.

(2) For the purpose of declaring the nonexistence of the father and child relationship presumed under paragraph (1), (2), or (3) of subdivision (a) of Section 7004 only if the action is brought within a reasonable time after obtaining knowledge of relevant facts. After the presumption has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party.

(b) Any interested party may bring an action at any time for the purpose of determining the existence or nonexistence of the father and child relationship presumed under paragraph (4) of subdivision (a) of Section 7004.

(c) An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7004 or whose presumed father is deceased may be brought by the child or personal representative of the child, the State Department of Social Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor. The commencement of such an action shall suspend any pending proceeding in connection with the adoption of such child, including a proceeding pursuant to subdivision (b) of Section 7017, until a judgment in the action is final.

(d) Except as to cases coming within the provisions of Section 621 of the Evidence Code, a man not a presumed father may bring an action for the purpose of declaring that he is the natural father of a child having a presumed father under Section 7004, if the mother relinquishes for, consents to, or proposes to relinquish for or consent to, the adoption of the child. Such an action shall be brought within 30 days after the man is served as prescribed in subdivision (f) of Section 7017 with a notice that he is or could be the father of such child or the birth of the child, whichever is later. The commencement of such action shall suspend any pending proceeding in connection with the adoption of such child until a judgment in the action is final.

(e) Regardless of its terms, an agreement between an alleged or presumed father and the mother or child does not bar an action under this section.

(f) An action under this section may be brought before the birth of the child.

(g) The district attorney may also bring an action under this section in any case in which he believes that the interests of justice will be served thereby.