#L-626 10/18/83

Memorandum 83-91

Subject: Study L-626 - Wills and Intestate Succession (Review of Comments on New Law)

We have received written comments on the new wills and intestate succession law from Professor Edward C. Halbach (see Exhibit 1) and from attorney Valerie J. Merritt (see Exhibits 2 and 3). This memorandum analyzes these comments.

Recapture of Quasi-Community Property

Under Probate Code Section 201.8, the surviving spouse may require that certain donative transfers of quasi-community property made during lifetime by the decedent be restored to the estate if the decedent "had a substantial quantum of ownership or control of the property at death." The new law replaces this language with more detailed language drawn from the augmented estate provisions of the Uniform Probate Code. New Section 102 permits recapture of donative transfers of quasi-community property if the transfer is any of the following types:

> (A) A transfer under which the decedent retained at the time of death the possession or enjoyment of, or the right to income from, the property.
>
> (B) A transfer to the extent that the decedent retained at the time of death a power, either alone or in conjunction with any other person, to revoke or to consume, invade, or dispose of the principal for the decedent's own benefit.
>
> (C) A transfer whereby property is held at the time of the decedent's death by the decedent and another with right of survivorship.

Professor Halbach suggests that paragraph (B) above be revised to read "dispose of the income or principal for the decedent's own benefit." This would change the UPC language that is used in Section 102. Nevertheless, the change suggested by Professor Halbach may be desirable. The change is consistent with the policy expressed in paragraph (A). What does the Commission wish to do?

Section 102 also contains the following exclusion drawn from the UPC:

> (b) Nothing in this section requires a transferee to restore to the decedent's estate any life insurance, accident insurance, joint annuity, or pension payable to a person other than the surviving spouse.

Professor Halbach thinks this is bad policy and should be reversed so that quasi-community life insurance, accident insurance, joint annuities, and pensions would be subject to recapture by the surviving spouse.

Initially (March 1982 meeting) the Commission discussed the possibility of treating quasi-community property the same as community property, but, after considering constitutional and practical problems with this approach, decided to keep the general recapture scheme of existing law, but to clean it up using the more detailed language taken from the UPC.

If the Commission agrees with Professor Halbach and thinks that quasi-community property insurance should be subject to recapture, the Commission should also then reconsider Professor Niles' argument that we should take the balance of the UPC provision which in effect deducts from the surviving spouse's share of quasi-community property other property received during marriage from the decedent and insurance the surviving spouse has received from the decedent.

The staff recommends that subdivision (b) of Section 102 be retained without change. We would be reluctant to undertake the substantial project involved in attempting to take into consideration what the surviving spouse received from the decedent during marriage.

Abatement

Change from hierarchical to proportional abatement scheme? When the estate must make payments not contemplated by the decedent's will, abatement rules determine how the burden shall be apportioned among beneficiaries under the will. Such payments may include the statutory share for an omitted spouse or children, family allowance, debts, and expenses of administration.

California's general abatement scheme is set forth in Probate Code Section 750, drawn from the common law. If the will does not specify the portion of the estate to be used to pay debts, expenses of administration, or family allowance, Section 750 provides a hierarchical scheme: These payments are taken first from that portion of the estate not disposed of by the will, then out of the residuary estate, and finally out of general and specific gifts in proportion to their value (with court discretion to exempt specific gifts if necessary to carry out the intent of the testator).

Under old California law, there is a specific abatement provision in the statute governing the rights of a child or issue omitted from the

testator's will: In such a case, the share is taken first from the estate not disposed of by the will and then proportionately from all will beneficiaries, whether specific or residuary. See Prob. Code § 91. The new law repeals this special abatement rule in the case of an omitted child and replaces it with a provision incorporating the common law residuary rule of Section 750. See new Section 6573.

Old law also provides a statutory share for a spouse omitted from the decedent's will, but is silent on the abatement question. See Prob. Code § 70. The new law incorporates the common law residuary rule of Section 750, consistent with the omitted child case. See new Section 6562.

Professor Halbach thinks we made the wrong policy choice when we opted for the common law residuary rule of Section 750. He prefers the proportional rule of old Section 91 (omitted child). He would restore that rule in both the omitted spouse and omitted child cases. The staff is inclined to agree with Professor Halbach. The staff thinks that when the testator's estate plan is disrupted by an unanticipated payment to an omitted spouse or child, the testator would ordinarily want to reduce specific, general, and residuary gifts proportionately, and not have the entire burden borne by residuary devisees until the residuary estate is exhausted as under Section 750. The staff would therefore revise new Sections 6562 (omitted spouse) and 6573 (omitted child) as follows:

Probate Code § 6562 (amended). Manner of satisfying share of omitted spouse

6562. ~~In~~ (a) Except as provided in subdivision (b), in satisfying a share provided by this article ~~, the devisees made by the will abate as provided in Chapter 13 (commencing with Section 750) of Division 3,~~ :

(1) The share shall first be taken from the testator's estate not disposed of by will, if any.

(2) If that is not sufficient, so much as may be necessary to satisfy the share shall be taken from all devisees in proportion to the value they may respectively receive under the testator's will.

(b) If the obvious intention of the testator in relation to some specific devise or other provision of the will would be defeated by the application of subdivision (a), the specific devise or provision may be exempted from the apportionment under subdivision (a), and a different apportionment, consistent with the intention of the testator, may be adopted.

Comment. Section 6562 is amended to provide a proportional rule of abatement for payment of an omitted spouse's share, drawn from former Section 91. For the rule in other contexts, see Sections 750 (payment of debts, expenses of administration, and family allowance, hierarchical rule), 6573 (omitted children, proportional rule).

Probate Code § 6573 (amended). Manner of satisfying share of omitted child

6573. ~~In~~ (a) Except as provided in subdivision (b), in satisfying a share provided by this article ~~, the devises made by the will abate as provided in Chapter 13 (commencing with Section 750) of Division 3~~ :

(1) The share shall first be taken from the testator's estate not disposed of by will, if any.

(2) If that is not sufficient, so much as may be necessary to satisfy the share shall be taken from all devisees in proportion to the value they may respectively receive under the testator's will.

(b) If the obvious intention of the testator in relation to some specific devise or other provision of the will would be defeated by the application of subdivision (a), the specific devise or provision may be exempted from the apportionment under subdivision (a), and a different apportionment, consistent with the intention of the testator, may be adopted.

Comment. Section 6573 is amended to provide a proportional rule of abatement for payment of an omitted child's share, drawn from former Section 91. For the rule in other contexts, see Sections 750 (payment of debts, expenses of administration, and family allowance, hierarchical rule), 6562 (omitted spouse, proportional rule).

The staff would defer the question of whether the general abatement rule in Section 750 (debts, expenses of administration, family allowance) should be similarly revised until we progress further in our study of Division 3 (administration of estates).

Should there be statutory abatement rules when the surviving spouse takes community or quasi-community property against the will? Professor Halbach thinks we should provide abatement rules when the surviving spouse claims a half interest in community or quasi-community property against the decedent's will. Under present law, there is no abatement when the surviving spouse claims a half share of community property. Suppose, for example, that the testator, believing the entire estate is separate property, provides for the surviving spouse by insurance, leaves Blackacre to a nephew, and the residue of the estate to the testator's alma mater. The surviving spouse establishes that Blackacre is in fact community property and takes half against the will. The full burden of the surviving spouse's election falls on the nephew; no pro rata contribution is required from the residuary devisee (the alma mater). Arguably the testator would have wanted such a contribution to be made. Similar rules appear to apply with respect to quasi-community property (see new Section 101; 7 B. Witkin, Summary of California Law Community Property §§ 111-112, at 5204-06 (8th ed. 1974); Brawerman,

Handling Surviving Spouse's Share of Marital Property, in California Will Drafting §§ 8.37-8.43, at 249-53 (Cal. Cont. Ed. Bar 1965)), although Professor Halbach thinks a court might be persuaded to apply abatement rules in this context.

If the Commission thinks we should apply abatement rules when the surviving spouse claims community or quasi-community property against the decedent's will, the staff will draft provisions for Commission consideration. What is the Commission's view?

Recognition of Dower Rights of Non-Domiciliary Decedent

New Section 120 continues former Section 201.6 and provides:

> 120. If a married person dies not domiciled in this state and leaves a valid will disposing of real property in this state which is not the community property of the decedent and the surviving spouse, the surviving spouse has the same right to elect to take a portion of or interest in such property against the will of the decedent as though the property were situated in the decedent's domicile at death.

New Section 6412 provides:

> 6412. The estates of dower and curtesy are not recognized.

To make clear the relationship between the two sections, Professor Halbach and the staff recommend that Section 6412 be revised to read:

> 6412. ~~The~~ Except to the extent provided in Section 120, the estates of dower and curtesy are not recognized.

Surviving Spouse's Waiver of Rights

Memorandum 83-71, on the agenda for this meeting, proposes legislation concerning the content of and requirements for marital property agreements. In the draft legislation are proposed amendments to the newly-enacted provisions of AB 25 (Sections 142-144, 146) concerning the surviving spouse's waiver of rights. The staff proposes to include the proposed amendments to Sections 142-144 and 146 in the wills and intestate succession bill to be introduced at the 1984 legislative session. These amendments are set out in Exhibit 4 to this memorandum and are clarifying.

Professor Halbach asks whether the provision of Section 146 that a "waiver under this chapter may not be altered, amended, or revoked except by a subsequent written agreement signed by each spouse or prospective spouse" was intended to change the practice under existing law whereby the waiver often includes a provision that permits the waiving

spouse unilaterally to revoke the waiver before the death of the other spouse. See California Will Drafting § 8.35, at 247 (Cal. Cont. Ed. Bar 1965). This was a deliberate policy choice made by the Commission. Is there any sentiment to change this?

Presumption Against Devise to Subscribing Witness

New Section 6112 provides that the "fact that the will makes a devise to a subscribing witness creates a presumption that the witness procured the devise by duress, menace, fraud, or undue influence." If the witness is unable to overcome the presumption, the devise to that witness fails. Professor Halbach raises two questions concerning this provision. First, he points out that the provision is not limited to a witness who is essential to establish the validity of the will, but that it applies also to a supernumerary witness, that is, an extra witness when there are already two subscribing witnesses to the will. The staff thinks that in this respect the provision is too broad, and that the presumption of impropriety should apply only when the witness is needed to establish the validity of the will. The rule of former Section 51 that automatically voided a gift to a subscribing witness did not apply if there were two other disinterested witnesses. This exception should be carried over into Section 6112 by revising subdivision (b) as follows:

> (b) A will or any provision thereof is not invalid because the will is signed by an interested witness. The fact that the will makes a devise to a subscribing witness creates a presumption that the witness procured the devise by duress, menace, fraud, or undue influence , unless there are at least two other disinterested subscribing witnesses to the will .

New Section 372.5 permits a beneficiary under the will to contest a gift to a subscribing witness without forfeiting any benefits under the will pursuant to a no-contest clause if the witness "is needed to establish the validity of the will." The quoted language creates the following problem: Suppose there are three witnesses to the will, two of whom receive benefits under the will. Which one of the two interested witnesses "is needed to establish the validity of the will"? Does the executor make this choice or does the person contesting the gift make it? The staff recommends that Section 372.5 be revised by striking the quoted language as follows:

> 372.5. Notwithstanding a provision in the will that one who contests or attacks the will or any of its provisions shall take nothing under the will or shall take a reduced share, any person interested may, without forfeiting any benefits under the will,

contest a provision of the will which benefits a witness to the will ~~if that witness is needed to establish the validity of the will~~ .

In the alternative, the section could be revised along the lines of the revision proposed above to subdivision (b) of Section 6112:

372.5. Notwithstanding a provision in the will that one who contests or attacks the will or any of its provisions shall take nothing under the will or shall take a reduced share, any person interested may, without forfeiting any benefits under the will, contest a provision of the will which benefits a witness to the will ~~if that witness is needed establish the validity of the will~~ unless there are at least two other disinterested subscribing witnesses to the will .

The staff recommends the first alternative above because of the general public policy against no-contest clauses in a will. See California Will Drafting § 7.31, at 216 (Cal. Cont. Ed. Bar 1965).

Inconsistencies Between California Statutory Wills Provisions and General Wills Law

Professor Halbach points out two inconsistencies between the provisions relating to California statutory wills and general wills law, and thinks they should be made consistent. The staff agrees. The first involves drafting (but not substantive) differences between the two sets of rules for taking by representation. As recommended in Memorandum 83-64 on the agenda for this meeting, the staff would revise the section on representation (section 6209) relating to California statutory wills to pick up by cross-reference the general representation provisions (Section 240):

6209. Whenever a distribution under a California statutory will is to be made to a person's descendents, the property shall be divided ~~into as many equal shares as there are then living descendants of the same degree of living descendants and deceased descendants of the same degree who leave descendants then living; and each living descendant of the nearest degree shall receive one share and the share of each deceased descendant of that same degree shall be divided among his or her descendants in the same manner~~ in the manner provided in Section 240 .

Professor Halbach points out an inconsistency between the rule of construction of a class gift to "descendants" or "children" under a California statutory will (see Section 6206) and under general wills and intestate succession law (see Sections 26, 50, 54, 6152, 6408). For example, under a California statutory will, a class gift to "descendants" or "children" includes all persons legally adopted into the class

during minority (Section 6206), while under general law the adoptee is not included in the class unless the adoptee lived while a minor (either before or after the adoption) as a regular member of the household of the adopting parent or of specified relatives of the adopting parent (Section 6152). This raises the question of the extent to which the general rules of construction for wills apply to a California statutory will. The last section on California statutory will provides that "[e]xcept as specifically provided in this chapter, nothing in this chapter changes the substantive law of California." Section 6248. Though not a model of drafting, this section probably has the effect of applying general law to California statutory wills except as modified by a specific provision on California statutory wills.

In the staff's view, the rules for construction of wills should be the same for a California statutory will as for wills generally. The staff would deal with Professor Halbach's specific problem (meaning of "descendants" or "children" in class gift context) and the general problem (applicability of rules of construction) by revising Sections 6205, 6206, and 6248 as follows:

Probate Code § 6205. Descendants

6205. "Descendants" means children, grandchildren, and their lineal descendants of all ~~degrees~~ generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent in Sections 26 and 54 .

Comment. Section 6205 is amended to conform the definition of "descendants" to the definition of "issue" under general law. See Section 50 ("issue" defined). Thus, for example, general law will apply in determining the extent to which the term includes adoptees and children born out of wedlock. See Sections 26, 54, 6408. See also Section 6248 (except as specifically provided, general law applies).

Probate Code § 6206. Plural may include singular

6206. ~~(a) A class designation of "descendants" or "children" includes (1) persons legally adopted into the class during minority and (2) persons naturally born into the class (in or out of wedlock).~~

~~(b)~~ A reference to "descendants" in the plural includes a single descendant where the context so requires.

Comment. Section 6206 is amended to delete the special rule of construction for a class gift to "descendants" or "children." As revised, the general rule of construction in Section 6152 will apply. See Section 6248 (except as specifically provided, general law applies).

Probate Code § 6248. Application of general law

6248. Except as specifically provided in this chapter, ~~nothing in this chapter changes the substantive~~ the general law of California applies to a California statutory will .

Comment. Section 6248 is amended to make clear that, except as provided in this chapter, general law applies to a California statutory will.

Uniform Testamentary Additions to Trusts Act

In the case of an inter vivos trust, the trust instrument sometimes provides that the terms of the trust are amendable by the settlor, by the trustee, or by the beneficiaries. G. Bogert, Handbook of the Law of Trusts, at 520 (5th ed. 1973). However, the Uniform Testamentary Additions to Trusts Act (new Section 6300) provides that when the testator's will pours over assets into an inter vivos trust, the trust terms may not be amended after the testator's death with respect to those assets unless the will so provides. The effect of this statute is that if the will is silent, after the testator's death the poured-over assets may be subject to one set of rules (the trust terms in effect at the testator's death), while the inter vivos assets may be subject to another set of rules (the trust terms as amended after the testator's death). Professor Halbach says that this is a bad result, and that most testators would prefer to have the poured-over assets and the inter vivos assets governed by one set of rules. Professor Halbach would reverse the rule and make the trust amendable with respect to poured-over assets unless the will provides the contrary.

The staff thinks Professor Halbach is right in saying that the testator would ordinarily prefer to have trust assets governed by one set of rules. However, the problem in trying to make the change that Professor Halbach suggests is that this is a uniform act, adopted in 44 of the 50 states. There is value in having uniformity in this area of the law.

Professor Halbach's proposal could be accomplished by making the following revision to the third sentence of Section 6300:

> Unless the testator's will provides otherwise, the property so devised (1) is not deemed to be held under a testamentary trust of the testator but becomes a part of the trust to which it is given and (2) shall be administered and disposed of in accordance with the provisions of the intrument or will setting forth the terms of the trust, including any amendments thereto made before or after the death of the testator (regardless of whether made before or

after the execution of the testator's will) ~~and, if the testator's will so provides, including any amendments to the trust made after the death of the testator.~~

The last sentence of Section 6300 provides that a "revocation or termination of the trust before the death of the testator causes the gift to lapse." Professor Halbach would qualify this as follows:

> A Unless otherwise provided in the will, a revocation or termination of the trust before the death of the testator causes the gift to lapse.

Again, the staff thinks that Professor Halbach's revision would be desirable but for the problem of national non-uniformity of trust law. What is the Commission's view?

Inheritance by Parent or Grandparent

Under the Commission's newly-enacted intestate succession scheme, as under the UPC, if the intestate decedent dies without spouse or issue, but is survived by one parent, that parent takes the decedent's estate. When that parent later dies, if the property passes by intestacy it will go to that parent's relatives. If the decedent's predeceased parent had issue who were not also issue of the decedent's surviving parent (in other words, half-brothers and half-sisters of the decedent and their issue), they would take nothing from the parent who inherited the decedent's property. Professor Halbach views this as an unjust result, which in most cases it probably is.

One possible way to deal with the problem is to resurrect the discredited ancestral property doctrine, so that upon the eventual death of the inheriting parent, the inherited property would pass by a special rule of succession to issue of the inheriting parent's predeceased spouse. The staff is against this method of dealing with the problem for the same reasons we have disfavored the other variants of the ancestral property doctrine (difficulty of application arising from commingling and the need for tracing and apportionment).

Another way to deal with the problem is to have the issue of a predeceased parent of the decedent inherit directly from the decedent. This would require a scheme whereby both of the decedent's parents would take equally if living, or if one is living and one is dead, half to the living parent and the other half to be divided among the issue of the deceased parent by representation, or if the predeceased parent has no issue then all to the surviving parent. A similar scheme could be

constructed for grandparents. This scheme is suggested by UPC Section 2-103(4), which provides:

> (4) if there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of the paternal grandparents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation; and the other half passes to the maternal relatives in the same manner; but if there be no surviving grandparent or issue of grandparent on either the paternal or the maternal side, the entire estate passes to the relatives on the other side in the same manner as the half.

The disadvantage of this scheme is that it introduces new complexities into the intestate succession scheme. The UPC provisions set out above was included in the legislation recommended in 1983, but the provision was deleted from the bill because it was opposed by the State Bar. The staff is therefore not enthusiastic about the suggestion. What is the Commission's view?

Inheritance by Relatives of Predeceased Spouse

New Section 6402.5 contains the only variant of the ancestral property doctrine that survived in the new law. This provision was a compromise between the Commission's original view that the ancestral property doctrine should be completely abolished, and the view of Brandenburger and Davis, a Sacramento probate research firm, which takes the view that the doctrine does serve justice in some cases. As compromised, Section 6402.5 applies only to real property and only where the decedent's predeceased spouse died not more than 15 years before the decedent. In such a case, and where there is no surviving spouse or issue of the decedent, the portion of real property in the decedent's estate attributable to the predeceased spouse passes to designated relatives of the predeceased spouse.

Professor Halbach questions the limitation to real property. As noted above, this was a compromise of two divergent viewpoints. Professor Halbach points out that the section continues the confusion of existing law in the definition of the "portion of the decedent's estate attributable to the decedent's predeceased spouse." The staff agrees that the definition is defective and needs to be cleaned up, along with some other serious problems in the application of the section (e.g., how are later improvements on the real property dealt with?). However, the

Commission decided at the last meeting not to tinker with Section 6408.5 for the present. The staff believes this is a sound decision. We can address the problems in Section 6408.5 at some future time when we can give the matter careful study.

Simultaneous Deaths and Intestate Succession

As enacted, new Section 6403 deals with the simultaneous death problem and intestate succession as follows:

> 6403. A person who fails to survive the decedent is deemed to have predeceased the decedent for the purpose of intestate succession, and the heirs are determined accordingly. If it cannot be established by clear and convincing evidence that a person who would otherwise be an heir has survived the decedent, it is deemed that the person failed to survive the decedent.

The Commission has decided to recommend legislation to amend this section to put in the 120-hour survival of the UPC, as follows:

> 6403. A person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for the purpose of intestate succession, and the decedent's heirs are determined accordingly. If it cannot be established by clear and convincing evidence that a person who would otherwise be an heir has survived the decedent by 120 hours, it is deemed that the person failed to survive the decedent for the required period. The requirement of this section that a person who survives the decedent must survive the decedent by 120 hours does not apply if the application of the 120-hour survival requirement would result in the escheat of property to the state.

Professor Halbach would change the second sentence of Section 6403 as set out above by striking "failed to survive the decedent for the required period" and substituting "predeceased the decedent." The staff recommends this suggested change.

Professor Halbach believes that the first sentence of Section 6403 adds nothing to the section and could be deleted. The staff believes that the first sentence may not be essential, but it makes Section 6403 complete. Moreover, the present structure of Section 6403 makes it parallel to the comparable Uniform Probate Code Section (Section 2-104). For this reason, the staff is reluctant to make what amounts to a change of taste. What is the Commission's view?

One-Way Inheritance

Under Section 6408, a child born out of wedlock may inherit from and through its natural parents, but Section 6408.5 provides a more restrictive rule for inheritance by the parent (or a relative of that

parent) from a child born out of wedlock. Under Section 6408.5, a parent or relative of a parent may inherit from a child born out of wedlock only if the parent has either (1) acknowledged parenthood or (2) supported the child. Professor Halbach says the parent or relative of the parent should be able to inherit from the child only if the parent has both acknowledged parenthood and supported the child. This provision was originally drafted by Professor Halbach, at which time it was in the form he favors. The staff thinks the change to the present form was inadvertent, and thinks Professor Halbach's view expresses the better policy. The staff recommends revising subdivision (b) of Section 6408.5 to read:

> (b) Neither a parent nor a relative of a parent inherits from or through a child on the basis of the relationship of parent and child between that parent and child if the child was born out of wedlock ~~and has neither~~ , unless the child has been both acknowledged by ~~nor~~ and supported by that parent.

Use of Testator's Oral Declarations to Construe a Will

Assembly Bill 25 repealed much-criticized Section 105 of the Probate Code which prohibited use of the testator's oral declarations to explain an ambiguous will. After repeal, the matter will be covered by Evidence Code Section 351 which provides that, "[e]xcept as otherwise provided by statute, all relevant evidence is admissible." Thus oral declarations of the testator will now be admissible if they fall within an exception to the hearsay rule, subject to the "plain meaning" rule of Section 6162 (words of will to be given ordinary and grammatical meaning unless intent to use them in another sense is clear and their intended meaning can be ascertained), subject to provisions that require the will to contain a provision to vary a rule otherwise applicable, and subject to the court's discretion to exclude evidence under Evidence Code Section 352 (undue consumption of time, danger of prejudice, confusing or misleading jury). The various exceptions to the hearsay rule include protections. E.g., Evid. Code § 1252 (evidence of statement of declarant's intent not admissible if made under the circumstances such as to indicate its lack of trustworthiness).

Valerie Merritt wrote the Commission (Exhibit 2) to suggest the enactment of a specific provision in the Probate Code concerning admissibility. The staff responded to point out the applicability of Evidence Code Section 351 and the difficulty of drafting a specific provision on admissibility of the testator's oral declarations because of the

difficult question of the extent to which the testator's oral declarations may be used to vary the plain meaning of words used in the will. Subsequently, Valerie Merritt wrote the Commission again (Exhibit 3) to say that, after reviewing the various hearsay exceptions, she concurred in the Commission's decision to repeal Section 105 without enacting a statutory replacement. Accordingly, the staff recommends that no further action be taken.

Informal Writing Disposing of Tangible Personal Property

The Commission considered and rejected the following section of the Uniform Probate Code:

> 2-513. Whether or not the provisions relating to holographic wills apply, a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money, evidences of indebtedness, documents of title, and securities, and property used in trade or business. To be admissible under this section as evidence of the intended disposition, the writing must either be in the handwriting of the testator or be signed by him and must describe the items and the devisees with reasonable certainty. The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing which has no significance apart from its effect upon the dispositions made by the will.

The UPC Comment describes the typical case as involving a list of personal effects. The Commission's reason for rejecting this section was because of the potential administrative problems involved with multiple lists being produced after death, and because the testator may accomplish the same purpose by using a holographic will.

The question of whether this is a desirable provision is raised anew by Valerie Merritt (Exhibit 2). She points out in Exhibit 2 that a similar section has been in effect in Colorado for 20 years and has worked well there. She develops her case for the provision in Exhibit 3. She would change the UPC provision to make clear an automobile can be disposed of by the informal writing. The staff was originally in favor of including this provision in our recommended legislation. What is the Commission's view?

Miscellaneous Problems

The staff would make the following technical change to Section 6401(c)(2)(B) as suggested by Professor Halbach:

> Where the decedent leaves no issue but leaves ~~the~~ a parent or parents or their issue or the issue of either of them.

The Commission's proposed amendment to Section 4352 of the Civil Code must be reintroduced, since that section was chaptered out by another bill (AB 1946) at the 1982 session. (This deals with the notice to be given to the parties in a divorce proceeding concerning the effect of divorce on their wills. The new law reverses the former rule and provides that divorce revokes dispositive provisions to a former spouse.)

The last point in Valerie Merritt's letter (Exhibit 2) concerning provision for minors in the decree of final dissolution should be deferred until we reach that portion of Division 3 in our study. The staff has written Ms. Merritt to this effect.

Respectfully submitted,

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Comments on A.B. no. 25
(As Amended to July 8, 1983)

Section 102 revises former §201.8, but I would like to raise several questions about it. In (a)(3)(B), might it not be wise to have the last portion read ". . . or dispose of the income or principal for the decendent's own benefit"? (I also do not believe that (a)(3)(A) clearly covers the question one way or the other.) More importantly, I simply cannot understand why §102(b) should exclude from quasi-community property protection all typical situations involving what ought to be quasi-community property insurance, annuities and pension benefits. This is a serious gap in a scheme that otherwise seeks to parallel community property, and involves the major assets of many estates. Is it simply because of the tradition established by New York and Pennsylvania, when they chickened out in face of the insurance lobby (alleging some dubious "complexities")? Finally, I don't believe any of the present material in the bill covers the problems of spousal elections in a comprehensive way, especially the method of abatement when a surviving spouse takes quasi-community property against a will. (Also, see generally the last two paragraphs of these comments of mine.) Is this to be covered in Division 3, to which I have elsewhere seen references, especially to §750 (which apparently is to deal with all of abatement)? California legislation has not previously dealt, but certainly ought to deal, with the question of abatement of other interests when a spouse makes a quasi-community property election against the will of a decedent. (Pretermitted heirs' shares have been provided for in California by ratable abatement, rather than the old common law residuary rule. I have always wondered whether the electing spouse was also to be handled this way by analogy under the C.C. §3511 maxim that like cases should be treated alike [where reason same rule should be same] or are "statutes in derogation of the common law" to be "narrowly construed"? Our statute should specify. I wonder whether, now, this is all intended to go in the opposite direction under §750. Again, see end of these comments.)

Section 120, on the right of a non-domiciliary decedent's spouse, wisely preserves our change in the common law by a comity reference to domiciliary law with respect to California land. This is not new, but I have always wondered whether we meant (as I think we should be prepared to mean) that we will recognize those rights even if they involve partial life interests in the form of common law or statutory dower. On this point, especially compare §6412, in which the bill specifies that "dower and curtesy are not recognized." Maybe §6412 should state that they are not "recognized, except as provided in §120."

Waiver of spouses' rights is covered in §§140-147. Something of this sort is clearly needed, and the present approach seems generally sound. Although §144 may tend to moot the problems created by § 143(b), the meaning of "not represented by independent legal counsel" is far from clear in the context of a spousal agreement or will. Also, §146(b) may have been drawn without considering of one of the most common types of waiver situations we have in California. That is the situation where the first decedent purports to dispose of both halves of community property (the so-called "widow's election") and the other spouse signs at the end of the will assenting to that disposition. (Both wills might be designed in this fashion, or maybe just one.) Did you intend to change the (apparent) present California law, which allows the waiver to be withdrawn by the "assenting" spouse any time up until the death of the first spouse? Or does the reference to binding effect merely contemplate a contractual waiver? And if both spouses sign on the other's will, is this contractual? Or are all waivers (and the endorsed will) bilaterally contractual? I think in most of these instances the acquiescences are intended to be (or at least advice given by lawyers would previously, and I fear will continue to, indicate that the waiver is) non-binding until one of the spouses has "changed position in reliance" by dying!

The material on execution of wills, despite a few "fussy" details that we seem still to be stuck with, represents progress. I have some questions, however, about §6112(b), which states that a devise to a subscribing witness creates a rebuttable presumption of impropriety. Should this be limited to an essential, i.e., not a supernumerary, witness? If the presumption is not rebutted, then what happens? Can the witness receive an intestate share or other share that the witness would have received but for the presumed impropriety? Assume I am a witness who would take $X intestate (or by prior will) but would receive $2X under the will in question, but I am unable to rebut the presumption (although I suppose if my share under the will in question were less than $X that alone might suffice to rebut the

presumption, but . . .?); do I only loose the excess over what I would otherwise have received, or do I loose everything? Compare existing statute.

In §6145, I suppose it is safe to omit any references to the Rule in Shelley's case and to Destructibility of Contingent Remainders, although I continue to think that there are a variety of benefits in having that specified, and doing so right where we re-state the abolition of the doctrine of Worthier Title. As a matter of fact, Worthier Title was essentially an inter vivos (not a probate law) problem, for it is almost (but not quite) impossible to imagine where the testamentary branch of the doctrine matters now. As I think I indicated before, what is not in §6415 is much to do about virtually nothing and is less complete then would be a simple, straightforward statement that all of these common law doctrines are abolished. On the other hand, I can happily deposit this criticism with you one more time and then forget it, because I think probably the whole area of concern is insignificant today.

In the areas of ademption by extinction and by satisfaction, I think I would drop your §6174 down to make it §6177 and renumber the sections in between. All the rest of these sections have do to with ademption by extinction, and only §6174 deals with ademption by satisfaction. This is just a question, of course, of organization, but I think a move would be helpful to somebody looking for this material.

A couple of matters on the California Statutory Will: It might be wise in some fairly simple way, intelligible to lay users, to conform §6206(a) and §6209 to our new definitions. It will be easy and obvious how to conform §6209 to §240 by mere changes of wording; §6206)a) is not so easy, but I really do think it is important to give the people who use this will the benefit of our full set of definitions dealing with descendants and children. Given the purposes of these definitions, and their continued use by lay individuals, maybe it is too much to ask them to take statutory rules on faith; but if not, the clause could simply state that these class designations "include persons adopted and born into the class (in or out of wedlock) under the same conditions as provided by the Code for class designations under wills generally."

While we are at it, maybe we should clean up the Uniform Testamentary Additions to Trusts Act, because its general exclusion of amendments after the testator's death does not correspond with the reality of planning and the capacity of lawyers in drafting to reverse every statutory mistake, will by will. I am confident that people who pour over into inter vivos trusts intend that the terms of the receptacle trust

include, for the testamentary assets as well, all of the trust's provisions (if any) allowing subsequent amendment after the death of the testator. He wants this for the poured assets just as much as he does for the original assets, and contemplates having the same scheme applied to everything. As a practical matter, rarely are direct powers of amendment included in inter vivos trusts in a way that would affect either the original or poured assets after the testator's death, except when this is done via powers of appointment conferred on others. But a power of appointment is a form of trust amendment provision. Conceptually, even my exercise of a general power of appointment is a filling in or modification of the terms of my donor's trust or will; it is not a transfer by me. I have always feared that this clause might make powers of appointment inapplicable to poured assets. Anyway, my general observation holds: in all probability, what one wants others to be able to do after his death by way of adapting or cleaning up his trust he would normally want to apply to all of the trust assets whether he put them in during his life or added them by his will. I therefore suggest that §6300 be modified beginning at the end of line 20 on page 61 to read: ". . . will) and, unless the testator's will provides otherwise, including any amendments to the trust made after the death of the testator." I would also continue for other reasons as follows: "Unless otherwise provided in the will, a revocation or termination of the trust before the death of the testator will cause the devise to lapse." We often do provide otherwise and this particular section does not happen to be expressly qualified in that way. Maybe it then becomes necessary, in some of the references in §§6302 and 6303 to the Uniform Act and to uniform construction, to state that the uniformity applies except where this chapter contains amended language.

In the intestate succession provisions, §6401(c)(2)(B), the last word in the first line should be "a" rather than "the", shouldn't it? My next question has to do with (i) the treatment of property passing to "decedent's parent or parents equally," with the issue of parents only to take in the absence of either parent surviving, and even more I wonder about (ii) the provision for "the grandparent or grandparents equally, or the issue of such grandparents if there is no surviving grandparent." (i) If I have no half-brothers and sisters (i.e., if the issue of each of my parents is the issue of both of my parents), I have no problem; but if all of my estate ends up in the hands of my mother, and if my father is dead and either or both of them had children of a prior marriage, all of the property is likely to end up in the hands of one set of siblings and their descendants to the exclusion of those on the other side. I don't know whether anything can satisfactorily be done with this problem without adding complicated looking language, but you've done so many other good, if difficult,

things for troublesome situations that. . . . (ii) The grandparent level presents even greater problems, because you don't have to have half-blood relatives in order to have the problem: my maternal grandparents or a maternal grandparent could end up with all of my property, and again only one side of the family is likely to end up with all my vast wealth. (In a world of more venturesome legislation, parents and grandparents would not inherit the property of their children outright anyway, for we would give them or the survivors of them life interests with the remainder to be sent down to relatives in a way that doesn't allow for diversion [or taxation] because of an atypical, fortuitous, brief "upset" in the order of survival among generations within a family.)

Next, let's take a look at §6402.5. The definition of the "decedent's estate attributable to the decedent's predeceased spouse" is troublesome, both in concept and in detail. Why does it apply only to real property, which, if sold, could be as difficult to trace as anything else? Does the form of a predeceased spouse's wealth really have anything to do with the policy involved? I am not sure how subparagraph (b)(1) really does anything, given the contents of subparagraph (b)(2); and (b)(3) deals with something that simply doesn't exist. "Community real property" never vests "in the decedent . . . by right of suvivorship." You may be referring to joint tenancy property that once was community property (although the two holding forms are absolutely inconsistent, and property is one or the other but it is not both; also, it can look like joint tenancy but in fact be community property, in which case it does not pass by right of survivorship but is subject to will or to intestate succession); if we mean joint tenancy acquired with community funds, the section should say so or should deal properly with the problem. I guess there is no need to deal with such things as insurance and pension proceeds, if for some reason you choose to (or have to) adhere to the present confinement to real property. There is a lot to be said for doing away, as you once had, with this special treatment for predeceased spouses' property; but I must confess that I myself would prefer to see something done so that the family's property doesn't go to the relatives of the spouse who just happens to be the survivor. Yet, if there is any validity in the latter idea, I cannot see why we should distinguish between real and personal property or that practical considerations justify such a result. In any event, please fix up that confused language about community real property passing by right of suvivorship, which I realize is a perpetuation of an existing (but recent) error in our statutes.

I wonder whether §6403 needs the first sentence. Couldn't it begin with the second sentence, with the word "predeceased" substituted for "failed to survive" in the last line? (I may

have missed something here, however.) In §6408.5, the last two lines of (b) have been changed in a way that alters, I suspect unintentionally, the meaning of the wording I provided you earlier. If it was intended to change the meaning, I wish you'd give it another thought. If a change was not intended, it should be restored to its prior form. I think lines 25 and 26 on page 76 should read: ". . . was born out of wedlock and either has not been acknowledged or has not been supported by that parent." In order for the family of a natural parent to inherit from the child, it seems to me that the parent should have both acknowledged and supported the child, and that one alone is not sufficient to make the child a member of the family and to entitle members to inherit from the child. You might take another look at this, especially if our differences resulted unintentionally from editing rather than deliberately from a different view of policy.

I find the omitted spouse material, §6560, puzzling. Is it really intended that the spouse not receive something approximating the intestate share but actually receive what will often exceed the intestate share in separate property but be less than the intestate share in community and quasi-community property? The rationale for this escapes me, but there is plenty of evidence around to suggest that my being mystified about something doesn't make it wrong! Also, the abatement question below is relevant to this.

I have serious doubts about both the adequacy and the wisdom of the references in §§6562 and 6573 to §750, if that is a reference to the existing contents of that section rather than to additional material yet to be provided. Unanticipated setting aside of a testamentary scheme in such a way and to such an extent is totally different from the kinds of more or less routine things (e.g., debts) contemplated by §750. Have you made a deliberate decision to go back on the ratable abatement that had previously been provided for pretermitted heirs and spouses? I think the failure to deal carefully with this question was one of the bigger regrets of most people who worked on the UPC. Incidentally, Chapter 13 in general needs an overall at some appropriate point, as illustrated in the last year or year and a half by a case (the name of which I don't now recall off hand) involving distinctions or possible distinctions betwen general and specific testamentary gifts.

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September 30, 1983

California Law Revision Commission
4000 Middlefield Road, #D-2
Palo Alto, California 94306

Attn: John H. DeMoully
Executive Secretary

Dear Mr. DeMoully:

Thank you very much for your letter of September 19, 1983, and its enclosures. The information should prove to be very useful to us.

I understand that I will soon be receiving a memorandum discussing the results of the September meeting.

As soon as the agenda for the November meeting is known, I would appreciate receiving a copy.

I'd also like to suggest three new sections which I believe will improve the Probate Code.

The first section is proposed to solve the problem that attorneys and testators alike face with regard to the doctrine of incorporation by reference as applied to testamentary gifts of tangible personal property. Frequently, a testator wants to leave specific items of tangible personal property to specific persons. It is not cost-effective to include such lists in wills, especially if they are lengthy. It is also costly to frequently modify such lists by codicil. If a new list fails to meet the requirements of a holographic will, it fails to be binding. This frustrates the intent of testators. Colorado has solved this problem by legislation which has worked well in the twenty years it has been in effect. Thus, I recommend we enact a new Section 6132 of the Probate Code to read as follows:

§ 6132. Separate Writing Identifying Bequest of Tangible Personal Property.

Whether or not the provisions relating to holographic wills apply, a will may refer to a written statement or list to dispose of items of tangible personal property, including automobiles, not otherwise specifically disposed of by the will. Tangible personal property excludes money, evidences of indebtedness, documents of title, securities, and any property used in trade or business. To be admissible under this section as evidence of the intended disposition, the writing must either be in the handwriting of the testator or be signed by the testator and must describe the items and the devisees with reasonable certainty. The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing which has no significance apart from its effect upon the dispositions made by the will.

The second section is proposed to solve the problems of use of extrinsic evidence to interpret wills. A.B. 25 repealed existing Probate Code Section 105 but enacted no substitute. Section 105 had problems, as eloquently pointed out in the decision in Estate of Kime (Court of Appeals, Second District, June 22, 1983). I recommend enactment of the following language to aid in interpreting wills.

§ 6163. Misdescription of Persons or Property - Extrinsic Evidence--Declaration of Testator.

When there is an imperfect description, or no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence. When an uncertainty arises upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, and all relevant evidence, including the testator's oral declarations.

The third section deals with a decedent who had minor children, but where no guardian needed to be appointed for them as part of the estate proceedings. This is commonly true when the will gives no property directly to the children. Sometimes, after-discovered property which does not require probate administration (e.g., employee benefits) is distributable to the children. New

proceedings may be necessary to either add that property to an existing testamentary trust for the children or to appoint a guardian of the estates of the children. This proposed change requires the decree of final distribution to contain provisions that anticipate the possibility of such a need, thereby eliminating the need for secondary proceedings at a later date.

§ 1027.5 Decree to Provide for Property to or for Benefit of Minors.

If decedent had a minor child or children at the time of his or her death, and if the decedent's estate is not distributable to said child(ren) or a guardian on their behalf, the decree for final distribution shall include either (1) a provision appointing the surviving parent of said child(ren) as guardian of the estate(s) of any minor child(ren) empowered to accept any after-discovered assets payable to said child(ren) upon posting of an appropriate bond in the minimum amount then required by law or (2) a provision directing that any after-discovered assets payable to said minor child(ren) shall be paid to the trustee(s) of a trust established for their benefit under the terms of decedent's will. Decedent may, by the terms of his or her will, require the appointment of someone other than the surviving parent as said guardian of the estate(s) of his or her minor child(ren), if the surviving parent was not the decedent's spouse at the date of death.

I would appreciate any comments you might have on any of these three suggestions.

Very truly yours,

Valerie J. Merritt

VJM:par

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October 14, 1983

Mr. John H. DeMoully, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, #D-2
Palo Alto, California 94306

Dear Mr. DeMoully:

Thank you for your letter of October 11. I appreciate the prompt response to my letter dated September 30, 1983.

With regard to my Section 6132, which was similar to U.P.C. Section 2-513, I have a few further comments.

One problem to relying on the holographic Will statute to solve the problem of bequests of tangible personal property is the requirement of case law that the document be a "will" and not a letter or list. Thus, a letter addressed to Executors would be ineffective to dispose of such property even if dated, signed and entirely in the testator's handwriting. A similar problem is that such a writing may be intended to be a codicil but make no mention of the underlying will; proving the intent may be difficult.

A second problem arises for the elderly testator who has a long list of items to be disposed of but is incapable of writing out the list entirely in his or her handwriting. I know of a woman who had a household of antique furniture. An auction house had listed and appraised each item for insurance purposes. She wanted to use that list and just write beside each item the name of the person who was to get it. Her plan would work under the proposed statute, but would not be a holographic will. Unfortunately, her arthritis would not allow her to write a holographic will and so she had to have an attorneys' office draw up a formal document. The attorneys' office charged her more than she wanted to pay, after writing off a large part of their costs in preparing the lengthy document. Do we, as a matter of public policy, want to encourage such difficulties? A physically feeble testator might have friends or relatives who could prepare a typewritten list which would carry out his or her intentions without meeting the requirements of either holographic or attested wills.

Finally, I believe my proposed Section 6132 is clearer than U.P.C. Section 2-513.

Having recently reviewed Evidence Code Sections 1220-1261, I concur in the repeal of former Probate Code Section 105 without enactment of a statutory replacement.

Sincerely,

Valerie J. Merritt

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