#L-626 10/24/83

Second Supplement to Memorandum 83-91

Subject: Study L-626 - Probate Law and Procedure (Comments from Professor Halbach)

We have received another memorandum from Professor Halbach concerning the new wills and intestate succession law and the Independent Administration of Estates Act. Professor Halbach's memorandum is attached as Exhibit 1. His points are discussed below.

WILLS AND INTESTATE SUCCESSION

Division by Representation

The new wills and intestate succession law includes the UPC provision on representation. Memorandum 83-64 recommends that we adopt Professor Lawrence Waggoner's representation scheme of "per capita at each generation." Professor Waggoner's scheme was rejected in the Uniform Probate Code, but is now included in a draft of the Uniform Statutory Will Act. Professor Halbach is not enthusiastic about the Waggoner scheme, and thinks it is unlikely that the Uniform Statutory Will Act will still have the Waggoner scheme in its final version. In view of Professor Halbach's comments, the staff recommends that we make no change in the new law.

Professor Halbach thinks the Waggoner proposal might be useful, however, as a statutory definition that could be picked up by one drafting a will simply by referring in the will to "per capita at each generation" or simply "per capita." Professor Halbach has drafted a section for this purpose which is set out on the last page of Exhibit 1. Is the Commission interested in including such a section in the new law?

Anti-lapse

Professor Halbach thinks that, in the case of future interests, the anti-lapse statute (Section 6147) should be broadened:

(1) To eliminate the requirement that the devisee be "kindred" of the testator.

(2) To permit the relatives of the devisee to take, even though the relative is not "issue" of the devisee, perhaps by broadening relatives of the devisee who may take under the antilapse statute to include those who would take from the predeceased devisee by intestate succession.

With the new constructional preference for contingent remainders (see Section 6146), the devisee of a future interest will be required to survive until possession vests, increasing the likelihood that the gift of the future interest will lapse because of the devisee's failure to survive. If the anti-lapse statute does not make a substitute gift in this case, the lapsed gift will either pass under the residuary clause of the testator's will (though perhaps long after the testator's death), or, if the gift was a residuary gift or there is no residuary clause in the testator's will, by intestacy to the testator's heirs. Professor Halbach thinks it would be preferable to pass the lapsed gift to the devisee's relatives, whether or not the relatives are "issue" of the devisee and whether or not the devisee is a relative of the testator.

Originally the Commission thought the "kindred" requirement of existing law should be deleted. Professor Dukeminier favored this change. However, Professor Niles and the State Bar opposed this change, and the Commission ultimately decided to keep the kindred requirement of existing law but to expand the anti-lapse provision to include devisees who were kindred of a surviving, deceased, or former spouse of the testator.

The argument in favor of the kindred requirement is that the testator probably would want a substitute gift to issue of a predeceased devisee who is a relative, but that where the gift is to a nonrelative (for example, to the trusted butler) the testator intends to benefit that person individually, not that person's issue, and in that case would prefer to have a lapsed gift pass under the residuary clause or by intestacy. The Uniform Probate Code has an even narrower anti-lapse rule: A substitute gift is made only if the devisee is a grandparent or a lineal descendant of a grandparent of the testator. UPC § 2-605. (This is consistent with the UPC's intestate succession scheme which cuts off inheritance rights of remote collateral relatives of the decedent.)

Professor Halbach's point raises anew the question of what should be the scope of the anti-lapse statute. Is there any sentiment on the Commission to broaden the present "kindred" requirement, either generally or limited to future interests? Is there any sentiment to broaden the substitute takers (presently the devisee's "issue") to some more inclusive class such as the devisee's "heirs?"

Intestate Share of Surviving Spouse

Professor Halbach supports the Commission's original proposal to increase the surviving spouse's share of the decedent's separate property so that the surviving spouse would take all of it unless the decedent were survived by issue some of whom were not also issue of the surviving spouse. He believes that the proposal should be presented in a separate bill. The Los Angeles Bar Association Committee was of the same view. At the last meeting, the Commission decided to give up that proposal because of objections from the State Bar Section Executive Committee, and instead to keep the existing scheme of Section 6401 (surviving spouse gets all, half, or a third, depending on the circumstances). In view of Professor Halbach's support of the original proposal to increase the surviving spouse's share, does the Commission wish to change the decision made at the last meeting and to submit this proposal as a separate bill?

Miscellaneous Technical Matters

The staff would make the following change to Section 6152 suggested by Professor Halbach:

> 6152. Unless otherwise provided in the will:
> (a) Except as provided in subdivision (b), halfbloods, adopted persons, ~~and~~ persons born out of wedlock, stepchildren, foster children, and the issue of all such persons when appropriate to the class, are included in terms of class gift or relationship in accordance with the rules for determining relationship and inheritance rights for purposes of intestate succession.
> . . . .

Stepchildren and foster children should have been included in Section 6152 as originally drafted, since stepchildren and foster children may take by intestate succession in appropriate cases. See Section 6408.

Professor Halbach thinks the drafting could be improved in Sections 649.2 and 660-664. The staff proposes to study these sections and work them over in connection with our recommendation on Division 3 (administration of estates).

Professor Halbach's comments on abatement are discussed in Memorandum 83-91.

INDEPENDENT ADMINISTRATION OF ESTATES ACT

Formal Closing

At the last meeting, the Commission decided to keep court supervision of final distribution and discharge under the Independent Administration

of Estates Act. Professor Halbach would make this optional by including it within the matters of which advice of proposed action must be given, with court approval required when demanded by any interested person. In view of Professor Halbach's comment, is there any sentiment on the Commission to change the previous decision?

Contents of Advice of Proposed Action

At the last meeting, the Commission decided to require that the advice of proposed action contain the telephone number for the executor or administrator. Professor Halbach would permit the executor or administrator to specify the attorney's telephone number as an alternative. What is the Commission's view?

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

Exhibit 1

MEMO

TO: John DeMoully

FROM: Ed Halbach

RE: A.B. 25 and Related Matters

A conflict between the definition of "devisee" in §34(b) and the intended meaning of "devisee" as used in §§6146 and 6147 (and possibly other sections) needs to be straightened out. In the latter sections, we are clearly talking about trust beneficiaries as devisee and not trustees. The former says that the devisee is the trustee of the testamentary trust (or other trust referred to in a will) and not the trust beneficiaries under the will.

Also, §§6146 and 6147 require some further work with respect to trust beneficiaries and with respect to future interests. On the latter, it may be that relationship should not be required for the anti-lapse provisions to apply and that the provision ought to be broadened beyond the mere substitution of issue. After all, this problem can arise many years after the testator's death, when we certainly would not want a partial intestacy with a reversion to the testator's actual, original heirs.

In the recently added §649.2 of AB 25, lines 15-21 (page 41), dealing with the notice, could be made more readily understandable. I think I have ultimately come to understand what these lines mean, but, as hard as I have tried, I can't really say that I am sure. Also, I do not believe the word "as" belongs in line 23, or else the words "to the same extent" should be deleted from lines 24 and 25.

On page 61 of AB 25, §6152(a) should, I believe, read: "Except..., halfbloods, adopted persons, persons born out of wedlock, stepchildren, foster children, and the issue of all such persons when...", or something like that. See §6408(a)(2) (second sentence) on page 103.

As I said in my last letter, Chapter 13, labeled "Sales" but also dealing with the order of abatement (especially §750), needs a general overhaul (although my prior letter contains a typo and says "overall" - maybe it needs an overall overhaul).

Also, old Chapter 8, which is now Chapter 11 of AB 25, simply repeats the weak material that was formerly contained in §§160-163, even continuing references to "legacy" and "legatee" even though we have shifted to "devise" and "devisee" (new §§32 and 34).

First Supplement to Memorandum 83-58 (9/14/83) discusses affidavit procedures. It seems to me that all these matters need to be taken up in the context of possibly broadening succession without administration. Oughtn't one consider the possibility of a procedure that simply requires a will to be established, thus providing a muniment of title, but with no further administration being required? In the 9/16/83 Supplement to Memorandum 83-59 reference is made to the Commission's decision to retain formal opening and closing of the estate, and the question is asked whether formal closing should be mandatory when no one wants it. It certainly seems to me that the requirement of a formal closing can and should be dispensed with, absent some perceived need by an interested party, and that all that is really needed is a formal opening with notice (which is essential to fair play when a will is to be established).

In that same memorandum, the intestate share of the surviving spouse is discussed. I hope you will go forward with what seems already to have been decided: that the issue should be squarely presented but separately from any other proposals that might be jeopardized by the controversy.

At page 3 of that same document, I agree with the proposed language that adds the telephone number of the personal representative, but I wonder if it shouldn't authorize the telephone number of the PR's attorney if the PR prefers. Similarly, as suggested on the next page, near the top, the PR should be permitted to specify in the advice of proposed action the person to whom an objection should be sent. Further down page 4, however, I wonder whether (and I haven't checked elsewhere in case there is a ready answer) it is clear just what the effect is when a failure to object is excused by the terms of the proposed revision; and when can one ever know for sure that there is not such an excused failure outstanding? Are bona fide purchasers effected by such a person's rights?

The comments and suggestions in both of the paragraphs on page 5 of that memo seem sound; on the first point, notice and opportunity to be heard seem quite clearly to be required anyway by due process before a proceeding can have any binding significance.

Next, your Memorandum 83-64 (9/15/83): I share at least some of your interest in a "per capita at each generation" scheme, although I would say that it may be more initially appealing than theoretical or lastingly appealing. Not that reflection discloses serious flaws, but it shows that this method suffers from the same disadvantages as representation - and probably a bit more, I have eventually come to think. Per capita at each generation also has never caught on as a drafting solution in private documents, although I am not sure how revealing this is. It initially seems to treat all members of a generation alike, but in fact it is quite "non-neutral"

and very much influenced by the order of particular deaths. A shift in the pattern of shares under a representation scheme at least requires the elimination of a whole generation.

To illustrate possible concerns about lack of neutrality, just imagine an elderly mother and two middle-aged children in terminal condition following an automobile accident. Each child has granted one of your durable powers of attorney for health care, and each attorney is now trying to decide whether, based on the number of children in each family, a particular child should be kept alive or unplugged before mother. That may be extreme, but it suggests the fortuity of the scheme. Also, one connot escape having to give up per capita treatment at some point. Many believe that this point should be at the first generation having living members at the crucial time.

In any event, if you wish to propose that California try per capita at each generation, then (a) the wording of the proposed draft is inadequate ("the decedent" does not establish the right time for a future interest) and (b) more importantly, the definition should be broken down if we go that way. The presumed meaning and shares of issue should, absent a good reason to the contrary, follow the intestate pattern. Thus, one might state the intestate rule and also say that this is what is meant by "issue" and "descendants" where the manner of distribution is not specified, or where "per capita at each generation" is specified (thus providing draftsmen with a shorthand reference); but I would not vary the meaning of what would still remain an equally if not more popular reference and would offer and clarify the alternative of "per stirpes" and "representation," defined to carry the meaning in the current AB 25. This offers maximum flexibility.

Even if we decide not to go for per capita at each generation for intestacy, and for the primary manner of distribution among "issue" or "descendants," we might wish to add a definition of "per capita at each generation," thus facilitating the use of this pattern on a private basis. The one thing that I really think would be a serious mistake, however, would be mis-define per stripes and representation. There is also considerable reason to doubt that the NCCUSL Uniform Statutory Will Act will end up with per capita at each generation.

E.C.H. 

P.S. I have just seen Jesse Dukeminier's letter, and I think it simply concurs with things you and I had already talked about; there are also a number of problems that go beyond those he has raised that we have to tackle. It is, of course, most obvious, as I have assumed was your plan from the start, that you will have to make conforming provisions or incorporations in the Civil Code.

Attachment

If distribution "per capita at each generation" is called for by this code, or if a will that expresses no contrary intention calls for distribution "per capita at each generation" or provides for issue or descendants to take "per capita" or without specifying the manner, the property is divided into as many equal shares as there are living members of the nearest generation of issue then living and deceased members of that generation who leave issue then living. Each living member of the nearest generation of issue then living is allocated one share, and the remaining shares, if any, are combined and then divided and allocated in the same manner among the remaining issue as if the issue already allocated a share and their descendants were then deceased.

If a will that expresses no contrary intention calls for distribution per stirpes or by representation, the property...[etc. as in original §240].

[Note: Other adaptations would also be required in the code; or, if representation is to remain primary and is to be used for intestacy but you wish to offer terminology and a definition for accomplishing the p.c. at each gen result, you could essentially invert the approach taken above.]