#L-626 11/22/83

Memorandum 84-2

Subject: Study L-626 - Probate Law and Procedure (Wills and Intestate Succession)

This Memorandum discusses a few issues left over from the last meeting concerning cleanup revisions to the new wills and intestate succession statute.

Inheritance by Great-Grandparents and Issue of Great-Grandparents

At the last meeting, the Commission decided to recommend repeal of unlimited inheritance in California, and instead to restrict inheritance to the decedent's great-grandparents and the issue of great-grandparents. The proposed revision is set out as an amendment to Probate Code Section 6402 in Exhibit 1 (pink page) to this Memorandum.

At the last meeting, the Commission did not address the question of where in the priority ladder the decedent's great-grandparents and issue should stand. Section 6402 as revised in Exhibit 1 provides that property not passing to a surviving spouse shall pass according to the following priority:

(1) To the decedent's issue.

(2) To the decedent's parent or parents.

(3) To issue of the decedent's parents (decedent's brothers, sisters, nieces, nephews, grandnieces, and grandnephews).

(4) To the decedent's grandparent or grandparents.

(5) To the issue of decedent's grandparents (decedent's uncles, aunts, and cousins).

(6) To the issue of decedent's predeceased spouse.

(7) To the decedent's great-grandparents and their issue.

(8) To the parents of a predeceased spouse of the decedent (decedent's father-in-law and mother-in-law).

(9) To the issue of parents of a predeceased spouse of the decedent (decedent's brother-in-law, sister-in-law, and their issue).

Is there any Commission sentiment to give items (8) and (9) priority over item (7) above?

One-Way Inheritance

At the last meeting, the staff proposed the substance of the following amendment to subdivision (b) of Section 6408.5 as suggested by Professor Halbach:

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

Professor Halbach had suggested a sex-neutral statute, but it seems to the staff that the intent of the provision above is to apply to fathers, and the staff has drafted the amendment accordingly.

The Commission asked the staff to look at statutory provisions for relieving a child from liability to support a parent when the parent has abandoned the child to see if that might suggest language that could be used in Section 6408.5. Civil Code Section 206.5 provides in part as follows:

> 206.5. Any adult person may file in the superior court of the county where his or her parent resides a verified petition alleging that, while the petitioner was a minor, the petitioner was abandoned by the parent, and such abandonment continued for a period of two or more years prior to the time the petitioner reached the age of 18 years, and the parent during such period was physically and mentally able to support the petitioner, and praying the court to free the petitioner from the obligation otherwise imposed by law to support the parent. . . .

The staff thinks it would be inappropriate to use an abandonment standard for inheritance purposes. It has been held that a showing that the mother voluntarily relinquished custody of the child to the father when the child was 4, infrequently visited and communicated with the child, and never contributed to the child's support, did not establish abandonment for the purpose of Civil Code Section 206.5. The court held that to have abandonment, there must be an intent to abandon. Stark v. Alameda, 182 Cal. App.2d 20, 23-24, 5 Cal. Rptr. 839 (1960).

The staff is of the view that there are cases short of abandonment where it would be inequitable to permit a parent who has failed to live up to parental responsibilities to inherit from a child born out of wedlock. In the out-of-wedlock case, there is the additional danger of fraud: One not the parent of the child may come forward to claim an intestate share if the estate is substantial. The requirements of (1) acknowledgment of the child and (2) support tend to minimize the danger of fraud. Accordingly the staff recommends the amendment to subdivision (b) of Section 6408.5 shown above in underscore, and recommends against using language of abandonment.

The staff would write the Comment to Section 6408.5 as follows. The second sentence of the Comment is to deal with a problem raised by attorney Valerie Merritt.

> Comment. Section 6408.5 is amended to provide in subdivision (b) that for the father or a relative of the father to inherit from a child born out of wedlock, the father must both have acknowledged and contributed to the support of the child. Section 6408.5 is not as restrictive as the standards for determining when a man is presumed to be the natural father of a child under Section 7004 of the Civil Code.

Anti-Lapse Statute

At the last meeting, the Commission decided that the requirement in the anti-lapse statute that the deceased devisee be "kindred" of the testator should be eliminated when the gift is of a contingent remainder. This change was recommended by Professor Halbach who argued that the remaindermen who take after a life estate or at the conclusion of a trust are typically those who have been closest to the testator, and that in such a case the testator would want to benefit family members of the deceased remainderman whether the remainderman is a blood relative or not. Professor Halbach said the question arises most frequently in the case of trusts, and he suggested that it be made clear that the term "devisee" in the anti-lapse statute means the trust beneficiary, not the trustee as provided in the general definition of "devisee" in Section 34.

To carry out this Commission decision, the staff proposes to revise Section 6147 and to add a new Section 6147.5 as follows:

Probate Code § 6147 (amended). Anti-lapse in wills

6147. ~~(a) As used in this section, "devisee" means a devisee who is kindred of the testator or kindred of a surviving, deceased, or former spouse of the testator.~~

~~(b)~~

(a) Subject to ~~subdivision~~ subdivisions (b) and (c), if a devisee is dead when the will is executed, or is treated as if he or she predeceased the testator, 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 devisee under a class gift is a devisee for the purpose of this subdivision unless his or her death occurred before the execution of the will and that fact was known to the testator when the will was executed.

(b) If the devise is of a present interest or a vested remainder, subdivision (a) does not apply unless the devisee is kindred of the testator or kindred of a surviving, deceased, or former spouse of the testator. If the devise is of a contingent remainder, subdivision (a) applies whether or not the devisee is kindred of the testator or of a surviving, deceased, or former spouse of the testator.

(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 and that fact was known to the testator when the will was executed.

Comment. Section 6147 is amended to delete former subdivision (a) and to replace it with new subdivision (b). Under the former rule, a deceased devisee had to be kindred of the testator or kindred of a surviving, deceased, or former spouse of the testator in order for this section to make a substitute gift to the devisee's issue. Under new subdivision (b), the kindred requirement applies only to a devise of a present interest or of a vested remainder, and not to a devise of a contingent remainder. See also Section 6146 (constructional preference for contingent remainder).

Probate Code § 6147.5 (added). Antilapse in trusts

6147.5. (a) Subject to subdivision (b), if a person entitled to income or principal from a trust is dead at the time the income or principal is to be distributed or is treated as if he or she were dead, the issue of the deceased person take in his or her place by representation. This subdivision applies to a person who would otherwise take as a member of a class unless the person died before the execution of the instrument that created the trust and that fact was known to the settlor when the instrument was executed.

(b) The issue of a deceased person do not take in his or her place if the terms of the trust express a contrary intention or a substitute disposition. With respect to multiple takers or a class of takers, a contrary intention or substitute disposition is not

expressed by a provision making a distribution to the "surviving" takers or to "the survivor or survivors" of them, or words of similar import, unless one or more of the takers had issue living at the time the instrument creating the trust was executed and that fact was known to the settlor when the instrument was executed.

Comment. Section 6147.5 is new and provides an antilapse rule for trusts similar to the antilapse rule for wills provided in Section 6147. Under prior law, antilapse rule could be applied to trusts in appropriate cases. See In re Estate of McCurdy, 197 Cal. 276, 284, 240 P. 498 (1925).

Under subdivision (b), express terms of the trust control over the provisions of this section. Unlike Section 6147, Section 6147.5 does not require that the trust beneficiary be "kindred" of the settlor before a substitute gift will be made.

Professor Halbach made two other suggestions concerning the anti-lapse statute that were not resolved. First, he suggested eliminating the "kindred" requirement for present interests as well as for contingent future interests, except where the gift is a specific dollar amount or specific item of property. This is based on the assumption that the average testator wants to benefit the named devisee individually and not issue of a deceased devisee if the gift is a specific dollar amount or property item, but in other cases would want to benefit issue of a deceased devisee. Professor Niles argued against elimination of the kindred requirement, pointing out that most states and the Uniform Probate Code do have some sort of kindred requirement and that only a very small minority of states have eliminated this requirement altogether. California, however, has eliminated the kindred requirement from the antilapse statute that applies to powers of appointment. See Civil Code § 1389.4. Professor Halbach's suggestion could be accomplished as provided in the draft of Section 6147 set out in Exhibit 2 (yellow page). Is there any sentiment on the Commission to eliminate the kindred requirement in the case of present interests as set out in Exhibit 2?

Professor Halbach also suggested that we broaden the class of substitute takers (now "issue") in the case of a contingent remainder. If the anti-lapse statute were broadened to make a substitute gift to "heirs at law" of the deceased devisee, a portion of the gift would go to the deceased devisee's surviving spouse (see Section 6401(c)), a result arguably more consistent with the testator's wishes where the testator's estate is being distributed to the ultimate takers. Also,

when the gift of a future interest lapses long after the testator's death there is a windfall to the residuary devisee or intestate taker who gets it; by expanding the class of substitute takers from the devisee's "issue" to the devisee's "heirs at law" in the case of contingent remainders, the incidence of windfalls resulting from lapse would be reduced. Professor Halbach listed three possible ways in which the substitute gift could be made:

(1) To heirs at law of the deceased devisee.

(2) To issue of the deceased devisee, but if there are no surviving issue, then to heirs at law of the deceased devisee. (This would have the effect of benefitting the devisee's issue to the exclusion of the devisee's surviving spouse.)

(3) To issue of the deceased devisee, but if there are no surviving issue, then to other members of the class in the case of a class gift, and to heirs at law of the deceased devisee in the case of all other gifts or where no class members survive.

Any one of these three choices will add to the complexity of the anti-lapse statute, but might be more consistent with the likely intent of the average testator. Is there any sentiment on the Commission to broaden the class of substitute takers? (If the Commission wants to broaden the class of substitute takers, perhaps the second sentence of subdivision (b) of Section 6147 should be deleted, since if "issue" in that sentence is similarly broadened (e.g., "heirs at law") the sentence will apply so seldom it will be meaningless.)

Constructional Preference for Contingent Remainders in Trusts

Professor Halbach pointed out that the provision in the general definition of "devisee" in Section 34 that in the case of a trust the term means the trustee, not the beneficiary, causes a problem in Section 6146 (constructional preference for contingent remainders) as well as Section 6147 (anti-lapse statute, discussed above). It should be made clear in Section 6146 (as in Section 6147) that "devisee" in that context means the trust beneficiary, not the trustee. Accordingly, the staff would amend Section 6146 as follows:

Probate Code § 6146 (technical amendment). Requirement that devisee survive testator or until a future time

6146. (a) A devisee who fails to survive the testator or until any future time required by the will does not take under the will. For the purposes of this subdivision, unless a contrary intention is indicated by the will, a devisee of a future interest (including one in class gift form or upon the termination of a trust) is required by the will to survive to the time when the devise is to take effect in enjoyment.

(b) In the absence of a contrary provision in the will:

(1) If it cannot be established by clear and convincing evidence that the devisee has survived the testator, it is deemed that the devisee did not survive the testator.

(2) If it cannot be established by clear and convincing evidence that the devisee survived until a future time required by the will, it is deemed that the devisee did not survive until the required future time.

(c) For the purpose of this section, "devisee" includes the beneficiaries under a trust and does not included the trust or trustee.

Comment. Section 6146 is amended to make clear that "devisee" as used in this section includes trust beneficiaries, and not the trust or trustee. This is an exception to the general definition of "devisee" in Section 34. See also Section 20 (general definitions not controlling if provision or context otherwise requires). This amendment is consistent with the intent of Section 6146 as it was originally enacted. See Legislative Committee Comment to Section 6146 (1983 addition).

Notice to Natural Parent in Case of Stepparent Adoption

New Section 226.12, added to the Civil Code, prescribes a notice to be given to the natural parent who relinquishes a child for adoption by a stepparent that the adoption does not cut off the child's right to inherit from or through the natural parent. The following technical change is needed in this section to conform to amendments made to the substantive provision concerning inheritance by an adoptee:

Civil Code § 226.12 (amended). Notice to natural parent in case of stepparent adoption

226.12. In the case of a stepparent adoption, the form prescribed by the State Department of Social Services for the consent of the natural parent shall contain substantially the following notice: "Notice to the natural parent who relinquishes the child for adoption: ~~Adoption~~ If you and your child lived together at any time as parent and child, the adoption of your child by a stepparent does not affect the child's right to inherit your property or the property of other blood relatives."

Comment. Section 226.12 is amended to conform the notice to the provisions of Probate Code Section 6408, the applicable inheritance statute.

Respectfully submitted,

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EXHIBIT 1

Probate Code § 6402 (amended). Intestate share of heirs other than surviving spouse

SEC. _____. Section 6402 of the Probate Code is amended to read:

6402. Except as provided in Section 6402.5, the part of the intestate estate not passing to the surviving spouse under Section 6401, or the entire intestate estate if there is no surviving spouse, passes as follows:

(a) To the issue of the decedent; if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree, then those of more remote degree take by representation.

(b) If there is no surviving issue, to the decedent's parent or parents equally.

(c) If there is no surviving issue or parent, to the issue of the parents or either of them, 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.

(d) 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, to the grandparent or grandparents equally, or to the issue of such grandparents if there is no surviving grandparent, 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 ~~degrees~~ degree take by representation.

(e) If there is no surviving issue, parent or issue of a parent, grandparent or issue of a grandparent, but the decedent is survived by the issue of a predeceased spouse, to such issue, the issue taking equally if they are all of the same degree of kinship to the predeceased spouse, but if of unequal degree, those of more remote degree take by representation.

(f) If there is no surviving issue, parent or issue of a parent, grandparent or issue of a grandparent, or issue of a predeceased spouse, but the decedent is survived by ~~next of kin, to the next of kin in equal degree, but when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through an ancestor more remote~~ one or more great-grandparents or issue of great-grandparents, to the great-grandparent or great-grandparents equally, or to the issue of such great-grandparents if there is no surviving great-grandparent, 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.

(g) If there is no surviving ~~next of kin of the deceedent and no surviving~~ issue, parent or issue of a parent, grandparent or issue of a grandparent, great-grandparent or issue of a great-grandparent, or issue of a predeceased spouse ~~of the deceedent~~, but the decedent is survived by the parents of a predeceased spouse or the issue of such parents, to the parent or parents equally, or to the issue of such parents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the predeceased spouse, but if of unequal degree those of more remote degree take by representation.

Comment. Section 6402 is amended to repeal California's rule of unlimited succession formerly contained in subdivision (f), pursuant to which the decedent's next of kin could inherit from the decedent no matter how remote the relationship. As revised, subdivision (f) is limited to great-grandparents and issue of great-grandparents of the decedent. For the rule of representation, see Section 240.

EXHIBIT 2

Probate Code § 6147 (amended). Antilapse in wills

6147. ~~(a) As used in this section, "devisee" means a devisee who is kindred of the testator or kindred of a surviving, deceased, or former spouse of the testator.~~

~~(b)~~ (a) Subject to subdivision ~~(c)~~ (b), if a devisee is dead when the will is executed, or is treated as if he or she predeceased the testator, or fails to survive the testator or until a future time required by the will, the [issue] [heirs at law] of the deceased devisee take in his or her place by representation. A devisee under a class gift is a devisee for the purpose of this subdivision unless his or her death occurred before the execution of the will and that fact was known to the testator when the will was executed.

~~(c)~~ (b) The [issue] [heirs at law] 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 and that fact was known to the testator when the will was executed.

Comment. Section 6147 is amended to delete subdivision (a) which contained the former requirement that the devisee be "kindred" of the testator or of a surviving, deceased, or former spouse of the testator before a substitute gift would be made by this section. As amended, Section 6147 will make a substitute gift (absent a contrary intention in the will) without regard to whether the deceased devisee is kindred of the testator or the testator's spouse.