

Second Supplement to Memorandum 84-2

Subject: Study L-626 - Probate Law and Procedure (Transitional Problems Under the New Wills and Intestate Succession Law)

The operative date for the Commission's new wills and intestate succession law is January 1, 1985. Under new Section 3, parts of the new law are further deferred where the decedent died before January 1, 1985: In such a case, old law continues to apply. This Supplement deals with problems under this scheme that have come to the staff's attention.

Partial Revocation of a Will by Dissolution or Annulment of Marriage

The new law reverses the old rule that dissolution or annulment of marriage had no effect on the will of either spouse, and substitutes a new rule that if the dissolution or annulment occurs after the will is executed, it revokes any disposition made by the will to the former spouse unless the will expressly provides otherwise. See Section 6122. Under the transition provision as it presently stands, the new rule applies to wills executed under the old law if the testator dies after January 1, 1985. See Section 3. The application of the new rule to old wills was thought to be justified as being consistent with what most testators would want had they thought about the matter.

The problem is caused by the fact that for the past three years every final judgment of dissolution or nullity of marriage has been required to contain a notice to the parties, advising them that the dissolution or annulment does not affect their wills. See Civil Code § 4352. We may assume that many testators who have received this notice and have not revised their wills have done so advisedly, intending their former spouse to take under the old will.

The staff has received comments from a number of lawyers that application of the new rule to old wills is unfair, particularly where the divorcing testator has received the notice that the will is unaffected. The staff thinks this point is well taken, and recommends that the new rule be limited to cases where the dissolution or annulment occurs after January 1, 1985. (The new law revises the notice to say that dissolution or annulment does partially revoke the will.) The new rule may be thus limited by adopting the revision to Section 6122 set forth in Exhibit 1 to this Supplement.

Inconsistent Deferment Provisions Where Decedent Dies Before January 1, 1985

A problem is created by the fact that some, but not all, of the provisions of the new law do not apply where the decedent dies before January 1, 1985. See Section 3. For example, the nonsubstantive conforming revisions that become operative on January 1, 1985, are not subject to further deferment where the decedent dies before that date, but many of them contain internal cross-references to provisions which may be thus deferred. The staff is persuaded that it would avoid confusion to apply the old law in its entirety where the decedent dies before January 1, 1985. This may be accomplished by adopting the revisions set forth in subdivision (a) of Section 3 in Exhibit 2 to this Supplement, and by adopting the uncodified section at the end of Exhibit 2.

References in Instruments to Repealed Statutes

The new law repeals many old sections and replaces them with new provisions recommended by the Commission. Ted Cranston of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section has suggested that we make clear that a reference in a will, trust, or other instrument to a repealed provision of the Probate Code is deemed to be a reference to the corresponding new provision to the extent it is the same as the repealed provision. This may be accomplished by adopting subdivision (b) of Section 3, and proposed new Sections 649.6 and 665, of the Probate Code set forth in Exhibit 2.

Respectfully submitted,

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EXHIBIT 1

Probate Code § 6122 (amended). Revocation by annulment or dissolution of marriage; no revocation by other changes of circumstances

6122. (a) Unless the will expressly provides otherwise, if after executing a will the testator's marriage is dissolved or annulled, the dissolution or annulment revokes all of the following:

(1) Any disposition or appointment of property made by the will to the former spouse.

(2) Any provision of the will conferring a general or special power of appointment on the former spouse.

(3) Any provision of the will nominating the former spouse as executor, trustee, conservator, or guardian.

(b) If any disposition or other provision of a will is revoked solely by this section, it is revived by the testator's remarriage to the former spouse.

(c) In case of revocation by dissolution or annulment:

(1) Property prevented from passing to a former spouse because of the revocation passes as if the former spouse failed to survive the testator.

(2) Other provisions of the will conferring some power or office on the former spouse shall be interpreted as if the former spouse failed to survive the testator.

(d) For purposes of this section, dissolution or annulment means any dissolution or annulment which would exclude the spouse as a surviving spouse within the meaning of Section 78. A decree of legal separation which does not terminate the status of husband and wife is not a dissolution for purposes of this section.

(e) No change of circumstances other than as described in this section revokes a will.

(f) Subdivisions (a) to (d), inclusive, do not apply to any case where the final judgment of dissolution or annulment of marriage occurs before January 1, 1985. Such case is governed by the law in effect prior to January 1, 1985.

Comment. Section 6122 is amended to add subdivision (f). Subdivision (f) is a special exception to the rule stated in Section 3. For the law in effect prior to January 1, 1985, see In re Estate of Patterson, 64 Cal. App. 643, 646, 222 P. 374 (1923) (divorce does not revoke will); 7 B. Witkin, Summary of California Law Wills and Probate § 150, at 5666 (8th. ed. 1974).

EXHIBIT 2

Probate Code § 3 (amended). Transitional provision

3. (a) Except as otherwise specifically provided, ~~Parts 1 (commencing with Section 100), 3 (commencing with Section 140), 4 (commencing with Section 200), and 5 (commencing with Section 220)~~ of Division 2, (commencing with Section 100) and Division 6 (commencing with Section 6100), do not apply in any case where the decedent died before January 1, 1985, and such case continues to be governed by the law applicable to the case prior to January 1, 1985.

(b) After December 31, 1984, a reference in a written instrument, including a will or trust, to a provision of the Probate Code that was in effect on December 31, 1984, shall be deemed to be a reference to the corresponding provision of the Probate Code that is in effect after that date to the extent the new provision is substantially the same as the old provision. Unless the instrument provides otherwise, to the extent the new provision is substantially different from the old provision, a reference in a written instrument, including a will or trust, to a provision of the Probate Code that was in effect on December 31, 1984, shall be deemed to be a reference to that provision as it was in effect on December 31, 1984.

Comment. Section 3 is amended to designate its former substance as subdivision (a), to revise subdivision (a) to make it applicable to all of Division 2, and to add subdivision (b). Formerly the section did not apply to Part 2 (words and phrases defined) or Part 6 (division by representation) of Division 2. For specific applications of subdivision (b), see Sections 649.6 and 665. See also Section 6122 (special rule concerning partial revocation of will by dissolution or annulment of marriage).

Probate Code § 649.6 (added). References in instruments

649.6. After December 31, 1984, a reference in a written instrument, including a will or trust, to a provision of former Chapter 8 (commencing with Section 160) of Division 1 shall be deemed to be a reference to the corresponding provision of this chapter.

Comment. Section 649.6 is new and is a specific application of subdivision (b) of Section 3. See also Section 665.

Probate Code § 665 (added). References in instruments

665. After December 31, 1984, a reference in a written instrument, including a will or trust, to a provision of former Section 202 shall be deemed to be a reference to Section 649.1.

Comment. Section 665 is new and is a specific application of subdivision (b) of Section 3. See also Section 649.6.

Transitional provision

SEC. _____. Except as otherwise specifically provided, the enactment, amendment, or repeal of any code section by Chapter 842 of the Statutes of 1983 does not apply in any case where the decedent died before January 1, 1985, and such case continues to be governed by the law applicable to the case prior to January 1, 1985.

Comment. Section _____ generalizes the rule of Probate Code Section 3, which applies to Divisions 2 and 6 of the Probate Code, and makes the rule of Section 3 applicable to all of the other sections enacted, amended, or repealed by 1983 Cal. Stats. ch. 842. Some of the sections added or amended by Chapter 842 contain internal cross-references to sections in Division 2 or 6 of the Probate Code which may be deferred in their operation by Probate Code Section 3. See, e.g., Civil Code § 730.05; Code Civ. Proc. §§ 377, 1443; Educ. Code § 24606; Gov't Code § 21371; Penal Code § 3524; Prob. Code §§ 300, 640, 641, 645, 645.3, 650, 655, 736, 1054, 1139, 1139.6, 1215. By deferring these added or amended sections where the decedent dies before January 1, 1985, Section _____ assures a consistent statutory scheme will be applicable to the case.