#L-626 12/27/83

Fourth Supplement to Memorandum 84-2

Subject: Study L-626 - Probate Law and Procedure (Right of Nonresident Aliens to Take by Will or Intestate Succession)

Dr. Renatus Chytil has written to urge that the right of nonresident aliens to take property in California by will or intestate succession be limited to the case where U.S. citizens have reciprocal rights in the alien's country of residence. A copy of this letter is attached to this Supplement as Exhibit 1. Dr. Chytil is an expert in foreign law, and used to testify in California estate proceedings as to foreign law before such testimony was made irrelevant by Commission-recommended legislation enacted in 1974 (see discussion below).

The Commission has consistently recommended against the restrictive rule for nonresident aliens urged by Dr. Chytil. A copy of the Commission's 1973 recommendation on this subject is attached as Exhibit 2. The staff thinks the Commission's long-standing view is sound, as discussed below.

Historical Background

From 1856 through 1941, it was the law in California that resident and nonresident aliens could take property by will or intestate succession equally with California and other U.S. citizens. 2 Cal. L. Revision Comm'n Reports, at B-13 (1959). In 1941, legislation was enacted in California as an eve-of-war measure to prevent a nonresident alien from taking property by will or intestate succession unless the alien's country of residence gave U.S. citizens the same right to take by will or intestate succession as that country gave to its own citizens. Id. at B-5, B-13, B-14.

In 1959, the Law Revision Commission recommended the repeal of the 1941 legislation limiting the rights of nonresident aliens. Id. at B-5. The Commission gave the following reasons for its recommendation (id. at B-5, B-6; see also Exhibit 2 at 441-44):

(1) The purpose of the 1941 law was to prevent hostile countries from confiscating a bequest or inheritance and using it for war purposes.

1941 Cal. Stats. ch. 895, § 2. However, the law did not achieve this purpose because it denied inheritance to a citizen of a friendly country that did not grant reciprocity, and permitted inheritance by a citizen of a hostile country that did grant reciprocity notwithstanding that the country confiscated most of the property for its own purposes. Moreover, a hostile country could qualify its citizens to inherit here by providing a bare minimum of reciprocal rights as a matter of expediency and shrewd business.

(2) The law interfered with testamentary freedom, frustrated decedent's wishes, and frequently caused estates to escheat or to go to remote relatives of the decedent at the expense of those who were the natural objects of the decedent's bounty.

(3) The law penalized innocent people rather than the policymakers of the foreign country.

(4) The law was litigation-breeding. Because of the possibility of escheat, the California Attorney General was frequently involved, causing expense to the state. The expense of proving reciprocal rights forced claimants having relatively small claims to give them up.

(5) Keeping American assets away from hostile countries is best left to uniform national control. The transfer of funds to hostile countries has been prevented by the Trading with the Enemy Act, 50 U.S.C. app. §§ 1-40, under which an inheritance of a citizen of a hostile country may be held in trust by the Attorney General of the United States for the alien involved. Additional federal regulation is provided under the Foreign Assets Control Regulations of the Secretary of the Treasury, 31 C.F.R. §§ 500.101-500.809.

The bill to effectuate the Commission's 1959 recommendation to repeal the restrictive law was not enacted. However, the Commission was prompted to renew its recommendation by a 1969 California case which held the restrictive law to be an unconstitutional intrusion by the state into the field of foreign affairs which the federal Constitution entrusts to the President and the Congress. Estate of Kraemer, 276 Cal. App.2d 715, 81 Cal. Rptr. 287 (1969). The Kraemer court thought its decision was compelled by a 1968 U.S. Supreme Court case which held unconstitutional an Oregon statute similar to California's. (For later cases, see 11 Cal. L. Revision Comm'n Reports, at 427 (1973).)

As a result of the Kraemer case, the Commission in 1973 again recommended repeal of the restrictive 1941 law. See 11 Cal. L. Revision Comm'n Reports, at 427 (1973). The repealing bill was enacted in 1974. Also in 1974, a separate provision was added to the California Constitution which provides: "Noncitizens have the same property rights as citizens." Cal. Const. Art. 1, § 20. The inheritance of a nonresident alien is subject to U.S. and California income taxation, and the personal representative must withhold the tax before money is sent out of the country. 2 California Decedent Estate Administration §§ 35.5, 35.7, 35.33 (Cal. Cont. Ed. Bar 1975).

Uniform Probate Code and California's 1983 Wills and Intestate Succession Law

The Uniform Probate Code provides that "[n]o person is disqualified to take as an heir because he or a person through whom he claims is or has been an alien." UPC § 2-112. The UPC Comment notes that, although some states have had restrictive statutes regarding nonresident aliens, such statutes are intrusions by the states into foreign affairs which the federal Constitution entrusts to the President and the Congress.

The Commission's new wills and intestate succession law includes the substance of the UPC provision. See Section 6411. The California Comment notes that Section 6411 is consistent with the California constitutional provision quoted above and with other provisions of California law (Civil Code § 671).

Staff recommendation

For the reasons enumerated in the Commission's 1959 recommendation, the Kraemer decision and other similar decisions on constitutional grounds, and the policy expressed in the California Constitution, Civil Code, the new wills and intestate succession law, and the Uniform Probate Code, the staff recommends against adopting Dr. Chytil's suggestion that we return to the restrictive 1941 law. That law failed to serve its intended purpose, and the matter is best left to regulation by the federal government.

Respectfully submitted

Robert J. Murphy III
Staff Counsel

Exhibit 1

Renatus R. J. Chytil, J.U.D.
732 S. Bronson Avenue
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Telephone (213) 387-8792

December 5, 1983

John H. DeMoully, Esq.
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suit D2
Palo Alto, California 94306

Re: PROPOSED LEGISLATION TO AMEND PROBATE CODES PERTAINING TO THE ELIGIBILITY OF NONRSIDENT ALIENS TO INHERIT AND TAKE PROPERTY IN CALIFORNIA ESTATES AND TRUSTS

Dear Sir:

Thank you for the material relating to inheritance rights of nonresident aliens (1959, 1973) and recommendation relating to wills and intestate succession (1982).

In response to our recent telephone conversation regarding the above captioned subject matter, please note the enclosed Abstract/Summary Memorandum 071980 and a copy of my letter to the Atotrney General, dated September 6, 1983.

In July of 1981, I wrote a letter to the State Bar proposing a study to check the devolution of proceeds from California estates and trusts to foreign (totalitarian) countries. In about March of 1982, a bill was introduced by Senator Roberti (legislative Counsel's Digest, March 14, 1982, #01765), which apparently was tabled. This bill would condition the rights of nonresident aliens to take property by intestate succession or testamentary disposition upon the existence of a reciprocal right upon the part of citizens of the United States to take property upon the same terms and conditions as the nonresident alien in the country of which the alien is a resident. In this case, the proof of reciprocity was conditioned upon the existence of a federal treaty which specifically would provide for (a) formal and (b) material reciprocity of inheritance rights. In the absence of such treaty, nonresident aliens would not be eligibile to inherit and take property in California estates and trusts. The law was further to be amended such that nonresident aliens would not be eligible to take property by intestate succession. But relating to wills and last testament, including inter-vivos gifts, the nonresident aliens would be eligible to inherit from California estates and trusts if they could prove to be immediate relatives of the decedent, his/her children, brothers, sisters or parents. The nonresident aliens would have the burden of proving the existence of reciprocal rights of ineheritance. In each case, if no reciprocal rights of inheritance could be established, then such property would be diposed as escheated property for the benefit of the State of California and its residents. In addition to the proof of reciprocity of inheritance, such aliens would have to establish the evidence of their domicile and legal residency in the State of California. They would have five years from the decedent's death to appear and claim property left to them by the decedent. A special Surrogate Office would be created to administer the claims

in liaison with the Department of State. The purpose of the proposed bill was to cure the "Laughing heir syndrome", to stop the drain of such proceeds abroad and confront the inheritance racket vis-a-vis the claims of nonresident aliens and the estates and trusts of foreign-born Californians.

What does the California Law Revision Commission suggests to cure the problem and inequities caused by the 1974 repeal of the so-called "reciprocity test"?

There seem to be numerous cases where often we find nonresident alien cousins, nephews and nieces who are two or three times removed from the direct heirship line, making claims to rather substantial estates. Because it is expedient to certain countries to siphon U.S. dollars, they often seek to establish an heirship relationship between the decedet and the claimant through documents that date back to the early 1800's. However, since our Probate Code does not limit the heirship relationship for purposes of making and proving a claim, the courts find themselves unable to show the impropriety of distribution to these non-resident claimants. In particular in intestate cases where there are no living relatives found in the United States, the drain of such proceeds to foreign contries is substantial.

The underlying question is whether or not the California Legislature may stop the drain of money abroad through the mortis causa disposition and inter vivos gifts. The answer seem to be affirmative. The Legislature can stop the drain. The U.S. Department of State in a letter of November 18, 1981, had stated:

> "On the issue of inheritances and other personal transfers to citizens in communist countries we seem to agree it is a matter of the various state legilsatures" (to decide).

It would be entirely constitutional for the California Legislature to pass an emergency measure that would prohibit the Probate Courts the transfer of proceeds from California estates and trusts to nonresident aliens unless they can prove the existence of reciprocity. In the absence of a federal treaty between the United States and the foreign power in question of which the alien is a national, the proceeds could be legally and constitutionally kep in California and escheat to the State of California. With most countries of the totalitarian world (including the communist bloc), there is no federal treaty providing for the existence of (a) formal and (b) material reciprocity (dollar for dollar) pertaining to the right to inherit. However, it is to be noted that the International Consular Convention which has been mistaken by California Probate Courts as a "treaty" has nothing to do with this issue. In the absence of a federal treary that specifically controls formal and material reciprocity of inheritance, California can stop through an emergency legislation such economic hemorrhage which is approxiamtely $500 million to $1 billion per year. Unbelievable?

In view of the compelling need to offset the $600 million loss in 1983-84 and the $720 million loss in 1984-85, and the continuous lesses of revenue in the future, because of the repeal of the California State Inheritance Tax, we need creative solutions to the taxpayer's dilemma. Any increasing sales tax on commodities hurts the people, especially those who are poor or on a fixed income, the elderly. Under the existing probate law, why to keep playing Santa Claus to foreigners who do not live in California, instead for the Legislators taking

a fiduciary responsibylity that would be beneficial to the people residing in California (including their pocketbook). Under the common law doctrine and customary international law, inheritance rights stop at the international borders. Thus in the absence of a federal treaty, the California Legislature can keep such moneys in this State and for the benefit of Californians. We do not here advocate that the State should confiscate private property or inheritances. But with respect of nonresident aliens and in the absence of a federal treaty, it would be far prefarable if California escheats such inheritances rather allowing the transfer to foreign countries, especially if it may have a totalitarian form of government. The argument that "this is a federal problem", misses the point. In this case we are concerned not only with an equitable solution to cure the "Laughing heir syndrome", but also with California economy at large (tax-losses). The todays argument that the former Section 259 of the California Probate Code was "unconstitutional and that it had operated to frustrate decedents' wishes, to deny inheritance rights to innocent persons and to require the State of California and others to expend considerable time and expenses in litigation" must be put into the correct perspective. First, we cannot imagine how the old law could had frustrated the decedent's wishes in the intestate cases. As a general rule, many foreign-born who have no relatives in the United STates simply do not bother making their last will and testament, not because they give a dam where their inheritance will go, but rather assume that such property will stay and go to California. Secondly, inheritance rights are not a matter of the civil rights or human rights issue, they are statutory rights and stop short at the international borders. Thirdly, it is quite possible that the Appellate Court in the Kramer case (276 Cal. App. 2d 715, 1960) had erred and that simply the California Law RevisionCommission and the State Bar of California which had supported the repeal jumped their guns. The repeal did not cure the "Laughing her" and the "Santa Claus syndrome". Fourtly, this year is 1983, and California had lost over $600 million in revenues from the repeal of the California State Inheritance Tax. We may not see the loss today, but certainly will feel it during the next fiscal years. (This has been a part of my plea also.) Fiftly, the removal of the eligibiliy of nonresident aliens to inherit by intestate succession in California would not violate the equal protection clause and would be constitutional. It would cure the "Laughing heir syndrome". However, in my opinion, with respect the issue of nonresident aliens, the Commission boxed itself in. But it should not take a great deal of intellectaul imagination to resolve the "Santa Claus syndrome" also. Sixtly, we are here talking about at least $50 to $500 million savings a year to the State of California with rexpect to the intestate "inheritance racket". I believe that this warrants the need of researching this matter further and in a greater detail. While we are told that the amount of proceeds from inheritances that is escheated by the State of California amounts only about $30 million a year (on the average), the "Siphon effect" runs into billions. In view of its 1982 study, has the Commission data of how many people are dying (a) testate and (b) intestate in California annully, and what is (c) the amount of property inolved, and (d) how much of it is going abroad?

I shall be looking forward to your reply. In the meantime, with best wisehs and regrads,

Very truly yours,

D. R. J. Chytil

Encl.

Exhibit 2

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

relating to

Inheritance Rights of Nonresident Aliens

September 1973

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

STATE OF CALIFORNIA RONALD REAGAN, Governor

CALIFORNIA LAW REVISION COMMISSION
SCHOOL OF LAW—STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305
(415) 321-2300, EXT. 2479

September 20, 1973

To: THE HONORABLE RONALD REAGAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was directed by Resolution Chapter 42 of the Statutes of 1956 to make a study to determine whether Probate Code Sections 259, 259.1, and 259.2, pertaining to the right of nonresident aliens to inherit property in this state, should be revised. The Commission submitted a recommendation and study on this topic to the 1959 session of the Legislature. *Recommendation and Study Relating to the Right of Nonresident Aliens to Inherit,* 2 CAL. L. REVISION COMM'N REPORTS at B-1 (1959). No legislation was enacted as a result of the 1959 recommendation.

The Commission has given this topic further study in the light of recent judicial decisions concerning the constitutionality of statutes restricting the right of nonresident aliens to inherit and, as a result of this further study, submits this recommendation and a background study. The background study was prepared at the suggestion of the Commission by Mr. Richard H. Will and is reprinted with permission from the *Pacific Law Journal.* Only the recommendation (as distinguished from the study) is expressive of Commission intent.

Respectfully submitted,
JOHN D. MILLER
Chairman

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

INHERITANCE RIGHTS OF NONRESIDENT ALIENS

Probate Code Sections 259, 259.1, and 259.2, originally enacted in 1941 as an eve-of-war emergency measure, provide in effect that a nonresident alien cannot inherit real or personal property in this state unless the country in which he resides affords United States citizens the same rights of inheritance as are given to its own citizens. Section 259.1 places on the nonresident alien the burden of proving the existence of such reciprocal inheritance rights.

In 1959, the Law Revision Commission recommended the repeal of Probate Code Sections 259, 259.1, and 259.2.[1] The Commission reported that its study of these sections indicated that they had operated to frustrate decedents' wishes, to deny inheritance rights to innocent persons, and to require both the State of California and others to expend considerable time and expense in

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[1] *Recommendation and Study Relating to the Right of Nonresident Aliens to Inherit*, 2 Cal. L. Revision Comm'n Reports at B-5 (1959).

litigating cases which arose under those sections.[2] The Commission concluded that these adverse results far outweighed any benefits that might result from the operation of the sections. No legislation was enacted as a result of the 1959 recommendation.

In a 1968 decision, *Zschernig v. Miller*,[3] the United States Supreme Court struck down an Oregon statute which sought to limit the right of a nonresident alien to inherit. The Oregon statute, which required the nonresident alien to establish the reciprocal right of a United States citizen to take property in the country of the alien's residence on the same terms as a citizen of that country, was held to be an unconstitutional intrusion by the state into the field of foreign affairs. In 1969, a California court of appeal held in

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[2]The case for repeal of Section 259 and the related sections was stated in the 1959 recommendation as follows:

> 1. Section 259 constitutes an undesirable encroachment upon the basic principle of our law that a decedent's property should go to the person designated in his will or, in the absence of a will, to those close relatives designated in our statutes of descent to whom the decedent would probably have left the property had he made a will. Section 259 has frequently caused such property either to escheat or to go to remote relatives of the decedent at the expense of those persons who were the natural objects of his bounty.
>
> 2. In the cases where Section 259 is effective it causes hardship to innocent relatives of California decedents rather than to those persons who make the policies of the countries which deny reciprocal inheritance rights to United States citizens.
>
> 3. The difficulty and expense of proving the existence of reciprocal inheritance rights is so substantial that even when such rights exist persons whose inheritances are small may find it uneconomic to claim them.
>
> 4. Section 259 does not necessarily operate to keep American assets from going to unfriendly countries. Many such countries find the general balance of trade with the United States in inheritances so favorable that they provide the minimum reciprocal inheritance rights required to qualify their citizens to inherit here. Moreover, keeping American assets out of the hands of enemies or potential enemies is a function more appropriately performed by the United States Government. This responsibility is in fact being handled adequately by the federal government through such regulations as the Trading with the Enemy Act and the Foreign Assets Control Regulation of the Secretary of the Treasury.
>
> 5. Section 259 does not insure that a beneficiary of a California estate living in a foreign country will actually receive the benefit of his inheritance. If the reciprocal rights of inheritance required by the present statute exist the nonresident alien's inheritance is sent to him even though it may be wholly or largely confiscated by his government through outright seizure, taxation, currency exchange rates or other means.
>
> 6. Section 259 has led to much litigation. The Attorney General has often been involved since an inheritance not claimed by reason of the statute may eventually escheat. Most of this litigation has been concerned with whether the foreign country involved did or did not permit United States citizens to inherit on a parity with its own citizens on the critical date. . . . [2 Cal. L. Revision Comm'n Reports at B-5, B-6.]

[3]389 U.S. 429 (1968). See note 6 *infra*.

Estate of Kraemer[4] that Section 259, being substantially the same as the Oregon statute, was likewise unconstitutional for the same reason. And in 1971, in *Estate of Horman*,[5] the California Supreme Court said: "*Kraemer* involved a statute substantially identical to that in *Zschernig*, and the decision in *Kraemer* was completely controlled by *Zschernig*."[6]

Accordingly, because recent decisions indicate that Sections 259, 259.1, and 259.2 are unconstitutional and because the experience under the sections has been unsatisfactory, the Commission again recommends their repeal.

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to repeal Chapter 3 (commencing with Section 259) of Division 2 of the Probate Code relating to inheritance rights of aliens.

The people of the State of California do enact as follows:

Section 1. Chapter 3 (commencing with Section 259) of Division 2 of the Probate Code is repealed.

Comment. Chapter 3 (commencing with Section 259) is repealed. The manner in which it was applied was held unconstitutional in *Estate of Kraemer*, 276 Cal. App.2d 715, 81 Cal. Rptr. 287 (1969), which relied on *Zschernig v. Miller*, 389 U.S. 429 (1968). *Zschernig* invalidated an Oregon statute similar in text and operation to the California statute. See also *Estate of Horman*, 5 Cal.3d 62, 79, 485 P.2d 785, 797, 95 Cal. Rptr. 433, 445 (1971) ("*Kraemer* involved a statute substantially identical to that in

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[4] 276 Cal. App.2d 715, 81 Cal. Rptr. 287 (1969). The California Supreme Court denied a hearing, Peters, J., being of the opinion that the petition should be granted.

[5] 5 Cal.3d 62, 79, 485 P.2d 785, 797, 95 Cal. Rptr. 433, 445 (1971).

[6] In *Clark v. Allen*, 331 U.S. 503 (1947), the United States Supreme Court held Section 259 constitutional on its face. In *Zschernig*, however, the court struck down the comparable Oregon statute because, as applied, the statute required "minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements," and other matters. 389 U.S. at 432. The California statute has been administered in a manner similar to that of the Oregon statute invalidated in *Zschernig*. See Estate of Chichernea, 66 Cal.2d 83, 424 P.2d 687, 57 Cal. Rptr. 135 (1967); Estate of Larkin, 65 Cal.2d 60, 416 P.2d 473, 52 Cal. Rptr. 441 (1966); Estate of Schluttig, 36 Cal.2d 416, 224 P.2d 695 (1950); Estate of Gogabashvele, 195 Cal. App.2d 503, 16 Cal. Rptr. 77 (1961). Reppy, J., concurring in *Estate of Kraemer*, 276 Cal. App.2d 715, 726, 81 Cal. Rptr. 287, 295 (1969), made the point that Section 259 was not unconstitutional on its face but that it was necessary to hold it unconstitutional as applied because the California Supreme Court's opinions in *Estate of Larkin, supra*, and *Estate of Chichernea, supra*, required lower courts to make the unconstitutional inquiries. See also Comment, *Inheritance Rights of Nonresident Aliens–A Look at California's Reciprocity Statute*, 3 Pac. L.J. 551 (1972), reprinted *infra*.

Zschernig, and the decision in *Kraemer* was completely controlled by *Zschernig.*"). In addition, the operation of the California statute frustrated decedents' wishes, denied inheritance rights to innocent persons, and required the inefficient expenditure of time and money by the state. See *Recommendation and Study Relating to Inheritance Rights of Nonresident Aliens,* 11 Cal. L. Revision Comm'n Reports 421 (1973). See also Comment, *Inheritance Rights of Nonresident Aliens—A Look at California's Reciprocity Statute,* 3 Pac. L.J. 551 (1972).