

Memorandum 84-50

Subject: Study L-626 - Wills and Intestate Succession (Amendments to Assembly Bill 2290)

Attached to this memorandum are the following:

(1) A copy of Assembly Bill 2290 as amended in Assembly April 23, 1984.

(2) Amendments to Assembly Bill 2290 designed to carry out decisions made by the Commission at the last meeting and to deal with other matters raised by the State Bar.

(3) A draft of a report prepared for the Senate Committee on Judiciary revising and supplementing the official comments to the provisions of Assembly Bill 2290.

We plan to have Assembly Bill 2290 amended as soon as possible to incorporate the attached amendments. It will be much easier to review the changes made when they are available in the form of a reprinted bill. We will send you a copy of the reprinted bill as soon as it is available. Accordingly, you may wish to delay your study of the amendments until they have been incorporated into the reprinted bill. However, we are sending this material now in case you do not want to delay your study of the amendments.

I direct your attention to Amendment 40. This amendment adds a sentence to Section 240-- the statutory rule for distribution by representation. As approved by the Commission, this sentence provided that the law applicable prior to January 1, 1985, applied "if a will or trust executed before January 1, 1985, calls for distribution per stirpes or by right of representation (emphasis added)." The staff deleted the underscored language at the urging of the State Bar Section; but the deleted language can be added in the next amendment to Assembly Bill 2290 if the Commission so desires. This issue is one that should be discussed by the Commission at the June meeting.

We have not dealt in these amendments with the problem of the application of the 1983 legislation where the decedent died before January 1, 1985. We will prepare a separate memorandum on that problem and will amend Assembly Bill 2290 after the June meeting to add the necessary additional provisions to deal with that problem and to make any other needed amendments.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

AMENDMENTS TO ASSEMBLY BILL NO. 2290 AS AMENDED IN
ASSEMBLY APRIL 23, 1984

Amendment 1

In line 1 of the title, strike out "Section 226.12" and insert:
Sections 226.12 and 5103

Amendment 2

In line 2 of the title, strike out "82, 140, 143, 144, 146,"
and insert:
26, 54, 82, 140, 142, 143, 144, 146, 147,

Amendment 3

In line 3 of the title, strike out "6146, 6147, 6152," and
insert:
6140, 6142, 6143, 6144, 6146, 6147, 6152, 6165,

Amendment 4

On line 4 of the title, after "6408.5," insert:
6409,

Amendment 5

In line 5 of the title, strike out "and 665" and insert:
665, and 6153

Amendment 6

On page 4, between lines 11 and 12, insert:
SEC. 2. Section 5103 of the Civil Code is amended to read:
5103. (a) Either Subject to subdivision (b), either husband
or wife may enter into any ~~engagement or~~ transaction with the other, or
with any other person, respecting property, which either might if
unmarried.

(b) subject Except as provided in Sections 143, 144, and 146
of the Probate Code, in transactions between themselves, a husband and

wife are subject to the general rules which control the actions of persons occupying confidential relations with each other, as defined by Title 8 (commencing with Section 2215) of Part 4 of Division 3.

Amendment 7

On page 4, line 12, strike out "SEC. 1.5." and insert:
SEC. 3.

Amendment 8

On page 4, after line 38, insert:

SEC. 4. Section 26 of the Probate Code is amended to read:

26. "Child" includes any individual entitled to take as a child under this code by intestate succession from the parent whose relationship is involved ~~and excludes any person who is only a stepchild, a foster child, a grandchild, or any more remote descendant.~~

SEC. 5. Section 54 of the Probate Code is amended to read:

54. "Parent" includes any person individual entitled to take, ~~or who would be entitled to take if the child died without a will,~~ as a parent under this code by intestate succession from the child whose relationship is ~~in question and excludes any person who is only a stepparent, foster parent, or grandparent~~ involved.

Amendment 9

On page 5, line 1, strike out "SEC. 2." and insert:
SEC. 6.

Amendment 10

On page 5, line 22, strike out "SEC. 2.1." and insert:
SEC. 7.

Amendment 11

On page 6, line 2, strike out "SEC. 2.2." and insert:
SEC. 8.

Amendment 12

On page 6, between lines 7 and 8, insert:

SEC. 9. Section 142 of the Probate Code is amended to read:

142. (a) A waiver under this chapter shall be in writing and shall be signed by the surviving spouse.

(b) Subject to subdivision (c), a waiver under this chapter is enforceable only if it satisfies the requirements of subdivision (a) and is enforceable under either Section 143 or Section 144.

(c) Enforcement of the waiver against the surviving spouse is subject to the same defenses as enforcement of a contract, except that:

(1) Lack of consideration is not a defense to enforcement of the waiver.

(2) A person intending to marry may make a waiver under this chapter as if married, but the waiver becomes effective only upon the marriage.

Amendment 13

On page 6, line 8, strike out "SEC. 2.4." and insert:
SEC. 10.

Amendment 14

On page 6, strike out lines 10 to 13, inclusive, and insert:
143. (a) Subject to Section 142, a waiver is enforceable under this section unless the surviving spouse proves either of the following:

(1) A fair and reasonable disclosure of the property or financial obligations of

Amendment 15

On page 6, line 18, strike out "(b)" and insert:
(2)

Amendment 16

On page 6, between lines 20 and 21, insert:
(b) Subdivision (b) of Section 5103 of the Civil Code does not apply if the waiver is enforceable under this section.

Amendment 17

On page 6, line 21, strike out "SEC. 2.6." and insert:
SEC. 11.

Amendment 18

On page 6, line 23, after the comma insert:
subject to Section 142,

Amendment 19

On page 6, strike out lines 24 and 25 and insert:
waiver is enforceable under this section if the court

Amendment 20

On page 6, strike out lines 29 and 30 and insert:
spouse.

Amendment 21

On page 6, line 32, after "property" insert:
and financial obligations

Amendment 22

On page 6, strike out lines 33 and 34 and insert:
decedent and the decedent did not violate the duty imposed by subdivision
(b) of Section 5103 of the Civil Code.

Amendment 23

On page 6, lines 38 and 39, strike out "existing facts and
circumstances" and insert:
circumstances existing at the time enforcement is sought

Amendment 24

On page 7, between lines 3 and 4, insert:
(c) Except as provided in paragraph (2) of subdivision (a),
subdivision (b) of Section 5103 of the Civil Code does not apply if the
waiver is enforceable under this section.

Amendment 25

On page 7, line 4, strike out "SEC. 3." and insert:
SEC. 12.

Amendment 26

On page 7, line 10, strike out "Unless" and insert:
Except as provided in subdivisions (c) and (d) of Section 147, unless

Amendment 27

On page 7, strike out lines 14 and 15 and insert:

(c) Subject to subdivision (d), the agreement is enforceable only if it satisfies the requirements of subdivision (b) and is enforceable under either subdivision (e) or subdivision (f).

(d) Enforcement of the agreement against a party to the agreement is subject to the same defenses as enforcement of any other contract, except that:

(1) Lack of consideration is not a defense to enforcement of the agreement.

(2) Persons intending to marry may enter into the agreement as if married, but the agreement becomes effective only upon their marriage.

(e) Subject to subdivision (d), an agreement is enforceable under this subdivision unless the party to the agreement against whom enforcement is sought proves either of the

Amendment 28

On page 7, line 17, after "property" insert:
or financial obligations

Amendment 29

On page 7, strike out lines 26 and 27 and insert:

(f) Subject to subdivisions (d) and (g), an agreement

Amendment 30

On page 7, line 28, after "enforceable" insert:
under this subdivision

Amendment 31

On page 7, line 30, strike out "spouses and the spouse" and insert:
spouses.

Amendment 32

On page 7, strike out lines 31 to 33, inclusive.

Amendment 33

On page 7, line 34, strike out "(e)" and insert:

(g)

Amendment 34

On page 7, line 36, strike out "(d)" and insert:

(f)

Amendment 35

On page 7, lines 37 and 38, strike out "existing facts and circumstances" and insert:

circumstances existing at the time enforcement is sought

Amendment 36

On page 8, between lines 2 and 3, insert:

(h) Subdivision (b) of Section 5103 of the Civil Code does not apply if the agreement is enforceable under this section.

SEC. 13. Section 147 of the Probate Code is amended to read:

147. (a) A Subject to subdivisions (c) and (d), a waiver, agreement, or property settlement made after December 31, 1984, is invalid insofar as it affects the rights listed in subdivision (a) of Section 141 unless it satisfies the requirements of this chapter.

(b) Nothing in this chapter affects the validity or effect of any waiver, agreement, or property settlement made prior to January 1, 1985, and the validity and effect of such waiver, agreement, or property settlement shall continue to be determined by the law applicable to the waiver, agreement, or settlement prior to January 1, 1985.

(c) Nothing in this chapter affects the validity or effect of any premarital property agreement, whether made prior to, on, or after January 1, 1985, insofar as the premarital property agreement affects the rights listed in subdivision (a) of Section 141, and the validity and effect of such premarital property agreement shall be determined by the law otherwise applicable to the premarital property agreement. Nothing in this subdivision limits the enforceability under this chapter of a

waiver made under this chapter by a person intending to marry that is otherwise enforceable under this chapter.

(d) Nothing in this chapter limits any right one spouse otherwise has to revoke a consent to disposition of his or her half of the community or quasi-community property under the will of the other spouse.

Amendment 37

On page 8, line 3, strike out "SEC. 3.1." and insert:
SEC. 14.

Amendment 38

On page 8, line 22, strike out "SEC. 4." and insert:
SEC. 15.

Amendment 39

On page 8, line 36, strike out "SEC. 5." and insert:
SEC. 16.

Amendment 40

On page 9, strike out lines 9 to 11, inclusive, and insert:
living issue. If a will or trust calls for distribution per stirpes or by right of representation, these terms shall be construed under the law that applied prior to January 1, 1985.

Amendment 41

On page 9, line 12, strike out "SEC. 6." and insert:
SEC. 17.

Amendment 42

On page 9, line 37, strike out "SEC. 7." and insert:
SEC. 18.

Amendment 43

On page 10, line 5, strike out "SEC. 7.3." and insert:
SEC. 19.

Amendment 44

On page 10; line 11, strike out "SEC. 7.5." and insert:
SEC. 20.

Amendment 45

On page 10, line 19, strike out "SEC. 7.7." and insert:
SEC. 21.

Amendment 46

On page 10, line 22, after "the" insert:
intention is indicated by the will that the

Amendment 47

On page 10, lines 23 and 24, strike out "in accordance with
the testator's intent"

Amendment 48

On page 10, line 29, strike out "SEC. 8." and insert:
SEC. 22.

Amendment 49

On page 11, between lines 1 and 2, insert:

(c) If a devise made by the will to an interested witness fails because the presumption established by subdivision (b) applies to the devise and the witness fails to rebut the presumption, the interested witness shall take such proportion of the devise made to the witness in the will as does not exceed the share of the estate which would be distributed to the witness if the will were not established. Nothing in this subdivision affects the law that applies where it is established that the witness procured a devise by duress, menace, fraud, or undue influence.

Amendment 50

On page 11, line 2, strike out "SEC. 8.5." and insert:
SEC. 23.

Amendment 51

On page 11, between lines 36 and 37, insert:

SEC. 24. Section 6140 of the Probate Code is amended to read:

6140. ~~A will is to be construed according to the intention of the testator.~~ (a) The intention of the testator as expressed in the will controls the legal effect of the dispositions made in the will.

(b) The rules of construction expressed in this article apply where the intention of this testator is not indicated by the will.

SEC. 25. Section 6142 of the Probate Code is amended to read:

6142. Except as provided by Sections 1386.1 and 1386.2 of the Civil Code relating to powers of appointment, ~~absent unless~~ a contrary intention ~~of the testator is indicated by the will~~, a will passes all property the testator owns at death including property acquired after execution of the will.

SEC. 26. Section 6143 of the Probate Code is amended to read:

6143. ~~Absent Unless~~ a contrary intention ~~of the testator is indicated by the will~~, a devise of property to more than one person vests the property in them as owners in common.

SEC. 27. Section 6144 of the Probate Code is amended to read:

6144. ~~Absent Unless~~ a contrary intention ~~of the testator is indicated by the will~~, if a will directs the conversion of real property into money, the property and its proceeds are deemed personal property from the time of the testator's death.

Amendment 52

On page 11, line 37, strike out "SEC. 8.7." and insert:

SEC. 28.

Amendment 53

On page 12, line 10, strike out "SEC. 8.8." and insert:

SEC. 29.

Amendment 54

On page 12, line 27, strike out "SEC. 9." and insert:

SEC. 30.

Amendment 55

On page 13, between lines 17 and 18, insert:

SEC. 31. Section 6153 is added to the Probate Code, to read:

6153. A testamentary disposition, including a devise to a person on attaining majority, is presumed to vest at the testator's death.

SEC. 32. Section 6165 of the Probate Code is amended to read:

6165. The rules of construction in this article apply ~~in~~ the absence of a contrary where the intention of the testator is not indicated by the will.

Amendment 56

On page 13, line 18, strike out "SEC. 10." and insert:

SEC. 33.

Amendment 57

On page 13, line 27, strike out "SEC. 11." and insert:

SEC. 34.

Amendment 58

On page 13, line 28, strike out "SEC. 11.1." and insert:

SEC. 35.

Amendment 59

On page 13, line 34, strike out "SEC. 11.3." and insert:

SEC. 36.

Amendment 60

On page 14, line 25, strike out "SEC. 11.7." and insert:

SEC. 37.

Amendment 61

On page 15, line 3, strike out "SEC. 12." and insert:

SEC. 38.

Amendment 62

On page 15, line 8, strike out "SEC. 13." and insert:
SEC. 39.

Amendment 63

On page 15, line 38, strike out "SEC. 14." and insert:
SEC. 40.

Amendment 64

On page 16, line 28, strike out "SEC. 15." and insert:
SEC. 41

Amendment 65

On page 17, line 37, strike out "SEC. 16" and insert:
SEC. 42.

Amendment 66

On page 18, between lines 12 and 13, insert:

SEC. 43. Section 6409 of the Probate Code is amended to read:

6409. (a) If a person dies intestate as to all or part of his or her estate, property the decedent gave during lifetime to an heir is treated as an advancement against that heir's share of the intestate estate only if one of the following conditions is satisfied:

(1) The decedent declares in a contemporaneous writing that the gift is to be deducted from the heir's share of the estate or that the gift is an advancement against the heir's share of the estate.

(2) The heir acknowledges in writing that the gift is to be so deducted or is an advancement.

(b) Subject to subdivision (c), the property advanced is to be valued as of the time the heir came into possession or enjoyment of the property or as of the time of death of the decedent, whichever occurs first.

(c) If the value of the property advanced is expressed in the contemporaneous writing of the decedent, or in an acknowledgment of the heir made contemporaneously with the advancement, that value is conclusive in the division and distribution of the intestate estate.

(d) If the recipient of the property advanced fails to survive the decedent, the property is not taken into account in computing the intestate share to be received by the recipient's issue unless the declaration or acknowledgment provides otherwise.

Amendment 67

On page 18, line 13, strike out "SEC. 17." and insert:
SEC. 44.

Amendment 68

On page 18, line 17, strike out "SEC. 18." and insert:
SEC. 45.

Amendment 69

On page 18, line 33, strike out "SEC. 19." and insert:
SEC. 46.

Amendment 70

On page 19, line 11, strike out "SEC. 20." and insert:
SEC. 47.

REPORT OF SENATE COMMITTEE ON JUDICIARY
ON ASSEMBLY BILL 2290

Assembly Bill 2290 was introduced to effectuate the California Law Revision Commission's Recommendation Relating to Revision of Wills and Intestate Succession Law, 17 Cal. L. Revision Comm'n Reports 537 (1984). The intent of the Senate Committee on Judiciary in approving Assembly Bill 2290 is reflected by the new and revised comments set out below, and with respect to the comments which are not revised below, by the comments in the Law Revision Commission recommendation.

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

Comment. Section 226.12 is amended to conform the notice to the provisions of Probate Code Section 6408(a)(3), the applicable inheritance statute.

Civil Code § 5103 (technical amendment). Transactions between husband and wife

Comment. Section 5103 is amended to divide the section into two subdivisions and to add references to the Probate Code provisions that constitute exceptions to the rule stated in subdivision (b). The division of Section 5103 into two subdivisions facilitates reference in other sections to the rule stated in subdivision (b). See, e.g., Prob. Code §§ 143, 144, 146. The omission of the word "engagement" in subdivision (a) is not a substantive change.

Probate Code § 3 (amended). Transitional provision

Comment. Section 3 is amended to designate the first sentence as subdivision (a) and to revise it to apply to all of Divisions 1, 2, and 6 enacted by 1983 Cal. Stats. ch. 842. Formerly the section did not apply to Division 1 (preliminary provisions and definitions) or to Part 2 (words and phrases defined) or Part 6 (division by representation) of Division 2. This amendment will ensure that if the decedent dies before January 1, 1985, a consistent body of old law will apply to the case.

Subdivision (b) is added to Section 3. The sections listed in subdivision (b) contain references to the new law. If the decedent dies before January 1, 1985, the references to the new law shall be deemed to be references to the corresponding provision of old law.

NOTE: THE COMMENT TO SECTION 3 WILL NEED TO BE REVISED TO REFLECT THE CHANGES TO BE MADE IN THE SECTION.

Probate Code § 26 (technical amendment). Child

Comment. Section 26 is amended to delete the last clause of the section which excluded from the definition of "child" any person "who is only a stepchild, a foster child, a grandchild, or any more remote descendant." The amendment does not make a substantive change; the

deleted language has been omitted because it was unnecessary and was confusing. As was noted in the 1983 Legislative Committee Comment to Section 26 as originally enacted, a stepchild or foster child was not included within the definition of "child" only on the basis of that relationship, but could be included if the requirements of Section 6408 were met. Deletion of the last clause from Section 26 makes it clearer that a stepchild or foster child may be included within the definition of "child" when the requirements of Section 6408 are met. See also Section 6152 (parent-child relationship for purposes of construing will).

Probate Code § 54 (technical amendment). Parent

Comment. Section 54 is amended to delete (1) the phrase "or who would be entitled to take if the child died without a will" and (2) the last clause of the section which excluded from the definition of "parent" any person "who is only a stepparent, foster parent, or grandparent." The first deletion eliminates unnecessary language and conforms Section 54 to Section 26 which does not contain similar language. The second deletion is not a substantive change, but the deleted language has been omitted because it was unnecessary and confusing. As was noted in the 1983 Legislative Committee Comment to Section 54 as originally enacted, a stepparent or foster parent was not included within the definition of "parent" only on the basis of that relationship, but could be included if the requirements of Section 6408 were met. Deletion of the last clause from Section 54, makes clearer that a stepparent or foster parent may be included within the definition of "parent" when the requirements of Section 6408 are met. See also Section 6152 (parent-child relationship for purpose of construing will) and Section 6408.5 (inheritance from or through child).

Probate Code § 82 (technical amendment). Trust

Comment. Section 82 is amended to add the reference to the Uniform Transfers to Minors Act of any state.

Probate Code § 140 (technical amendment). "Waiver" defined

Comment. Section 140 is amended to change the word "executed" to "signed" for clarity. This change is nonsubstantive. Conforming changes are made in Sections 143, 144, and 146.

Probate Code § 142 (amended). Formal requirements of waiver;
general rule on enforceability

Comment. Section 142 is amended to add subdivisions (b) and (c). These new subdivisions make clear that enforcement of the waiver is subject to the same defenses as enforcement of a contract, but lack of consideration is not a defense and a minor intending to marry is treated as an emancipated minor (Civil Code § 63). The surviving spouse can raise the defense of lack of capacity to contract. See Civil Code § 1556 (unsound mind or deprived of civil rights). The defense of lack

of consent because of duress, menace, fraud, undue influence, or mistake (Civil Code §§ 1565-1579) also is available. But see the Comment to Section 143.

Probate Code § 143 (amended). Enforcement where independent legal counsel and disclosure or waiver of disclosure

Comment. Section 143 is amended to expand the disclosure under subdivision (a)(1) to include a disclosure of the financial obligations of the decedent. Information concerning financial obligations may be important in determining whether the rights described in Section 141 should be waived.

Enforcement of a waiver under Section 143 is subject to the same defenses as enforcement of a contract. See Section 142(c). However, the requirement of representation by independent legal counsel and disclosure or waiver of disclosure on the advice of independent legal counsel should permit enforcement of the waiver against a claim of undue influence or duress or mistake except where the surviving spouse lacked sound mind or there was some type of duress, mistake, or fraud that the independent counsel and disclosure requirements do not protect against. Thus, parties who seriously want an enforceable waiver should obtain independent legal counsel despite the added expense. See Rothschild, Antenuptial and Postnuptial Agreements, in 2 California Marital Dissolution Practice § 29.2, at 1175, § 29.4, at 1176 (Cal. Cont. Ed. Bar 1983); Wolfe and Hellman, Handling Surviving Spouse's Share of Marital Property, in California Will Drafting Practice §§ 5.31-5.33, at 205-207 (Cal. Cont. Ed. Bar 1982). However, even if the requirements of Section 143 are not satisfied, the waiver may be enforceable under Section 144.

Subdivision (b) is added to make clear that the fiduciary standards normally applicable to spouses pursuant to Section 5103 do not apply if the requirements of Section 143 are satisfied.

As to nonsubstantive clarifying revisions in Section 143, see the Comment to Section 140.

Probate Code § 144 (amended). Enforcement in discretion of court

Comment. Section 144 is amended to delete the requirement of paragraphs (1) and (2) of subdivision (a) that the surviving spouse "understood the effect of and voluntarily signed the waiver." In place of this requirement, Section 142 has been amended to make enforcement of the waiver against the surviving spouse subject to the same defenses as enforcement of a contract. See the Comment to Section 142. See also the Comment to Section 143.

Paragraph (2) of subdivision (a) is amended to require adequate knowledge not only of the property of the decedent but also of the financial obligations of the decedent. Information concerning financial obligations may be important in determining whether the rights described in Section 141 should be waived.

The phrase "circumstances existing at the time enforcement is sought" is substituted for "existing facts and circumstances" in subdivision (b). This is a clarifying, nonsubstantive revision.

Section 144 also is amended to make clear the extent to which the fiduciary standards normally applicable to spouses pursuant to Section 5103 apply when the waiver is sought to be enforced under Section 144. See subdivision (a)(2) and subdivision (c) of Section 144. See also

Wolfe and Hellman, Handling Surviving Spouse's Share of Marital Property, in California Will Drafting Practice §§ 5.31, 5.32 at 205-206 (Cal. Cont. Ed. Bar 1982).

As to nonsubstantive, clarifying revisions in Section 144, see the Comment to Section 140.

Probate Code § 146 (amended). Alteration or revocation of waiver

Comment. Section 146 is amended to conform to Sections 142-144. The introductory phrase added to subdivision (b) makes clear that a waiver expressly may provide, for example, that it is revocable during the lifetime of the other spouse. See, e.g., Wolfe and Hellman, Handling Surviving Spouses's Share of Marital Property, in California Will Drafting Practice §§ 5.34, at 207-208, § 5.36, at 208-209 (Cal. Cont. Ed. Bar 1982).

Probate Code § 147 (amended). Preexisting agreements and premarital property agreements not affected

Comment. Subdivisions (c) and (d) are added to Section 147. Subdivision (c) makes clear that the rights listed in subdivision (a) of Section 141 can be waived in a valid premarital property agreement, even though the requirements of this chapter are not satisfied. Subdivision (d) makes clear that this chapter does not limit the right to revoke a waiver of the right to take community or quasi-community property against the will of the other spouse. See discussion in Wolfe and Hellman, Handling Surviving Spouses's Share of Marital Property, in California Will Drafting Practice §§ 5.31-5.34, at 205-208 (Cal. Cont. Ed. Bar 1982). See also the Comment to Section 146.

Probate Code § 150 (amended). Contracts concerning will or succession

Comment. Section 150 is amended to substitute "made" for "executed" in subdivision (a) and to add subdivision (c). Under subdivision (a), Section 150 applies only to contracts made after December 31, 1984. Subdivision (c) makes clear that if the contract was made on or before December 31, 1984, old law will apply to that case. See former subdivision (6) of Section 1624 of the Civil Code, which provided that "an agreement to devise or bequeath any property, or to make any provision for any person by will" had to be in writing and subscribed by the party to be charged or by the party's agent.

Probate Code § 224 (amended). Life or accident insurance

Comment. Section 224 is amended to substitute the special rule provided by the optional provision of Section 5 of the Uniform Simultaneous Death Act for former subdivision (b) of Section 224. The new special rule applies where the insurance policy is community or quasi-community property and there is no alternative beneficiary except the estate or personal representatives of the insured. In such a case, the proceeds are not paid to the estate or personal representatives of the insured, but are distributed half as if one spouse had survived and as if that half belonged to that spouse, and half as if the other spouse had survived and as if that other half belonged to the other spouse. See Section 103.

Probate Code § 240 (amended). Representation

Comment. Section 240 is amended to apply its rule of representation to inter vivos and testamentary trusts where no contrary intention is expressed in the trust instrument, to delete the former application of the section to a will that "calls for distribution per stirpes or by representation," and to add the last sentence to provide that if a will or trust executed before January 1, 1985, calls for distribution per stirpes or by right of representation, these terms shall be construed under the law that applied prior to January 1, 1985. For a discussion of the former law, see C.E.B. Estate Planning and California Probate Reporter 103 (February 1984).

Probate Code § 282 (amended). Effect of disclaimer

Comment. Section 282 is amended to broaden paragraph (1) of subdivision (b) by deleting the former limitation in that paragraph to disclaimers of "an interest created by intestate succession" and by applying the paragraph to any "other provision of a will or trust." The purpose of this paragraph is to prevent an heir from disclaiming property for the purpose of increasing the share of his or her line at the expense of other lines of descendants. This paragraph changes the rule concerning manner of distribution to children of the disclaimant as enunciated in Estate of Bryant, 149 Cal. App.3d 323, 335, 196 Cal. Rptr. 856 (1983).

Probate Code § 649.6 (added). References in instruments

Comment. Section 649.6 is new and is a special exception to the rule of Section 3. See also Section 665.

Probate Code § 665 (added). References in instruments

Comment. Section 665 is new and is a special exception to the rule of Section 3. See also Section 649.6.

Probate Code § 736 (technical amendment). No sale of specifically devised property to exonerate other encumbered property

Comment. Section 736 is amended to make nonsubstantive drafting improvements.

Probate Code § 6112 (amended). Who may witness a will; interested witness

Comment. Section 6112 is amended (1) to limit subdivision (b) so that the presumption does not apply if there are two other witnesses to the will who are disinterested witnesses and (2) to add subdivision (c). Subdivision (c) continues the substance a portion of former Section 51.

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

Comment. Section 6122 is amended to add subdivision (f). Subdivision (f) is a special exception to the rule of Section 3.

Probate Code § 6140 (amended). Intention of testator; rules of construction

Comment. Section 6140 is amended to substitute language drawn from Section 2-603 of the Uniform Probate Code for the former language of the section. This change is nonsubstantive. Nothing in Section 6140 limits the extent to which extrinsic evidence may be used under existing law to determine the testator's intent as expressed in the will. See generally 7 B. Witkin, Summary of California Law Wills and Probate §§ 160-162, at 5676-79 (8th ed. 1974).

Probate Code § 6142 (amended). Will passes all property including after-acquired property

Comment. Section 6142 is amended to provide that the section applies unless a contrary intention is indicated "by the will." This change is nonsubstantive. Nothing in Section 6142 limits the extent to which extrinsic evidence may be used under existing law to determine the testator's intent as expressed in the will. See generally 7 B. Witkin, Summary of California Law Wills and Probate §§ 160-162, at 5676-79 (8th ed. 1974).

Probate Code § 6143 (amended). Devisees as owners in common

Comment. Section 6143 is amended to provide that the section applies unless a contrary intention is indicated "by the will." This change is nonsubstantive. Nothing in Section 6143 limits the extent to which extrinsic evidence may be used under existing law to determine the testator's intent as expressed in the will. See generally 7 B. Witkin, Summary of California Law Wills and Probate §§ 160-162, at 5676-79 (8th ed. 1974).

Probate Code § 6144 (amended). Direction in will to convert real property into money

Comment. Section 6144 is amended to provide that the section applies unless a contrary intention is indicated "by the will." This change is nonsubstantive. Nothing in Section 6144 limits the extent to which extrinsic evidence may be used under existing law to determine the testator's intent as expressed in the will. See generally 7 B. Witkin, Summary of California Law Wills and Probate §§ 160-162, at 5676-79 (8th ed. 1974).

Probate Code § 6146 (amended). Failure of devise

Comment. Section 6146 is amended to delete the second sentence from subdivision (a). The second sentence of subdivision (a) formerly established a constructional preference in favor of contingent remainders (survivorship required) rather than vested remainders (survivorship not required). With the deletion of the second sentence from subdivision (a), the question of whether or not survivorship is required is to be determined according to general rules of construction. See, e.g., Section 6140 (intention of testator). See also 6153 (presumption that disposition vests at testator's death).

Probate Code § 6147 (amended). Antilapse

Comment. Section 6147 is amended to delete the second sentence of subdivision (c).

Probate Code § 6152 (technical amendment). Half bloods, adopted persons, and persons born out of wedlock

Comment. Section 6152 is amended to make clear that under some circumstances stepchildren and foster children are included in terms of class gift or relationship pursuant to the rules for intestate succession. See Section 6408 (when stepchild or foster child treated the same as adopted child).

Subdivision (c), which is not affected by the amendment to Section 6152, makes clear that the rules stated in subdivisions (a) and (b) apply for the purposes of the antilapse statute (Section 6147) and in construing devises (Section 6151).

Probate Code § 6153 (new). Presumption that devise vests at testator's death.

Comment. Section 6153 continues the substance of former Section 28.

Probate Code § 6165 (amended). Rules of construction apply in absence of contrary intention

Comment. Section 6165 is amended to provide that the rules of construction in this article apply unless a contrary intention is indicated "by the will." This change is nonsubstantive. Nothing in Section 6165 limits the extent to which extrinsic evidence may be used under existing law to determine the testator's intent as expressed in the will. See generally 7 B. Witkin, Summary of California Law Wills and Probate §§ 160-162, at 5676-79 (8th ed. 1974).

Probate Code § 6206 (added). Reference to Uniform Gifts to Minors Act

Comment. Section 6206 is added in recognition that the Uniform Gifts to Minors Act has been superseded by the new Uniform Transfers to Minors Act. See also Sections 6245 and 6246.

Probate Code § 6226 (amended). Revocation by dissolution or annulment of marriage

Comment. Subdivision (d) of Section 6226 is amended so that the section will only apply to cases where the final judgment of dissolution or annulment of marriage occurs on or after January 1, 1985. This makes Section 6226 consistent with subdivision (f) of Section 6122.

Probate Code § 6247 (amended). Application of provisions of chapter

Comment. Section 6247 is amended to add subdivisions (b) and (c). Subdivision (c) validates California statutory wills executed after the operative date of the new law on a form prepared under the old law; such wills are governed by old law except as provided in subdivision (b).

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

Comment. Section 6402 is amended to make a nonsubstantive technical change.

Probate Code § 6408.5 (amended). Inheritance by natural relatives from or through adopted child or child born out of wedlock

Comment. Subdivision (b) of Section 6408.5 is amended to require both acknowledgment and contribution to the support or care of a child born out of wedlock before the parent or a relative of that parent may inherit from or through the child. Formerly, subdivision (b) required either acknowledgment or support.

Probate Code § 6409 (amended). Advancements

Comment. Section 6409 is amended so that it covers advancements where there is a partial intestacy.

Probate Code § 6560 (amended). Share of omitted spouse

Comment. Section 6560 is amended to provide that, with respect to the testator's separate property, the omitted spouse shall receive the lesser of an intestate share or one-half. This eliminates the possibility that the statutory shares may add up to more than one hundred per cent if the testator's will, for example, omits to provide for a spouse and two or more children. See Section 6401(c)(3) and Section 6570.