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Memorandum 86-33

Subject: Study L - Assembly Bill 2625 (Comprehensive Probate Bill)

Exhibit 1 attached is a letter stating that the Executive Committee of the Probate Section of the Los Angeles County Bar Association has voted to support Assembly Bill 2625 in principal with the exceptions and suggestions noted in the letter. The exceptions and suggestions are discussed in this memorandum.

Operative Date

The Section believes that the operative date of the bill should be postponed to at least July 1, 1987, and possibly to January 1, 1988. This will give time to review the bill as enacted and to suggest technical amendments that may only become apparent after the bill is enacted.

A representative of the Judicial Council suggested that the operative date be delayed until July 1, 1987, to allow time for the Judicial Council to prepare the forms that will be required by the new court procedures established by the bill and to revise existing forms to conform to changes in existing procedure.

The staff is of the view the the operative date should be delayed until July 1, 1987. In addition to the considerations outlined above, delaying the operative date will allow lawyers to become familiar with the new law (through CEB or other courses and published materials) before the new law becomes operative. Accordingly, the staff recommends that the operative date be delayed until July 1, 1987.

Small Estate Set Aside

The Section objects to giving the court discretion concerning the granting of a petition to set aside a small estate. The Commission has discussed this matter at some length and concluded that the small

estate set aside should be treated the same as a probate homestead which also is discretionary with the court. One must recognize that the small estate set-aside takes property from the person to whom the decedent has given the property by a valid will and gives it to the surviving spouse and/or minor children who may have been more than adequately provided for by transfers during lifetime or by nonprobate transfers. The staff recommends that the Commission retain the discretionary feature of the small estate set-aside as provided in the bill.

The Section opposes the requirement that all expenses of administration, funeral expenses, and expenses of last illness be paid prior to the granting of a small estate set-aside. The Section recommends that the statute should be amended to require disclosure of any unpaid liabilities in the form of funeral expenses, last illness expenses, or expenses of administration by the petitioner so that the court may fashion such orders that may be required. The staff recommends that the bill be amended to adopt the substance of this suggestion.

The Section suggests that Section 6611 be redrafted to allow coordination between probate estates and small estates so that the surviving spouse can take advantage of the four-month creditors' claim period of the estate. The Section believes that a creditor who has been barred by the four-month statute of limitation should not be able to pursue the surviving spouse and minor children for up to one year after entry of any order under Section 6600. Although Section 6611 continues existing law, the staff recommends that the following new subdivision, drawn from Section 13552 of the bill (liability for debts of deceased spouse), be added to Section 6611:

(e) If proceedings are commenced in this state for the administration of the estate of the decedent and the time for filing or presenting claims has commenced, any action upon the personal liability of a person under this section is barred to the same extent as provided for claims under Article 1 (commencing with Section 700) of Chapter 12 of Division 3, except as to the following:

(1) Creditors who had commenced judicial proceedings for the enforcement of the debts and had served the person liable under this section with process prior to the expiration of the time for filing or presenting claims.

(2) Creditors who have or who secure the acknowledgment in writing of the person liable under this section that that person is liable for the debts.

(3) Creditors who file a timely claim in the proceedings for the administration of the estate of the decedent.

Mandatory Return of All Property Where Property Collected Under Affidavit and Probate Estate Later Opened

The Section believes that the requirement that the person collecting property by affidavit restore the property to the decedent's estate if the estate is later probated should be made discretionary with the court. The Section makes a good case for this change. See item 3 on page 2 of the letter attached as Exhibit 1.

The staff recommends that the substance of this suggestion be adopted and that the bill be amended accordingly. Specifically, we recommend that Section 13111 be revised to read as set out below:

13111. (a) Subject to subdivisions (b), (c), ~~and~~ (d), and (e), if proceedings for the administration of the decedent's estate are commenced, each person to whom payment, delivery, or transfer of the decedent's property is made under this chapter is liable for:

[No change in omitted portion of section]

(d) An action to enforce the liability under this section may be brought only by the personal representative of the estate of the decedent. In an action to enforce the liability under this section, the court may give a judgment enforcing the liability only to the extent necessary to protect the interests of the heirs, devisees, and creditors of the decedent.

~~(d)~~ (e) An action to enforce the liability under this section is forever barred three years after [no change in remainder of section].

A comparable revision should be made in Section 13206 (affidavit procedure for real property of small value).

Affidavit Procedure for Collection of Real Property

The Section suggests that the six month time period before the affidavit procedure can be used for real property be reduced to 40 days. The affidavit procedure for real property is taken from the Arizona statute which requires six months. If faster action is needed, the bill provides a procedure based on the existing Section 650 procedure whereby a court order can be obtained confirming title passed to the successor. This order can be issued if 40 days or more

have elapsed since the death of the decedent. The affidavit procedure for collection of real property is a new procedure. The staff recommends against reducing the period to 40 days.

As recommended by the Section, the staff recommends that the following subdivision be added to Section 13200 (affidavit procedure for real property of small value:

(e) A certified copy of the decedent's death certificate shall be attached to the affidavit.

Right of Surviving Spouse to Dispose of Real Property

Section 13540 gives a surviving spouse full power to sell, lease, mortgage, or otherwise deal with and dispose of the community or quasi-community real property to the same extent as if the property had been owned as separate property of the surviving spouse in any of the following cases:

(1) Where the property is held as of record in the name of the surviving spouse only [as where the property was purchased by the surviving spouse with earnings during marriage and title taken only in the name of the surviving spouse.]

(2) Where the property is held of record by the deceased spouse and the surviving spouse as joint tenants [the deceased spouse has a right to dispose of community property held in joint tenancy form by a will].

(3) Where the property is held as of record by the deceased spouse and the surviving spouse as community property.

The Los Angeles Section urges that paragraphs (1) and (2) above be omitted.

To understand the purpose of this section, one must recognize that a married person has the right to dispose of his or her one-half of the community or quasi-community property by will without regard to how the title to the property is held. For example, if one spouse purchases real property using community funds and takes title in his or her own name only, the real property continues to be community property, and the nonacquiring spouse can dispose of his or her one-half interest in the property by will. Or if property is acquired using community funds and the title is taken by the married person in joint tenancy (for convenience and without the intent to change the

nature of the property to separate property), either spouse can dispose of his or her one-half interest in the property by will because the property continues to be community property. Or if real property is acquired by married persons and the title to the property is taken as community property, either spouse can dispose of his or her one-half interest in the property by will.

Accordingly, without regard to how the title to real property is held of record, there is always the possibility that the property is community or quasi-community property and was disposed of by the will of the deceased spouse. The provision of existing law continued as Section 13540(a) protects the title company that insures title when property is transferred by a married person and the property is held as of record in the name of the surviving spouse, or by the deceased spouse and the surviving spouse as joint tenants, or by the deceased spouse and the surviving spouse as community property. This provision protects the grantee, purchaser, encumbrancer, or lessee against the possibility that the property was community or quasi-community property and was disposed of by will of the deceased spouse. Absent this provision, title companies will run a significant risk if they insure title when a surviving spouse transfers real property acquired during the marriage. This same risk that property held in the name of one spouse is community property is the reason why title companies will not now insure title of property transferred by one spouse during marriage unless both spouses join in the transfer or the other spouse gives a quitclaim deed.

If Section 13540 were limited as suggested by the Los Angeles Section, we believe that the title companies would run a significant risk in insuring title to property in the cases covered by paragraphs (1) and (2) unless they were confident that the property was in fact not community or quasi-community property. We do not know if the examples given in the letter from the Los Angeles Section are actual cases, but we believe that a title company would be at risk if they gave title insurance during the 40-day period. A devisee of the deceased spouse could later produce a will which devised the deceased

spouse's one half interest in the property to the devisee, and the title company would be faced with a law suit turning on the issue of whether or not the property actually was community or quasi-community property.

The staff will send a copy of this Memorandum to the California Land Title Association to determine whether title companies would give title insurance without the need to file a Section 650 petition in the cases described in paragraphs (1) and (2) if the scope of the section was limited to only the case described in paragraph (3). Absent such assurance, the staff recommends against any change in Section 13540.

Technical Amendments

The staff recommends that the following technical amendments be made to Assembly Bill 2625 the next time the bill is amended:

AMENDMENT ____

In line 1 of the title, strike out "'Section 353.5" and insert:
Sections 353.5 and 385

AMENDMENT ____

In line 4 of the title, after "605," insert:
704.2,

AMENDMENT ____

On page ____, between lines ____ and ____, insert:

SEC. 1.5. Section 385 of the Code of Civil Procedure is amended to read:

385. (a) An action or proceeding does not abate by the death, or any disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action or proceeding may be continued in the

name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding.

(b) In the case of an action for injury to or for the death of a person caused by the wrongful act or neglect of the defendant, and the defendant dies after the commencement of the action, the action may be continued, against the decedent as the original party defendant without the appointment of a representative or successor in interest, if the decedent had liability insurance applicable to the cause of action, the amount of damages sought in the action does not exceed the maximum amount of such insurance, or recovery of excess thereof is waived, and the estate of the decedent otherwise qualifies for summary probate proceedings pursuant to ~~the provisions of~~ Section 630 Part 1 (commencing with Section 13000) of Division 8 of the Probate Code. No action may be continued under this subdivision unless the insurer has been served with the complaint filed in the action. For good cause, the court, upon motion of an interested person or upon its own motion, may order the appointment of a personal representative and his substitution as the defendant.

AMENDMENT ____

On page ____, between lines ____ and ____ insert:

SEC. 9.5. Section 704.2 of the Probate Code is amended to read:

704.2. A claim may be filed by the surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse for the payment of the debts of the deceased spouse described in ~~Section 6491A~~ Chapter 3 (commencing with Section 13550) of Part 2 of Division 8. The claim must be filed prior to the filing of a petition for final distribution. It shall set forth the reason why the debts are not barred by ~~subdivision (b) of Section 6491A~~ Section 13551 and a statement whether the debts remain unpaid or have been paid by the surviving spouse. If the surviving spouse is personally liable for the debts, the claim shall also include an inventory of the separate property of the surviving spouse and any community property not administered in the estate and a statement of the value of the property less the amount of the liens

and encumbrances upon the property as of the date of death of the deceased spouse. The statement may identify any property which is exempt from enforcement of a money judgment.

AMENDMENT ____

On page ____, line ____, [Probate Code § 1200.5(a)(6)] strike out "duly"

Respectfully submitted,

John H. DeMouilly
Executive Secretary

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March 25, 1986

Assemblyman Alister McAlister
State Capitol
Sacramento, California 95814

Re: Assembly Bill 2625

Dear Assemblyman McAlister:

On behalf of the Executive Committee of the Probate Section of the Los Angeles County Bar Association, I am pleased to report that the Section has voted to support the Bill in principle with the following exceptions and suggestions:

1. The Section believes that the Bill will require substantial study and involves complex subjects that require careful consideration. Accordingly, it is the view of the Section that the effective date of 2625 should be postponed to at least July 1, 1987 or possibly to January 1, 1988. This will give various Bar Associations and practitioners time to review the Bill in the form of law and suggest various technical amendments that may only at that time become apparent.

2. In regard to small estate set asides, (6600 et seq.) the Section has asked me to state its opposition to the following:

2.1 The Bill in its present form allows the Court complete discretion concerning the granting of any petition under this section. The Court can consider the needs of creditors, the decedent's estate plan, the existence of any inter vivos trusts, or other facts that may impinge on its equitable considerations. The Section believes that the purpose of the small estate set aside is to provide for widows and orphans who may have extremely small estates. The Section believes that the inclusion of these various discretionary matters will greatly increase the cost of the small estate set aside and largely eliminate its usefulness. Accordingly, the Section strongly urges that the Bill be amended and require the Court to grant an order for distribution of a small estate to the surviving spouse and minor children if the petition meets all the other requirements set forth under the Code.

2.2 The Section opposes the requirement that all expenses of administration, funeral expenses, and expenses of last illness be paid prior to the granting of an order under this section. The Section believes that the property may have to be sold in order to pay these expenses and the only alternative will be to open a probate. Since the statute is designed to allow the passage of small estates without administration to surviving spouses and minor children, the Section believes that the Court should be given the ability to fashion such liens as may be required to protect the interests of such creditors. Accordingly, the statute should be amended to require disclosure of any unpaid liabilities in the form of funeral expenses, last illness expenses, or expenses of administration by the petitioner so that the Court may fashion such orders that may be required.

2.3 The Section further suggests that Probate Code §6611 be redrafted so as to allow coordination between probate estates and small estate set asides so that the surviving spouse can take advantage of the four month creditors claim period of the estate. The Section believes that a creditor who has been barred by the four month statute of limitation should not be able to pursue the surviving spouse and minor children for up to one year after entry of any order under §6600.

3. §13100 et seq.: The Section generally supports the changes to Probate Code §630 as reflected in §13100 et seq. The Section only opposes the mandatory return of all property set forth in §13111 in those cases where property has been collected under an Affidavit and a probate estate is later opened. The Section believes that this section should be discretionary with the Court. The Section can foresee instances where a creditor could open an estate for a relatively small debt and the various heirs or beneficiaries will have to return up to \$60,000.00 worth of property. The Section does not understand how any public policy could be served by this potentially painful disgorgement of assets when the Court can be granted the equitable authority by statute to fashion such orders that may be required. The Section also believes that the statute could be open to abuse by disgruntled family members who would open an estate for the unfortunate purpose of requiring other family members to return property previously collected. Once again, discretion with the Court to fashion such orders that may be required will protect creditors and beneficiaries that may have been hurt by the collection procedure while at the same time avoiding abuses that would be possible under §13111.

4. §13200 et seq.: The Section has two minor points of opposition to the real estate collection procedure set forth in §13200 et seq.:

4.1 The six month time period set forth in §13200(a)(5) should be changed to 40 days. The Section believes that the 40 day requirement, that provides protection for the passage of personal property, is sufficient to allow the same protection for the passage of real property.

4.2 A subparagraph e should be added to §13200 to require the attachment of a death certificate and use the same language as set forth in the §13100 series.

5. The Section has one point of opposition to the spousal transfer proceedings under §13500 et seq. This involves §13540 which requires a 40 day waiting period before joint tenancy real property and property standing in the name of the surviving spouse can be transferred, conveyed or otherwise acted upon. The Section believes that this is an unwarranted intrusion on the estate plan of spouses that have previously established their estates so that property could be passed by joint tenancy. The Section does not understand the need to create a secondary class of joint tenancy property which will not immediately pass by right of survivorship. Joint tenancy property between other persons who are not spouses would not be affected and they would have the immediate right to dispose of their property. The Section believes that a substantial number of people would be adversely affected.

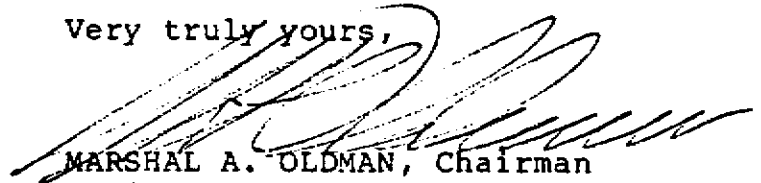
For example: Husband and wife enter into a transaction to sell their home to a third party. During the period of escrow and prior to the signing of any deeds, the husband dies and under the statute the wife would be required to wait 40 days. The third party is unable to wait that long because his financing commitment expires before the end of the 40 day period. Under existing law, the surviving spouse can file an Affidavit of Death of Joint Tenant and carry on with the escrow without interruption. Under the change proposed, the surviving spouse might very well lose the transaction and thereby suffer hardship.

The Section is also concerned that a surviving spouse's separate real property will be rendered unmarketable for the 40 day period. No title insurance company would be able to determine for itself if property is truly separate property and would be unwilling to grant title insurance on a sale during a period following 40 days from the predeceased spouse's death.

Assemblyman Alister McAlister
March 25, 1986
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Aside from possible constitutional problems, the Section believes that this an unwarranted intrusion in the surviving spouse's separate business affairs. Accordingly, subparagraphs (1) and (2) of subparagraph (a) of §13540 should be deleted.

Very truly yours,



MARSHAL A. OLDMAN, Chairman
Legislative Monitoring Committee
Los Angeles County Bar Association
Probate Section

MAO:fsd
cc: Deborah Debow
Valerie Merritt