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11/13/89

Second Supplement to Memorandum 89-89

Subject: Study L-3007 - In-Law Inheritance (Comments on TR)

Attached as Exhibits are five more letters on the Tentative Recommendation, three supporting and two opposing it.

The Commission received a total of 54 letters on this Tentative Recommendation. Seven of the letters were equivocal or noncommittal. Of the 47 letters that expressed a view concerning whether Section 6402.5 should be repealed:

Supporting repeal:	41	(87%)
Opposed to repeal but favoring cleanup:	1	(2%)
Opposed to repeal with or without cleanup:	5	(11%)
	47	(100%)

While we ordinarily receive only a few comments on a tentative recommendation, many persons wrote to express their view concerning this particular recommendation. The number who wrote to support the recommendation is especially significant. Ordinarily, only those who object to a recommendation or have a suggested change take the time to write to us concerning the recommendation.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

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October 31, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Tentative Recommendations

Greetings,

I do appreciate receiving copies of your tentative recommendations and would like to continue receiving them. I have been a probate and estate planning paralegal for 15 years and hope that you will consider the following comments regarding the sets of recommendations sent to me within the last couple of months:

1. Uniform Statutory Form Power of Attorney Act. Good idea. The new form is much easier for a client to follow and at least provides a lead to the Civil Code provisions.

2. In-Law Inheritance. Prob.C. §6402.5 is much too difficult to apply (and, in fact, we in the field will do all we can to avoid its application). I hope it is repealed.

3. Access to Decedent's Safe Deposit Box - L-3022. The recommendation that the financial institution deliver the original Will to the County Clerk and mail a copy to the Executor is a bit unreasonable. How does the bank know to which county to mail the Will? Or the address of the Executor? Given the general incompetency of bank personnel, this is a risky proposal. Wouldn't it be more reasonable to require the bank to turn over the original Will to the named Executor? I suggest that the code also state that the bank shall make a copy of any original Trusts, Trust Amendments, Revocations, and Codicils, and give to the Executor or successor Trustee, and, possibly, make a copy of every item in the box for the key-holder.

4. Notice to Creditors - L-1025. One year statute for filing claims. Yes! (Does this bypass the State Legislature?)

5. Miscellaneous Probate Code Revisions - L. Fine, but please consider adding a corresponding guardianship section to proposed Prob.C. §10006 (Cotenants' consent to sale).

Sincerely,

Cheryl Templeton

EXHIBIT 2

Study L-3007
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November 3, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Probate Code §6402.5
Uniform Statutory Form Power of Attorney Act

Ladies and Gentlemen:

Somewhat belatedly, I am responding to your proposed recommendations captioned above. The repeal of in-law inheritance under §6402.5 appears desirable, provided that the repeal does not bring into question the rights under other statutes, including the right for such heirs to be takers of last resort in preference to an escheat.

With respect to the tentative recommendation on Uniform Statutory Form Power of Attorney Act, I concur in the desire to have a uniform (and hopefully less complicated) California form, and to modify the Uniform Act to provide for joint or several action by co-agents.

Because the broadest form powers of attorney will include this language anyway, I would prefer to see the language in the comment to §2475 added as an additional option, perhaps titled "Further Grant of All Powers Possible" with a space to initial either at the margin or within line (N). Along similar lines, and perhaps subject to some restraint with respect to agents dealing with themselves or discharging an obligation of support (in order to be sensitive to possible problems under Internal Revenue Code §2041 relating to general powers of appointment), it would be helpful to have a form addendum of "Supplemental Estate Planning Powers (Broad Form)." I also note that the broader estate planning (gift) matters referred to in the comment to §2475 do not include any discussion of the agent making disclaimers. I would suggest that the comment be revised to reference this, since doing so would serve as an alert to those who might otherwise believe they have the power to make a disclaimer without extra "addendum" authority under a power of attorney under the Uniform Statutory form.

I wonder if the language in §2490(H), which would appear to allow the attorney-in-fact to borrow funds at margin, is interpreted

by stockbrokers to allow for margin debt. I am aware that brokers often are sensitive to a fiduciary creating a margin account. Subject to deductibility concerns, margin debt is often the cheapest and most readily available source of liquidity through borrowing. In situations involving trusts, some brokers have preferred to see the word "margin" in the trust powers rather than merely the authorization to pledge trust property as security for borrowing.

By separate letter, I am responding to the tentative recommendations of September 1989 relating to safe deposit box access, miscellaneous code revisions, and notice to creditors.

Respectfully submitted,

Peter L. Muhs

PLM:em:3020

I endorse this recommendation. Please keep me on the list. Joel Dobris c/c Professor Stone

IN-LAW INHERITANCE

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

Repeal of Probate Code Section 6402.5 ("In-Law Inheritance")

August 1989

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature in 1990. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN SEPTEMBER 29, 1989.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

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EXHIBIT 4

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October 3, 1989

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Repeal of Probate Code Section 6402.5

Members of the Commission:

The Commission's tentative recommendation relating the repeal of Probate Code section 6402.5 ("Tentative Recommendation") may contain a philosophically sound proposition. However, the reasons for the proposition as set forth in the Tentative Recommendation are, for the most part, either specious or overly broad.

The Tentative Recommendation sets forth the following reasons in support of the proposal:

1. Probate Code section 6402.5 (the "Statute") increases expense and causes delay in probate proceedings;

2. The Statute defeats reasonable expectations and produces inequitable results;

3. The Statute is complex and difficult to interpret and apply; and

4. The rights of relatives of the predeceased spouse are adequately protected under other recently enacted laws.

1. The Statute Increases Expenses and Causes Delay in Probate Proceedings.

The Tentative Recommendation recites that notice of probate proceedings, even where the decedent left a valid will, must be given to all of the decedent's heirs who would

participate in the decedent's estate if the decedent had died intestate. The Tentative Recommendation recites the efforts which must be made by the person who petitions for probate or for letters of administration, and the efforts of the estate attorney necessary to deal with inquiries from such potential heirs, even where those heirs take no part of the estate.

The essence of this argument in support of the Tentative Recommendation seems to be that notice requires effort, which on occasion can be considerable, and that effective notice may generate inquiry which may require additional effort. If such notice and the false expectations which it can generate are truly the culprit, the remedy would appear to be a limitation on the notice rather than repeal of the statute.

In some cases, even close relatives of the decedent are difficult to find. In one recent case, a resident of San Diego County died intestate and was survived by a son, whose whereabouts were unknown. The son was eventually located, but only after the Public Administrator had filed her petition for letters of administration and had made the necessary efforts to locate the missing son. Is that case an aberration? Indeed not. Some years ago a resident of San Diego County died intestate and was survived by three children. The whereabouts of the children were unknown and were eventually discovered through the services of an heir finder. All three of them lived in San Diego County!

If the goal is truly to control the effort required to give notice, repeal of the Statute is too drastic. Perhaps the Probate Code should be revised to provide that, except for issue and ancestors, inheritance by intestacy will not inure to relatives of the decedent unless they are related to the decedent within the third degree. In other words, ancestors and issue of all degrees, and siblings and the children of siblings, would be the only ones allowed to participate in an intestate's estate.

2. The Statute Defeats Reasonable Expectations and Produces Inequitable Results.

One must first recognize that intestacy statutes are intended as a substitute for the failure of the intestate decedent to put in effect a plan to distribute his or her estate. It is almost oxymoronic to say that an inheritance statute defeats reasonable expectations. Had the decedent had any

expectations, the decedent could readily have fulfilled those expectations by making a will. Conversely, had the decedent's blood relatives had any reasonable expectations, the decedent could have defeated those reasonable expectations by making a will giving everything to charity or to a friend. Perhaps we should eliminate the right of a decedent to make a will so as to preclude the possibility that he will frustrate the reasonable expectations of his relatives!

I note that in its discussion of Estate of Luke, the Tentative Recommendation states:

> "Raymond was probably unaware of the California in-law inheritance statute, since California is the only state having such a statute. He probably expected his estate to go his blood relatives, not to Catherine's. This case illustrates how the in-law inheritance statute may defeat reasonable expectations."

If Raymond had had any reasonable expectations, or had taken even a modest amount of time to concern himself with his estate and the natural objects of his bounty, Raymond would have made a will. If Raymond had reasonable expectations, the Statute did not defeat them. Raymond did.

The same statement is true concerning the purportedly inequitable results caused by the Statute. In Estate of McInnis, it would have been a simple matter for the decedent to have made a will disposing of her estate in favor of her relatives who had maintained such a close relationship with her and had performed various services for her for more than ten years immediately prior to her death. If the decedent thought so little of those relatives, is the result so inequitable? If the decedent thought so little of those relatives, should we repeal the Statute and thereby raise those relatives to a more favored status?

The result in Estate of Riley is characterized as "clearly inequitable." Is it really? The mother made a completed gift of the property to her son and his wife. If the wife had severed the joint tenancy and disposed of her half of the property by a properly drawn will, or by sale or other disposition and squandering of the proceeds, could the mother have complained that the wife's actions produced an inequitable result as to her? Would it not have been reasonable to expect

the son to make the will in favor of his mother after the wife's death? If the mother had been so concerned after the wife's death, could she not have suggested to her son that he make an estate plan?

Any intestacy statute will always produce some inequitable results. However, those inequitable results are always avoidable results, and the avoidance is in the hand of the decedent. The Tentative Recommendation's citation of these cases as indicative of inequitable results is without merit. Regardless of whether one views the results from the decedent's perspective or from the perspective of the heirs (whether included or excluded), the Statute only comes into play when the decedent has failed to act responsibly with respect to his or her own estate and his or her own "close" heirs.

The Tentative Recommendation states that it is unclear whether the in-law inheritance statute applies to property given by one spouse to the other during marriage when the marriage ends in divorce. If indeed there is lack of clarity, the remedy should be to add clarity, not to discard the statute. However, there really is no lack of clarity. The Statute refers to "the decedent" and the "decedent's predeceased spouse." If the marital relationship is terminated by dissolution of the marriage, which would certainly appear to be the case, then a former spouse is no longer a spouse and therefore cannot be either a deceased spouse or a predeceased spouse. If that is not the obvious and necessary result, a former spouse would similarly inherit as a surviving spouse under Probate Code section 6401, notwithstanding the fact that the marital relationship had been terminated by decree of dissolution.

Finally, the Tentative Recommendation asserts that normally "one who gives property by will to his or her 'heirs' expects that the property will go to his or her own blood relatives." Is that supported by empirical evidence? If one gives property to his or her heirs and expects those heirs to be blood relatives, that expectation can be given effect by a properly drawn estate plan. If one gives property to his or her heirs, presumably that gift is encapsulated in a will or other estate planning document. In my experience, a gift over to "heir" is, in the usual case, made only after all of the relatives about whom the testator knows or cares had either predeceased the testator or the event causing distribution. Once again, the testator probably has no expectation. If indeed there

is such an expectation, it can be implemented by simple language modifying "heirs" and identifying them as those persons who would be the testator's heirs determined at the time of the event of distribution and in accordance with the laws of California then in effect with respect to separate property not acquired from a predeceased spouse. There is nothing so terribly complex or difficult about including such language in documents, and such language is in all manner of form books.

3. The Statute is Complex and Difficult to Interpret and Apply.

If complexity and difficulty in application justify repeal of a statute, then we will soon be short of statutes. One might start with California's unitary tax provisions and move along quickly to the generation-skipping transfer tax. If one looks at the annotations under Code of Civil Procedure section 473, one will find dozens of pages of annotations dealing with the application of a relatively short statute, but I know of no suggestion that the large number of cases interpreting and applying that statute justifies the repeal of the statute. What shall we do about environmental provisions? Anti-trust laws? Indeed, criminal laws?

Tracing and apportionment problems are really not problems of general application at all. Rather, they are problems which are borne by the person claiming to be the heir of the decedent through a predeceased spouse. See the statute at subsection (c). If tracing and apportionment problems are indeed so overwhelming, revise subsection (c) to apply not only to personal property but to real property as well and elevate the claimant's burden of proof to that of clear and convincing evidence. However, I think even that is probably unnecessary.

The courts are in the business of unraveling snarls of facts, circumstances, and apparently applicable laws and cases. No one ever said the task would be easy, but that is not sufficient reason to abandon the task. Courts have available to them special masters and commissioners to assist them in working their way through complex matters.

I note with some interest that the discussion of the Estate of Nereson recites that the court "held that it would be equitable to award Oberlin's sister a pro rata share based on the proportion of the mortgage payments after Ethel's death to the total mortgage payments." Should one interpret this to mean

that the Tentative Recommendation acknowledges that the statute produces not only inequitable results but also equitable ones? I note also that the discussion goes on to describe how the court's task involved resort to various statutes and allocation procedures, all without invariable formula or precise standard. (While it would be nice if all conduct could be governed by invariable formula or precise standard, one need only consider the proliferation of Christian religions and their different interpretations of the Decalog to know that that will never be the case.) The Tentative Recommendation recites that because of the court's considerable discretion and the lack of precise standards, it is impossible to tell what the apportionment will be without litigating the issue. However, such discretion and imprecision will, absent recalcitrant participants, lead to uncertainty and therefore to some reasonable settlement in most cases.

4. Rights of Relatives of the Predeceased Spouse are Adequately Protected Under Recently Enacted Laws.

The Tentative Recommendation cites Probate Code section 6408 as an illustration of a proper and effective statute. I note also that the statute, praised as one which promotes equitable results, imposes on the predeceased spouse's child the burden to establish by clear and convincing evidence that the decedent/step-parent would have adopted the child but for a legal barrier. If the decedent had had such a great affection for the child of his or her predeceased spouse, the decedent would surely have made a will in favor of that stepchild. Absent a will, the statute will apply only after a sufficiently elaborate presentation of evidence to establish by a clear and convincing standard that the decedent would have adopted the stepchild but for legal barrier. While this law is simply stated, I expect that its application will be complex, not because of a question of the intention of the statute or how it is to be applied but rather because of the proof of the intention of the decedent by clear and convincing evidence after the decedent's death.

Summary and Conclusion.

The Tentative Recommendation may raise some issues which should be addressed, but those issues are clouded by faulty logic and questionable presentation. The argument as to what a decedent would have expected or would have intended is no argument at all, because intestacy statutes deal only with

situations where decedents had no sufficient expectations or intentions, and certainly no sufficient interest, to deal with their estates. No empirical evidence is presented to support recitations of what a decedent would have intended or expected. All statutes of such general application, which are designed to relieve the decedent's family of the decedent's lack of responsibility, will invariably produce some inequitable results. However, the general result is a sound and proper one and should be preserved, absent a persuasive and compelling reason to the contrary.

Very truly yours,

Kenneth G. Coveney

Kenneth G. Coveney
for
GRAY, CARY, AMES & FRYE

KGC:vjp
ltrs.1089.032

2d Supp Memo 89-89

EXHIBIT 5

CA LAW REV. COMM'N

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November 7, 1989

California Law Revision Commission
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Palo Alto, California 94303-4739

Re: Repeal of Probate Code
§6402.5

Gentlemen:

I am opposed to the repeal of this section. It certainly would be easier to administer estates of decedent's who died intestate without this section, but the purpose of this law should not be abandoned in the name of expediency. The surviving spouse's family, whoever that may be, should not be allowed to profit at the expense of the predeceased's family just because one spouse happened to survive the other. The law should treat both sides of the family equally. This, of course, may be changed with a testamentary disposition but at least the other family will have notice of this.

Very truly yours,

PETER R. PALERMO

PRP/dml