

Memorandum 82-71

Subject: Study L-625 - Probate Code (Tentative Recommendation--Spouse Omitted From Testator's Premarital Will)

The Commission has tentatively approved Section 254.010, which protects a spouse who is omitted from a decedent's will made before marriage. The section provides an intestate share for the surviving spouse if it does not appear that the omission was intentional. This is taken from UPC Section 2-301 and is closely similar to existing California law.

Both under existing California law and the Commission's recommended intestate succession scheme, the surviving spouse's intestate share is all of the community property. Under the Commission's recommendation, the surviving spouse's intestate share of separate property is all of the property, except where the decedent has one or more issue of a prior marriage. The distinction between cases where the decedent's children are all of the present marriage and where they are not, is made to protect the decedent's issue of a prior marriage against ultimate disinheritance by an unsympathetic stepparent.

Applying the intestate succession separate property share where a surviving spouse is omitted from a premarital will can cause problems if the decedent has children of a prior marriage. Although the surviving spouse's share is reduced in favor of such children in case of intestacy, there is no reason to reduce the surviving spouse's share if the decedent's will disinherits the children. In the writer's view, the omitted spouse statute should provide that all the decedent's separate property goes to the omitted spouse unless the decedent leaves issue of a prior marriage, and in the latter case the property should go to the omitted spouse except to the extent that the property would otherwise go to the decedent's issue either under the decedent's will or under the pretermisison statute. This revision would have the desirable effect of preferring the omitted spouse over third-party legatees (to whom property was willed instead of children) where the decedent has issue of a prior marriage.

The staff has redrafted Section 254.010 (attached as Exhibit 1) to make this change. Does the Commission approve the staff revision?

Respectfully submitted,

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EXHIBIT 1

Provision for Spouse Omitted From Pre-Marital Will

Both California law and the UPC provide that if the testator marries after making a will and the will fails to provide for the spouse, on the testator's death the omitted spouse is entitled to an intestate share unless it appears from the will that the omission was intentional or unless other specified provision is made for the spouse.⁷³ The California and UPC provisions differ with respect to the kind of provision outside the will that will suffice as being in lieu of a testamentary provision. California limits such provision outside the will to provision by marriage contract.⁷⁴ However, the UPC permits a showing that the testator provided for the spouse by any transfer outside the will, and the testator's intent that the transfer was to be in lieu of a testamentary provision may be shown by statements of the testator, from the amount of the transfer, or from other evidence.⁷⁵ Thus the UPC provision would have the effect of reducing the number of instances where the spouse omitted from the testator's pre-marital will could nonetheless claim an intestate share.⁷⁶

73. See Prob. Code § 70; Uniform Probate Code § 2-301. Although the California provision speaks in terms of the will being "revoked" as to the omitted spouse, the effect of the provision is to give the omitted spouse an intestate share. Estate of Steward, 69 Cal.2d 296, 298, 444 P.2d 337, 70 Cal. Rptr. 545 (1968); French & Fletcher, supra note 38, at 374.

74. Prob. Code § 70; French & Fletcher, supra note 38, at 375.

75. Uniform Probate Code § 2-301; see French & Fletcher, supra note 38, at 374.

76. In its 1973 critique of the Uniform Probate Code, the State Bar expressed concern that UPC Section 2-301 would not permit the testator to provide for the omitted spouse by marriage contract as does present California law unless the marriage contract were accompanied by an actual transfer of property. See State Bar of California, The Uniform Probate Code: Analysis and Critique 33 (1973). However, this concern would appear to be adequately dealt with by UPC Section 2-204 (included in the recommended legislation) which permits a written waiver, before or after marriage, of all

The UPC rule more effectively carries out the testator's intent.⁷⁷ For this reason, the Commission recommends adoption of the UPC rule which more readily permits evidence that the testator's omission of a spouse from a will made before marriage was intentional because other provision was made for the spouse.

Instead of incorporating the intestate succession provisions for determining the omitted spouse's share as does California law and the UPC,⁷⁸ the proposed law sets forth self-contained rules which are closely analogous to the intestate succession provisions: The omitted spouse's share is all of the community and quasi-community property, and is all of the decedent's separate property if the decedent either leaves no issue or leaves issue all of whom are also issue of the omitted spouse. If the decedent leaves issue one or more of whom are not also issue of the surviving spouse, the spouse's share is all of the decedent's separate property which does not pass to the decedent's issue under the decedent's will or by virtue of the pretermission statute-- this has the desirable effect of preferring the omitted spouse to third-party legatees of the decedent which is probably consistent with the decedent's intent, and permits the decedent to provide by will for issue where some are issue of a prior marriage.

benefits from the other spouse by way of intestate succession or from a will executed before the waiver. Although the waiver does not apply to benefits from a will executed after the waiver, the will itself may make clear that the testator's omission of the other spouse was intentional, and if the will is made after the marriage there is no statutory presumption that the omission was intentional. See Uniform Probate Code § 2-301.

77. See Joint Editorial Board for the Uniform Probate Code, Response of the Joint Editorial Board 7 (1974).

78. Prob. Code § 70; Uniform Probate Code § 2-301.

CHAPTER 6. SPOUSE AND CHILDREN UNPROVIDED FOR IN WILLS

§ 254.010. Omitted spouse

254.010. (a) Except as provided in subdivision (c), if a testator fails to provide by will for his or her surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive:

- (1) All of the decedent's community and quasi-community property.
- (2) All of the decedent's separate property if there are no surviving issue of the decedent or if there are surviving issue of the decedent all of whom are also issue of the surviving spouse.
- (3) All of the decedent's separate property which does not pass to the decedent's issue either under the decedent's will or under Section 254.110 if there are surviving issue of the decedent one or more of whom are not issue of the surviving spouse.

(b) In satisfying a share provided by this section, the devise made by the will abate as provided in Chapter 13 (commencing with Section 750) of Division 3.

(c) This section does not apply if it appears from the will that the omission was intentional or the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

Comment. Section 254.010 is drawn from Section 2-301 of the Uniform Probate Code and supersedes former Section 70. Unlike former Section 70, Section 254.010 permits a showing that the testator's omission to provide by will for the surviving spouse was intentional by the fact of a "transfer outside the will" if such transfer was intended to be in lieu of a testamentary provision.

Also, unlike Section 70 and UPC Section 2-301, Section 254.010 does not provide an intestate share for the omitted spouse. Although the omitted spouse's share under subdivision (a) is closely analogous to the surviving spouse's intestate share under Section 220.020, paragraph (3) of subdivision (a) prefers the surviving spouse to third-party legatees of the decedent but permits the decedent to provide by will for issue where some are issue of a prior marriage.