

## Memorandum 82-107

Subject: Study L-625 - Probate Law and Procedure (Rules of Construction of Wills)

Attached to this Memorandum as Exhibit 1 is the portion of the comprehensive wills and intestate succession draft that deals with rules of construction of wills. A number of the rules continue provisions found in existing law which date back to the Field Code. At the last meeting, Professor Niles said that some of these old rules may cause problems and agreed to work with the staff to eliminate troublesome language. Professor Dukeminier has also written to the staff to raise many of the same problems found by Professor Niles. This memorandum addresses these problems.

§ 204.090. Scope of disposition to a class; afterborn member of class

Proposed Section 204.090 continues the rule of existing Probate Code Section 123 that a testamentary disposition to a class where possession is postponed (such as where the will creates a life estate with the remainder to the testator's "heirs") includes as members of the class both those who answer the class description at the testator's death and those who come within the description after the testator's death but before possession vests. 7 B. Witkin, Summary of California Law Wills and Probate § 201, at 5712 (8th ed. 1974). In other words, the class may be enlarged after the testator's death by birth or adoption, but is not diminished by the death of class members. If a class member dies before possession vests, a share of the remainder interest is valued and taxed in the estate of the deceased class member and passes to heirs or devisees of the latter.

Both Pennsylvania and Massachusetts have adopted a statutory rule of construction to avoid estate taxation by creating a rebuttable presumption that the membership of the class is not determined until possession vests, thereby excluding those who fail to survive until that time. See, e.g., 20 Pa. Cons. Stat. § 2514. Both Professors Niles and Dukeminier have recommended that California adopt a similar rule. The staff recommends that this be accomplished by revising proposed Section 204.090 as follows:

204.090. (a) A testamentary disposition to a class includes every person answering the description at the testator's death; but when the possession is postponed to a future period; it includes also all persons coming within the description before the time to which possession is postponed. A testamentary disposition, whether directly or in trust, to the testator's or another designated person's "heirs," "next of kin," "relatives," or "family," or to "the persons entitled thereto under the intestate succession laws," or to persons described by words of similar import, means "heirs" as defined in Section 100.090 determined as if the testator or other designated person were to die intestate at the time when the testamentary disposition is to take effect in enjoyment.

(b) A person conceived before but born after a testator's death, or any other period when a disposition to a class vests in right or in possession, takes if answering to the description of the class.

Comment. Subdivision (a) of Section 204.090 supersedes the first sentence of former Section 123, and is drawn from Section 2514 of the Pennsylvania Consolidated Statutes, title 20. The former provision applied to all class gifts, while subdivision (a) of Section 204.090 applied only to a class gift to "heirs" or a similarly described class. When possession is postponed to some future time, subdivision (a) postpones the determination of class membership until that future time. This changes the rule under former Section 123 that death of a class member after the testator's death but before possession vests does not diminish the class. See 7 B. Witkin, Summary of California Law Wills and Probate § 201, at 5712 (8th ed. 1974). The effect of subdivision (a) is to prevent the future interest from passing through the estate of one who does not survive until possession vests, and thereby avoids estate taxation.

Subdivision (b) continues the second sentence of former Section 123, except that it substitutes "person" for a "child" conceived before but born after a testator's death. Subdivision (b) is comparable to the rule in intestate succession. See Section 220.080.

The rules of Section 204.090 yield to a contrary intent expressed in the testator's will. See Section 204.015.

Subdivision (b) of proposed Section 204.090 could be split out and made a separate section; Professor Niles favors doing so.

At the last meeting, Professor Niles thought perhaps Section 204.090 should be broadened to deal with more kinds of class gifts than those treated in the section. Professor Niles suggests we contact Professor Edward Halbach to get his views and to ask if he would draft a broader section if that is desirable. The staff will do this and advise the Commission.

#### § 204.100. Vesting

Subdivision (a) of proposed Section 204.100 continues Probate Code Section 28 and provides that "[t]estamentary dispositions, including

devises to a person on attaining majority, are presumed to vest at the testator's death." Both Professors Niles and Dukeminier recommend deleting this provision. Professor Dukeminier says this presumption of vesting is undesirable because it may create adverse tax consequences: If the taker of a future interest dies before the life tenant, it will be valued and taxed in the taker's estate if the interest is vested, but not if it is contingent. Thus the statutory presumption of vesting increases the likelihood that the court will find an ambiguous future interest to be vested and therefore subject to taxation. The staff has recommended revising Section 204.090 supra to eliminate the presumption of early vesting of class gifts, and it would be consistent with that recommendation to delete subdivision (a) of section 204.100. Accordingly, the staff recommends that subdivision (a) be deleted as recommended by Professors Niles and Dukeminier.

204.100. ~~(a) Testamentary dispositions, including devises to a person on attaining majority, are presumed to vest at the testator's death.~~

~~(b) A devise of property to more than one person vests the property in them as owners in common.~~

Comment. Section 204.100 continues former Section 29. Section 204.100 yields to a contrary intent expressed in the testator's will. See Section 204.015. This continues a provision of former Section 29. See also Section 100.090 ("devise" means disposition of real or personal property by will).

#### § 204.130. Death of devisee of limited interest

Proposed Section 204.130 continues Probate Code Section 140 and provides that "[t]he death of a devisee of a limited interest before the testator's death does not defeat the interest of persons in remainder who survive the testator." Thus if the testator's will creates a life estate for A, remainder to B, the fact that A predeceases the testator does not defeat B's interest. See, e.g., Estate of Rowley, 126 Cal. App.2d 571, 578, 272 P.2d 911 (1954). This result seems obvious.

Professor Dukeminier recommends deleting this section because it is "unnecessary and just clutters up the statutes. Can you conceive of a court coming to the opposite result?"

The staff has no strong view on this provision. Does the Commission wish to delete it?

§ 204.210. Conditional disposition

§ 204.220. Condition precedent

§ 204.230. Condition subsequent

Proposed Sections 204.210, 204.220, and 204.230 continue Probate Code Sections 141, 142, and 143. Both Professors Niles and Dukeminier recommend deleting all three of these sections.

Proposed Section 204.210 provides:

204.210. A conditional disposition in a will is a disposition that is to take effect or be defeated upon the occurrence of some uncertain event.

Professor Niles says this section is descriptive only. Both Professors Niles and Dukeminier say the section adds nothing to the law. Professor Dukeminier notes that the section is also ambiguous, because the definition seems to cover a contingent remainder which is never referred to in the books as a "conditional disposition." He says that we "could clarify it to refer to an immediate gift, but why bother?" The staff agrees, and recommends deleting proposed Section 204.210.

Proposed Section 204.220 provides:

204.220. A condition precedent in a will is a condition that is required to be fulfilled before a particular disposition takes effect. The condition precedent is deemed fulfilled when the testator's intention has been substantially, though not literally, complied with. A disposition subject to a condition precedent does not vest until the condition precedent is fulfilled; but, if fulfillment is impossible, the disposition vests unless the condition precedent was the sole motive of the disposition and the impossibility was unknown to the testator or arose from an unavoidable event after the execution of the will.

The first sentence of this section is subject to the same objections as proposed Section 204.210 (descriptive only, adds nothing to the law). The remainder of this section is objectionable because, as Professor Niles says, it "is no longer an accurate statement of the law." Professor Niles goes on to say:

There has been much refinement in the law since 1872. For example, it is now thought immaterial whether or not the impossibility was known to the testator. The phrase "or arose from an unavoidable event after the execution of the will" is too restrictive.

Professor Niles says the best modern statement of the effect of impossibility of performance is found in the Restatement materials, and could be cast as follows:

Impossibility of performance of the terms of a provision in a donative transfer, otherwise valid, excuses from such performance if, and only if, this result is the appropriately ascertained intent of the person imposing the restraint.

However, since this provision applies to any donative transfer, not just to wills, it should go in the Civil Code, not the Probate Code. Professor Niles concludes that proposed Section 204.220 should be deleted from the wills and intestate succession recommendation.

Professor Dukeminier agrees with Professor Niles that proposed Section 204.220 should be deleted. He says it "is truly a useless addition to the statutes." The staff agrees, and recommends deleting proposed Section 204.220.

Perhaps we should study the Civil Code provisions on conditions precedent and subsequent and illegality of performance (Civil Code §§ 707-711), and consider adding a modern provision on impossibility of performance. Professor Niles is presently writing an article on this subject which will recommend revisions to the Civil Code provisions. However, this should be done as a separate study, and not as part of our probate study.

Proposed Section 204.230 provides:

204.230. A disposition in a will is subject to a condition subsequent if the disposition is so given as to vest immediately subject only to being divested by some subsequent act or event. A testamentary disposition, when vested, cannot be divested except upon the occurrence of the precise contingency prescribed in the will for that purpose.

Professor Dukeminier recommends deleting this section because the difference in treatment of a condition precedent and a condition subsequent will produce capricious results depending on "chance language used by the drafter." Professor Niles and the staff are of the same view. The staff recommends deleting proposed Section 204.230.

#### § 204.330. Clear and distinct devise

Proposed Section 204.330 continues Probate Code Section 104 and provides:

204.330. A clear and distinct devise is not affected by any of the following:

- (a) Any reasons given for the devise.
- (b) Any other words not equally clear and distinct.
- (c) Inference or argument from other parts of the will.
- (d) An inaccurate reference to or recital of its contents in another part of the will.

Professor Niles recommends deleting this section because he finds it inconsistent with the immediately preceding provision which provides that "[a]ll the parts of a will are to be construed in relation to each other and so as, if possible, to form a consistent whole." The staff has no strong view on Section 204.330. Does the Commission wish to delete it?

§ 204.350. Words referring to death or survivorship

Proposed Section 204.350 continues Probate Code Section 122 and provides:

204.350. Words in a will referring simply to death or survivorship relate to the time of the testator's death unless possession of devised property is postponed, in which case the words relate to the time of possession.

Professor Niles recommends deleting this section because it is "unnecessary and possibly misleading." The staff has no strong view. Does the Commission wish to delete this section?

Respectfully submitted,

Robert J. Murphy III  
Staff Counsel

## Exhibit 1

## CHAPTER 5. RULES OF CONSTRUCTION OF WILLS

Article 1. General Provisions

204.010. The intention of a testator as expressed in his or her will controls the legal effect of the dispositions in the will.

204.015. Except to the extent the rule otherwise provides, the rules of construction in this chapter apply unless a contrary intention is indicated by the will.

204.020. The meaning and legal effect of a disposition in a will shall be determined by the local law of a particular state selected by the testator in the will unless the application of that law is contrary to the provisions of this code relating to any of the following:

- (a) The rights of the surviving spouse in community and quasi-community property.
- (b) The provisions of Part 3 (commencing with Section 250.010).
- (c) Any other public policy of this state otherwise applicable to the disposition.

204.030. (a) A devisee who does not survive the testator by 120 hours is treated as if the devisee predeceased the testator. If the time of death of the testator or of the devisee, or the time of death of both, cannot be determined, and it cannot be established that the devisee has survived the testator by 120 hours, it is deemed that the devisee did not survive for the required period.

(b) Subdivision (a) does not apply if the testator's will contains language (1) dealing explicitly with simultaneous deaths or deaths in a common disaster or (2) requiring that the devisee survive the testator for a stated period in order to take under the will.

204.040. Except as provided by Sections 1386.1 and 1386.2 of the Civil Code relating to powers of appointment, a will passes all property the testator owns at death including property acquired after execution of the will.

204.050. If a devisee is dead at the time of execution of the will, fails to survive the testator, or is treated as if he or she predeceased the testator, the issue of the deceased devisee who survive the testator by 120 hours take in place of the deceased devisee and if they are all of the same degree of kinship to the devisee they take equally, but if of unequal degree then those of more remote degree take by representation. One who would have been a devisee under a class gift if he or she had survived the testator is treated as a devisee for the purposes of this section whether his or her death occurred before or after the execution of the will.

204.060. Except as provided in Section 204.050:

(a) If a devise other than a residuary devise fails for any reason, the property devised becomes a part of the residue.

(b) If the residue is devised to two or more persons and the share of one of the residuary devisees fails for any reason, the share passes to the other residuary devisee or to the other residuary devisees in proportion to their interests in the residue.

204.080. Halfbloods, adopted persons, and persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with rules for determining relationships for purposes of intestate succession.

204.090. (a) A testamentary disposition to a class includes every person answering the description at the testator's death; but when the possession is postponed to a future period, it includes also all persons

coming within the description before the time to which possession is postponed.

(b) A person conceived before but born after a testator's death, or any other period when a disposition to a class vests in right or in possession, takes if answering to the description of the class.

204.100. (a) Testamentary dispositions, including devises to a person on attaining majority, are presumed to vest at the testator's death.

(b) A devise of property to more than one person vests the property in them as owners in common.

204.110. The law of this state does not include (1) the common law rule of worthier title that a testator cannot devise an interest to his or her own heirs or (2) a presumption or rule of interpretation that a testator does not intend, by a devise to his or her own heirs or next of kin, to transfer an interest to them. The meaning of a devise of a legal or equitable interest to a testator's own heirs or next of kin, however designated, shall be determined by the general rules applicable to the interpretation of wills. This section applies to all cases in which a final judgment had not been entered as of September 18, 1959.

204.120. 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.

204.130. The death of a devisee of a limited interest before the testator's death does not defeat the interest of persons in remainder who survive the testator.

## Article 2. Conditional Dispositions in Wills

204.210. A conditional disposition in a will is a disposition that is to take effect or be defeated upon the occurrence of some uncertain event.

204.220. A condition precedent in a will is a condition that is required to be fulfilled before a particular disposition takes effect. The condition precedent is deemed fulfilled when the testator's intention has been substantially, though not literally, complied with. A disposition subject to a condition precedent does not vest until the condition precedent is fulfilled; but, if fulfillment is impossible, the disposition vests unless the condition precedent was the sole motive of the disposition and the impossibility was unknown to the testator or arose from an unavoidable event after the execution of the will.

204.230. A disposition in a will is subject to a condition subsequent if the disposition is so given as to vest immediately subject only to being divested by some subsequent act or event. A testamentary disposition, when vested, cannot be divested except upon the occurrence of the precise contingency prescribed in the will for that purpose.

## Article 3. Ascertaining Meaning of Language Used in the Will

204.310. The words of a will are to receive an interpretation that will give every expression some effect, rather than one that will render any of the expressions inoperative; and preference is to be given to an interpretation of a will that will prevent a total intestacy, rather than one that will result in a total intestacy.

204.320. All the parts of a will are to be construed in relation to each other and so as, if possible, to form a consistent whole. If

the meaning of any part of a will is ambiguous or doubtful, it may be explained by any reference to or recital of that part in another part of the will.

204.330. A clear and distinct devise is not affected by any of the following:

- (a) Any reasons given for the devise.
- (b) Any other words not equally clear and distinct.
- (c) Inference or argument from other parts of the will.
- (d) An inaccurate reference to or recital of its contents in another part of the will.

204.340. The words of a will are to be given their ordinary and grammatical meaning unless the intention to use them in another sense is clear and their intended meaning can be ascertained. Technical words are not necessary to give effect to a disposition in a will. Technical words in a will are to be considered as having been used in their technical sense unless (1) the context clearly indicates a contrary intention or (2) it satisfactorily appears that the will was drawn solely by the testator and that the testator was unacquainted with the technical sense.

204.350. Words in a will referring simply to death or survivorship relate to the time of the testator's death unless possession of devised property is postponed, in which case the words relate to the time of possession.

#### Article 4. Exoneration; Ademption

204.400. A specific devise passes the property devised subject to any mortgage, deed of trust, or other lien existing at the date of death, without right of exoneration, regardless of a general directive in the will to pay debts.

204.410. (a) If the testator intended a specific devise of certain securities rather than the equivalent value thereof, the specific devisee is entitled only to:

(1) As much of the devised securities as is a part of the estate at the time of the testator's death.

(2) Any additional or other securities of the same entity owned by the testator by reason of action initiated by the entity excluding any acquired by exercise of purchase options.

(3) Securities of another entity owned by the testator as a result of a merger, consolidation, reorganization or other similar action initiated by the entity.

(4) Any additional securities of the entity owned by the testator as a result of a plan of reinvestment if it is a regulated investment company.

(b) Distributions prior to death with respect to a specifically devised security not provided for in subdivision (a) are not part of the specific devise.

204.420. A specific devisee has the right to the remaining specifically devised property and all the following:

(a) Any balance of the purchase price (together with any security interest) owing from a purchaser to the testator at death by reason of sale of the property.

(b) Any amount of an eminent domain award for the taking of the property unpaid at death.

(c) Any proceeds unpaid at death on fire or casualty insurance on the property.

(d) Property owned by the testator at death as a result of foreclosure, or obtained in lieu of foreclosure, of the security for a specifically devised obligation.

204.430. (a) Except as otherwise provided in this section, if specifically devised property is sold by a conservator, the specific devisee has the right to a general pecuniary devise equal to the net sale price of the property.

(b) Except as otherwise provided in this section, if an eminent domain award for the taking of specifically devised property is paid to a conservator, or if the proceeds on fire or casualty insurance on specifically devised property are paid to a conservator, the specific devisee has the right to a general pecuniary devise equal to the eminent domain award or the insurance proceeds.

(c) This section does not apply if, after the sale, condemnation, fire, or casualty, the conservatorship is terminated and the testator survives the termination by one year.

(d) The right of the specific devisee under this section is reduced by any right the specific devisee has under Section 204.420.

204.440. (a) Property a testator gave during lifetime to a person is treated as a satisfaction of a devise to that person in whole or in part only if one of the following conditions is satisfied:

(1) The will provides for deduction of the lifetime gift.

(2) The testator declares in a contemporaneous writing that the gift is to be deducted from the devise or is in satisfaction of the devise.

(3) The devisee acknowledges in writing that the gift is in satisfaction.

(b) Subject to subdivision (c), for the purpose of partial satisfaction, property given during lifetime is valued as of the time the devisee came into possession or enjoyment of the property or as of the time of death of the testator, whichever occurs first.

(c) If the value of the gift is expressed in the contemporaneous writing of the testator, or in an acknowledgment of the devisee made contemporaneously with the gift, that value is conclusive in the division and distribution of the estate.

204.450. If the testator after execution of the will enters into an agreement for the sale or transfer of specifically devised property, the specific devisee has the right to the property subject to the remedies of the purchaser or transferee.

204.460. If the testator after execution of the will places a charge or encumbrance on specifically devised property for the purpose of securing the payment of money or the performance of any covenant or agreement, the specific devisee has the right to the property subject to the charge or encumbrance.

204.470. If the testator after execution of the will alters, but does not wholly divest, the testator's interest in specifically devised property by a conveyance, settlement, or other act, the specific devisee has the right to the remaining interest of the testator in the property.