

#L-605

06/04/84

Memorandum 84-52

Subject: Study L-605 - Probate Law and Procedure (Optional Representation Systems)

At the last meeting, the Commission asked the staff to prepare a revised draft of optional representation systems which could be used in a will or trust by a simple cross-reference to the appropriate statutory term. The revised staff draft is attached to this Memorandum. If the Commission approves the draft, the staff will send it out as a tentative recommendation for review and comment, with a view toward perfecting a recommendation for introduction in bill form at the 1985 session of the Legislature.

Respectfully submitted,

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Staff Counsel

Staff Draft

TENTATIVE RECOMMENDATION

relating to

OPTIONAL REPRESENTATION SYSTEMS

Under existing law, if a will or trust provides for descendants of a deceased beneficiary to take the share of the deceased beneficiary but the instrument does not specify the manner of distribution, the share is distributed to the issue of the deceased beneficiary according to the representation rule for intestate succession.<sup>1</sup> Under the rule for intestate succession, the primary division of the deceased beneficiary's share is made at the first generation having any living members. Thus if all of the deceased beneficiary's children are deceased and there are living grandchildren, the primary division is made at the grandchildren's generation. Thereafter, the deceased beneficiary's share descends down the various branches of descendants, except that if a descending share reaches a generation all of whose members are deceased, that share is redivided equally at the next generation having any living members.<sup>2</sup>

If the will or trust provides for the manner of distribution, the language of the will or trust is controlling, rather than the statutory scheme for intestate succession. Various language may be used in wills and trusts, including distribution "per stirpes," "per capita," "in equal shares," and "by right of representation."<sup>3</sup> If the terms used are defined in the instrument, the definition will control. However, if the terms are not defined in the instrument, the court must try to determine the meaning of the terms according to usual rules of construction.<sup>4</sup> The

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1. Prob. Code § 240 (operative January 1, 1985).
  2. Id.
  3. See, e.g., Johnston, Outright Bequests and Devises, in California Will Drafting §§ 11.40-11.44, at 373-75 (Cal. Cont. Ed. Bar 1965).
  4. See, e.g., Prob. Code §§ 6140 (intention of testator controls legal effect of will), 6162 (technical words in a will).

result of this interpretive process may not be predictable, since there is disagreement concerning the meaning of terms such as "per stirpes" and "by right of representation."<sup>5</sup>

The Commission recommends that statutory definitions be added to the law to define terms commonly used in drafting representation provisions in wills and trusts, so that one drafting a will or trust could use the statutory definition by a simple shorthand reference in the instrument. This will afford clarity and predictability in wills and trusts and may encourage explicit consideration and discussion with clients of the possible alternative distribution schemes. The statutory definitions should yield to a contrary intent expressed in the will or trust.

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The Commission's recommendation would be effectuated by enactment of the following measure:

An act to add a heading immediately preceding Section 240 of, and to add Chapter 2 (commencing with Section 250) to Part 6 of Division 2 of, the Probate Code, relating to wills.

The people of the State of California do enact as follows:

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5. See, e.g., Halbach, Whither Distribution by Representation?, in CEB Estate Planning & California Probate Reporter 103 (February 1984).

Probate Code--heading for Chapter 1 (commencing with Section 240) of Part 6 of Division 2 (added)

SECTION 1. A heading is added immediately preceding Section 240 of the Probate Code, to read:

CHAPTER 1. REPRESENTATION GENERALLY

Probate Code §§ 250-253 (added). Optional representation systems

SEC. 2. Chapter 2 (commencing with Section 250) is added to Part 6 of Division 2 of the Probate Code, to read:

CHAPTER 2. OPTIONAL REPRESENTATION SYSTEMS

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§ 250. Strict per stirpes

250. (a) Unless a contrary intent is expressed in the will or trust, the distribution scheme provided by this section applies if a will or trust calls for distribution in any of the following manners:

- (1) Per stirpes.
- (2) Strict per stirpes.
- (3) Pure per stirpes.
- (4) Per stirpes with per stirpes representation.

(b) When subdivision (a) applies or when a will or trust calls for distribution in the manner provided in Section 250 of the Probate Code, the property shall be divided into as many equal shares as there are living children of the designated ancestor, if any, and deceased children who leave issue then living. Each living child of the designated ancestor is allocated one share, and the share of each deceased child who leaves issue then living is divided in the same manner.

Comment. Section 250 is new and gives one drafting a will or trust the option of selecting a pure stirpital representation system. Under such a system, the roots or stocks are determined at the children's generation, whether or not any children are then living. See generally Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. B. Foundation research J. 321, 378-79. See also the discussion in Maud v. Gatherwood, 67 Cal. App.2d 636, 155 P.2d 111 (1945).

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§ 251. Per capita

251. (a) Unless a contrary intent is expressed in the will or trust, the distribution scheme provided by this section applies if a will or trust calls for distribution in any of the following manners:

- (1) By representation.
- (2) Per capita.
- (3) Per capita with per capita representation.

(b) When subdivision (a) applies or when a will or trust calls for distribution in the manner provided in Section 240 of the Probate Code, the property shall be distributed in the manner provided in Section 240.

Comment. Section 251 is new and gives one drafting a will or trust the option of selecting the distribution system provided in Section 240. Section 240 is the distribution system used in case of intestate succession and for a will or trust that provides for issue or descendants to take without specifying the manner. See generally Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. B. Foundation Research J. 321, 380.

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§ 252. Per capita at each generation

252. (a) Unless a contrary intent is expressed in the will or trust, the distribution scheme provided by this section applies if a will or trust calls for distribution per capita at each generation.

(b) When subdivision (a) applies or when a will or trust calls for distribution in the manner provided in Section 252 of the Probate Code, the property shall be divided into as many equal shares as there are living members of the nearest generation of issue then living and deceased members of that generation who leave issue then living. Each living member of the nearest generation of issue then living is allocated one share, and the remaining shares, if any, are combined and then divided and allocated in the same manner among the remaining issue as if the issue already allocated a share and their descendants were then deceased.

Comment. Section 252 is new and gives one drafting a will or trust the option of selecting the system of per capita at each generation representation. See generally Waggoner, A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants, 66 Nw. U.L. Rev. 626, 630-31 (1971); Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. B. Foundation Research J. 321, 380-82.