

## Memorandum 81-31

Subject: Study L-603 - Probate Code (Effect of Marriage or Divorce on Prior Will)

This memorandum is concerned with the effect on a will of a subsequent marriage or divorce. The memorandum deals only with some aspects of this situation.

Revocation by Dissolution of Marriage

Should a disposition made by will to the former spouse be revoked as a matter of law when the marriage is dissolved or annulled unless the will otherwise expressly provides? This was a controversial issue presented by a bill presented at the 1980 session.

The Uniform Probate Code (Section 2-508) provides that divorce or annulment of the testator's marriage revokes any disposition made by will to the former spouse unless the will expressly provides otherwise. All provisions of the will in favor of the former spouse are revoked. California, on the other hand, follows the rule that annulment or dissolution of marriage has no effect on the will of either spouse. In re Estate of Patterson, 64 Cal. App. 643, 646, 222 P. 374 (1923).

The instances where resort must be had to a rule of law to resolve this question are reduced by the fact that it is standard practice for California lawyers to anticipate the question in the marital settlement agreement. See California Marital Termination Settlements § 4.106, at 135 (Cal. Cont. Ed. Bar 1971). The marital settlement agreement ordinarily includes provisions on the right of each spouse to take property upon the death of the other. In addition, the lawyer handling the divorce ordinarily will discuss the wills, jointly held property, life insurance beneficiaries, and the like, at the time of the divorce. However, where the parties divorce without a marital settlement agreement, or where the agreement is silent concerning the right to take by will, a rule is needed to resolve the matter. The rule should correspond to what most divorcing spouses would intend in such a situation. See Note, The Effect of Divorce on Wills, 40 So. Cal. L. Rev. 708, 710 (1967).

It has been argued that the California rule of nonrevocation should be changed to correspond to the UPC rule that divorce does partially

revoke, presumably on the theory that that is what the testator would have intended if he or she had thought about the matter. See Niles, Probate Reform in California, 31 Hast. L.J. 185, 212 (1979) (failure to provide for partial revocation on divorce is a "serious defect"); Evans, Comments on the Probate Code of California, 19 Calif. L. Rev. 602, 610 (1931) (provision for partial revocation on divorce "merits further consideration"); Turrentine, Introduction to the California Probate Code, in West's Annotated California Codes, Probate Code 38 (1956) (provision for partial revocation on divorce absent a contrary intent shown by the will "would seem desirable"). Also, the State Bar thought the UPC rule of partial revocation on divorce was "a worthwhile concept." State Bar of California, The Uniform Probate Code: Analysis and Critique 45 (1973).

On the other hand, it has been argued that some divorces are friendly and that in such a case the testator would want the former spouse to continue to benefit under the will. Note, The Effect of Divorce on Wills, supra at 714-15. In the bitter divorce case, it is argued, the person would likely go to the trouble of changing the will. Id. This argument is greatly strengthened by the enactment in 1980 of Civil Code § 4352, which reads:

4352. Every final judgment declaring a marriage a nullity or dissolving a marriage shall contain the following notice.

Notice: Please review your will. Unless a provision is made in the property settlement agreement, this court proceeding does not affect your will and the ability of your former spouse to take under it.

It may fairly be assumed that this notice will reduce the instances of a testator unintentionally benefiting a former spouse by will.

Perhaps the strongest argument for disregarding the thoughtful advice of Professors Niles, Evans, and Turrentine supra and retaining the present California rule of nonrevocation by divorce is the fact that the Legislature considered and rejected this proposed change in 1980. As originally introduced, the bill which resulted in the enactment of the notice requirement contained in new Section 4352 of the Civil Code was drawn to enact the UPC rule of partial revocation. See AB 2088 (1980). Although the bill passed the Assembly in this form, it ran into

opposition in the Senate Judiciary Committee. The committee's view was that most testators who (1) divorce, (2) do not insist on a waiver of will benefits in a marital settlement agreement, and (3) do not revise their wills, in fact want their former spouses to take as provided in the will. The committee therefore concluded that the existing California rule of nonrevocation by divorce should be preserved. Accordingly, the bill was amended to delete the provision for partial revocation.

In view of this recent statement of legislative intent, as well as the likely impact of the newly-required notice in divorce cases, the staff recommends against adopting the UPC rule of partial revocation by divorce (UPC § 2-508), and in favor of preserving the California rule of nonrevocation by operation of law upon dissolution or annulment of the marriage. We also recommend the retention of Civil Code § 4352 (notice in final divorce or annulment judgment).

#### Revocation by Remarriage After Divorce

As the preceding discussion indicates, there is substantial support for the UPC rule that the dissolution or annulment of the marriage revokes any disposition made by will to the former spouse unless the will otherwise provides. Nevertheless, the staff has recommended against this provision, primarily because the 1980 Legislature gave this proposal careful consideration and refused to adopt it. The 1980 legislation is based on the assumption that the testator desired the disposition made by the will to the former spouse be given effect notwithstanding the dissolution of the marriage. The staff believes, however, that this assumption is unwarranted if the testator remarries after the divorce. In case of remarriage, the staff recommends that the disposition made to the former spouse be revoked upon the remarriage. We would revise the UPC provision to substitute divorce plus remarriage in place of divorce. The rule proposed by the staff would be consistent with the law of some other states that provide that marriage or marriage plus the birth of issue revokes a prior will (see Official Comment to UPC § 2-508); but, unlike the rule in these other states, the staff-proposed rule would revoke the will only with respect to the disposition made to the former spouse. (We are not proposing to adopt the general rule, rejected in the UPC, that marriage or marriage plus issue revokes a will entirely.)

The staff suggestion would be accomplished by modifying UPC § 2-508 to read in substance as follows:

Section 2-508. Revocation by Divorcee Remarriage After Marriage Dissolved or Declared Nullity ; No Revocation by Other Changes in Circumstances

If after executing a will the ~~testator is divorced or his marriage annulled~~, the divorcee or annulment marriage of the testator is dissolved or declared a nullity and the testator thereafter remarries, the remarriage revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, conservator, or guardian, unless the will expressly provides otherwise. Property prevented from passing to a former spouse because of revocation by ~~divorce or annulment~~ remarriage passes as if the former spouse failed to survive the decedent, and other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the decedent. If provisions are revoked solely by this section, they are revived by testator's remarriage to the former spouse. ~~For purposes of this section, divorce or annulment means any divorce or annulment which would exclude the spouse as a surviving spouse within the meaning of Section 2-802(b).~~ A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section. No change of circumstances other than as described in this section revokes a will.

The modified UPC rule disinherits the first spouse from taking any benefits under the will, but the rule is not necessary to protect the new spouse. The new spouse (not mentioned in the will) is entitled to the same share the spouse would get if the testator dies without a will (all of the community property of the second marriage plus all or a portion of the testator's separate property). The modified UPC rule would govern only the disposition of the decedent's property remaining after the second spouse gets the statutory share. The rule would give the will such effect as could be given it after giving the second spouse the statutory share and eliminating the disposition to the former wife.

Effect of Marriage on Prior Will

Section 70 of the Probate Code provides:

70. If a person marries after making a will, and the spouse survives the maker, the will is revoked as to the spouse, unless provision has been made for the spouse by marriage contract, or unless the spouse is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation can be received.

If the testator's intent to omit the post-testamentary spouse from the will is not shown as provided in Section 70, the omitted spouse is entitled to an intestate share of the estate. French & Fletcher, supra at 374; Estate of Stewart, 69 Cal.2d 296, 298, 444 P.2d 337, 70 Cal. Rptr. 545 (1968).

The UPC provision is similar to the California provision:

2-301. (a) If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate he would have received if the decedent left no will unless 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.

(b) In satisfying a share provided by this section, the devises made by the will abate as provided in Section 3-902.

Unlike the California provision, the UPC permits a showing that the omission was intentional by the fact of a "transfer outside the will" if intended to be in lieu of a testamentary provision. The UPC language "provided for the spouse by transfer outside the will" would appear to include the Probate Code language "provision has been made for the spouse by marriage contract." ("Marriage contract" as used in Section 70 refers to antenuptial agreements and marital settlement agreements. See In re Estate of Smith, 15 Cal. App.2d 548, 550-51, 59 P.2d 854 (1936).)

If the testator has made provision for the post-testamentary spouse by a transfer outside the will, the UPC provision which permits this fact to be shown as having been in lieu of a testamentary provision seems to be a desirable change in California law. It promotes fairness by carrying out the testator's intent, though it may engender some litigation which a more restrictive rule would preclude. Thus, UPC Section 2-301 appears preferable to Probate Code Section 70, and the staff recommends the substance of the UPC section.

Respectfully submitted,

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Executive Secretary