

Third Supplement to Memorandum 82-9

Subject: Study L-603 - Probate Law (Disposition of Remaining California Provisions on Wills)

Attached to this Supplement as Exhibit 1 are the remaining sections in Division 1 (wills) of the Probate Code which are not disposed of in some other memorandum. The only significant policy question is discussed below.

Restriction on Bequest or Devise to Nonprofit Charitable Corporation
Appointed Guardian or Conservator

Probate Code Section 22.1 provides:

22.1. A bequest or devise to a nonprofit charitable corporation which has been appointed guardian or conservator of the person or estate, or both, of the person making the bequest or devise is invalid if the bequest or devise is contained in a will executed within six months prior to the filing of the petition for guardianship or conservatorship.

This section was added in 1974 as part of legislation to authorize certain nonprofit corporations to serve as guardian or conservator. Apparently the section was added as a precautionary measure to prevent undue influence on the testator.

However, in 1971 the Legislature repealed other similar provisions which invalidated certain testamentary gifts to charity if made within 30 days preceding the testator's death. The reason for the repeal was that the statutory restriction was easily circumvented by including in the will a substitutional gift to a trusted friend in the event the charitable gift was held invalid; since the failure of the gift would not benefit the heirs, they were unlikely to attack it. 7 B. Witkin, Summary of California Law Wills and Probate § 34, at 5557 (8th ed. (1974)); Review of Selected 1971 California Legislation, 3 Pac. L.J. 191, 197 (1972). It would seem that Section 22.1 can be circumvented in the same way, and that for that reason perhaps should not be continued. On the other hand, Section 22.1 contemplates the situation where the testator is about to be placed under conservatorship, is therefore likely susceptible to undue influence, and should be protected by a special provision.

On balance, the staff is inclined to recommend that Section 22.1 be retained. A draft section is set forth in Exhibit 2. Does the Commission concur?

Respectfully submitted,

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EXHIBIT 1

DISPOSITION OF REMAINING SECTIONS IN DIVISION 1 (WILLS)

Probate Code § 22 (repealed). Duress, menace, fraud, or undue influence

~~22. A will or part of a will procured to be made by duress, menace, fraud or undue influence, may be denied probate; and a revocation procured by the same means may be declared void.~~

Comment. Former Section 22 is continued in Section 328.3. See also Section 371 (claim of duress, menace, fraud, or undue influence triable by jury).

[Note. The UPC recognizes duress, fraud, and undue influence as grounds to challenge a will; these provisions are found with the UPC provisions on administration of estates. See UPC § 3-407.]

Probate Code § 22.1 (repealed). Bequest or devise to nonprofit charitable corporation appointed guardian or conservator

~~22.1. A bequest or devise to a nonprofit charitable corporation which has been appointed guardian or conservator of the person or estate, or both, of the person making the bequest or devise is invalid if the bequest or devise is contained in a will executed within six months prior to the filing of the petition for guardianship or conservatorship.~~

Comment. Former Section 22.1 is continued in Section 2-501.8.

[Note. Draft Section 2-501.8 is set forth in Exhibit 2 to this Memorandum.]

Probate Code § 23 (repealed). Conjoint or mutual will

~~23. A conjoint or mutual will is valid, but it may be revoked by any of the testators in like manner as any other will.~~

Comment. Former Section 23 is superseded by the last sentence of UPC Section 2-701 ("[t]he execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills").

Probate Code § 24 (repealed). Conditional will

~~24. A will, the validity of which is made conditional by its own terms, shall be granted or denied probate, or denied effect after probate, in conformity with the condition.~~

Comment. Former Section 24 is continued in Section 328.7.

Probate Code § 25 (repealed). Codicil republishes will

25. The execution of a codicil referring to a previous will has the effect to republish the will as modified by the codicil.

Comment. Former Section 25 is not continued. The original purpose of Section 25 was to extend the effect of a will to cover property acquired after the date of the will. Evans, Comments on the Probate Code of California, 19 Calif. L. Rev. 602, 608 (1931). However, under present law a will is construed to pass all property which the testator owns at death. UPC § 2-604. Hence Section 25 is no longer needed, and has in some cases caused problems. See Evans, supra.

Probate Code § 26 (repealed). Validity of foreign will under law of another state

26. No will made out of this state is valid as a will in this state unless (1) executed according to the provisions of this act, or (2) executed according to the laws of the state in which it was executed, or (3) valid under the laws of the state in which the testator was domiciled on the date of execution of the will.

Comment. Former Section 26 is superseded by UPC Section 2-506.

[Note. The Comment to this section is drafted on the assumption that the Commission will approve the staff recommendation in Memo 82-11 (validity of will under law of another state or country).]

Probate Code § 27 (repealed). Who may take testamentary dispositions

27. A testamentary disposition may be made to the United States, to any instrumentality of the United States, to any of the United States, to any foreign state complying with the provisions of Chapter 3 (commencing at Section 259) of Division 2 of this code, to the state, to counties, to municipal corporations, to natural persons capable by law of taking the property, to unincorporated societies or associations or lodges or branches thereof, and to corporations.

Comment. Former Section 27 is superseded by Section 2-501.7.

[Note. Draft section 2-501.7 is attached to the basic memorandum--Memo 82-9.]

Probate Code § 71 (repealed). Subsequent marriage; revocation as to issue

71. If a person marries after making a will and has issue of such marriage, and any of the issue survives the maker, or is born after the death of the maker, the will is revoked as to such issue, unless provision

has been made for such issue by some settlement, or unless such issue are 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 such revocation can be received.

Comment. Former Section 71 is superseded by [either family maintenance legislation or UPC Section 2-302 (pretermitted children)].

[Note. The question of whether to adopt family maintenance legislation or the UPC's pretermittance statute is discussed in Memo 82-16. Whatever decision is made on that question, Section 71 should be repealed since it is superfluous. See Turrentine, Introduction to the California Probate Code, in West's Annotated California Codes, Probate Code 11 (1956); French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 375 n.125 (1976).]

Probate Code § 90 (repealed). Omitted children and grandchildren

90. When a testator omits to provide in his will for any of his children, or for the issue of any deceased child, whether born before or after the making of the will or before or after the death of the testator, and such child or issue are unprovided for by any settlement, and have not had an equal proportion of the testator's property bestowed on them by way of advancement, unless it appears from the will that such omission was intentional, such child or such issue succeeds to the same share in the estate of the testator as if he had died intestate.

Comment. Former Section 90 is superseded by [either family maintenance legislation or UPC Section 2-302 (pretermitted children)].

Probate Code § 91 (repealed). Source of share of omitted children and grandchildren

91. The share of the estate which is assigned to a child or issue omitted in a will, as hereinbefore mentioned, must first be taken from the estate not disposed of by the will, if any; if that is not sufficient, so much as may be necessary must be taken from all the devisees or legatees, in proportion to the value they may respectively receive under the will, unless the obvious intention of the testator in relation to some specific devise or bequest, or other provision in the will, would thereby be defeated; in such case, such specific devise, legacy or provision may be exempted from such apportionment, and a different apportionment, consistent with the intention of the testator, may be adopted.

Comment. [If the staff recommendation in Memo 82-16 is followed, Section 90 will either be replaced by a limited family maintenance act or replaced by the UPC pretermittance section. If a family maintenance

act is to be adopted, Section 91 will not be continued. If the UPC pre-
termission section is adopted, Section 91 should be temporarily moved to
Division 3 (administration of estates) until we consider the UPC's
administration provisions.]

Probate Code § 328.3 (added). Duress, menace, fraud, or undue influence

328.5. A will or part of a will procured to be made by duress,
menace, fraud, or undue influence, may be denied probate. A revocation
procured by the same means may be declared void.

Comment. Section 328.3 continues former Section 22.

Probate Code § 328.7 (added). Conditional will

328.7. A will, the validity of which is made conditional by its
own terms, shall be granted or denied probate, or denied effect after
probate, in conformity with the condition.

Comment. Section 328.7 continues former Section 24.

EXHIBIT 2

Section 2-501.8. Devise to nonprofit charitable corporation appointed guardian or conservator

2-501.8. A devise to a nonprofit charitable corporation which has been appointed guardian or conservator of the person or estate, or both, of the person making the devise is invalid if the devise is contained in a will executed within six months prior to the filing of the petition for guardianship or conservatorship.

Comment. Section 2-501.8 continues former Section 22.1. See also Section 1-201 ("devise" means testamentary disposition of real or personal property).

[Note. If this section is approved, it will be inserted with the other wills provisions attached to the basic memorandum--Memo 82-9.]