

Memorandum 82-13

Subject: Study L-603 - Probate Law (Waiver of Rights in Spouse's Estate)

Both California law and the UPC have provisions which permit a married person to waive by agreement rights in the estate of the other spouse. See Prob. Code § 80 (attached as Exhibit 2); UPC § 2-204 (attached as Exhibit 1). The California Probate Code section was enacted in 1980 to deal with the specific problem of whether a divorced person may take property under the will of the person's former spouse. The section appears to add little if anything to prior California decisional law. See Review of Selected 1980 California Legislation, 12 Pac. L.J. 235, 257 (1981). The section is quite narrowly drawn: It only applies after a dissolution or annulment of marriage, and provides that a property settlement agreement which contains appropriate language of waiver results in a waiver of the right to take under a pre-agreement will of the other spouse.

Under California decisional law, a spousal waiver may be made in any written agreement, whether premarital, postmarital, or made in connection with dissolution of marriage. See Grant, Marital Contracts Before and During Marriage, in 1 The California Family Lawyer § 5.8, at 157-58 (Cal. Cont. Ed. Bar 1962). The spouse may waive not only rights under the will of the other, but any or all of the following rights:

(1) The right to take by intestate succession. 7 B. Witkin, Summary of California Law Wills and Probate § 36, at 5559 (8th ed. 1974).

(2) The right to claim community property rights against an inconsistent will of the deceased spouse. 7 B. Witkin, supra § 20, at 5541.

(3) The right to a probate homestead. Grant, supra; 7 B. Witkin, supra § 533, at 5949; Wayne, Exempt and Homestead Property, in 1 California Decedent Estate Administration § 12.52, at 446 (Cal. Cont. Ed. Bar 1971).

(4) The right to have exempt property set aside out of the estate of the deceased spouse. In re Estate of Fulton, 15 Cal. App.2d 202, 59 P.2d 508 (1936).

(5) The right to a family allowance. Grant, supra; Pigott, Family Allowance, in 1 California Decedent Estate Administration § 11.8, at

397 (Cal. Cont. Ed. Bar 1971); Landry & Prager, Using Spousal Agreements in Estate Planning, in Estate Planning 1981 § 3.6, at 109 (Cal. Cont. Ed. Bar 1982).

(6) The right to have a small estate summarily set aside. Soares v. Steidtmann, 130 Cal. App.2d 401, 278 P.2d 953 (1955).

The UPC section provides a comprehensive statement which is generally consistent with the California decisional rules described above. Under the UPC, the agreement must be in writing, signed by the party waiving, and follow "fair disclosure." The agreement may be made before or after marriage, and may waive intestate succession rights, rights under the other spouse's pre-agreement will, elective share, family allowance, homestead allowance, and exempt property. UPC § 2-204 (Exhibit 1).

The staff is of the view that it would be useful to have a complete statement of the law which the UPC section would afford. Writing before the enactment of Probate Code Section 80, Professor Niles was of the same view. See Niles, Probate Reform in California, 31 Hastings L.J. 185, 212 n.171, 218 (1979). The staff recommends adopting UPC Section 2-204 in place of Probate Code Section 80. The staff has revised the UPC section (see Exhibit 1) to preserve a useful provision of Section 80 to the effect that if after a property settlement agreement made in connection with dissolution of marriage the parties remarry, the agreement does not have the effect of waiving rights at death.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

EXHIBIT 1

Section 2-204. Waiver of right to elect and of other rights

2-204. (a) The [right of election of a surviving spouse and the] rights of the surviving spouse to homestead allowance, exempt property and family allowance, [small estate set-aside,] or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement or waiver signed by the party waiving after fair disclosure.

(b) Unless it provides to the contrary, a waiver of "all rights" (or equivalent language) in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or ~~divorce~~ dissolution or annulment of marriage is a waiver of all rights to [elective share,] homestead allowance, [small estate set-aside,] exempt property and family allowance by each spouse in the property of the other and a renunciation of each of all benefits which would otherwise pass to him or her from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement.

(c) Notwithstanding subdivision (b), if the spouses remarry each other and one of them dies during the remarriage, a property settlement entered into after or in anticipation of separation or dissolution or annulment of marriage is not a waiver or renunciation as provided in subdivision (b).

Comment. Subdivisions (a) and (b) of Section 2-204 are the same in substance as Section 2-204 of the Uniform Probate Code [except as modified to take account of Commission decisions with respect to elective share and small estate set-aside]. Section 2-204 supersedes former Section 80 of the Probate Code. Subdivision (c) is drawn from subdivision (b) of former Section 80.

[Note. The bracketed language in Section 2-204 depends on Commission decisions with respect to elective share and small estate set-aside. See Memo 82-15 and 82-17.]

EXHIBIT 2

Probate Code § 80 (repealed). Property settlement agreement waiving rights at death

80. (a) If after executing a will or any codicil thereto, the testator's marriage is dissolved or declared a nullity by a final judgment of a court of competent jurisdiction, and if the testator and his or her former spouse have executed a property settlement agreement waiving and renouncing all rights to inherit the estate of the other at the other's death, or to receive any property of the other under a will executed prior to the agreement, the former spouse of the testator and the lineal descendants of the former spouse of the testator shall be deemed to have predeceased the testator for purposes of the will or codicil, unless the will or codicil expressly provides otherwise. For the purpose of this section, "lineal descendants" shall include all lineal descendants of the former spouse of the testator who are not also lineal descendants of the testator.

(b) The provisions of subdivision (a) shall not be applicable if the testator's death occurs during the remarriage to the former spouse.

(c) The provisions of this section shall be applicable only to wills or codicils executed on or after January 1, 1981.

Comment. Subdivisions (a) and (b) of former Section 80 are superseded by UPC Section 2-204. Subdivision (c) of former Section 80 is superseded by Section [general transitional provision, to be drafted].