

Memorandum 82-40

Subject: Study L-607 - Probate Law (Disclaimers)

Recent legislation expands the class of interests that can be disclaimed pursuant to Probate Code Sections 190-190.10. (See 1982 Cal. Stats. ch. 41, § 1, amending Prob. Code § 190.) Under the law prior to this amendment, a person could disclaim an interest arising by intestate succession, by will, by succession to a disclaimed interest, by election to take against a will, under a testamentary trust, by power of appointment, or by inter vivos gift, whether outright or in trust. As amended, Probate Code Section 190 specifies the following additional methods of acquiring an interest that may be disclaimed: by grant, as surviving joint tenant, as beneficiary of insurance, annuity, or other contract, as beneficiary under a pension, profit sharing, or other retirement plan for employees and self-employed persons, as beneficiary of any testamentary or nontestamentary instrument, or in any other manner. This legislation remedies one major defect in the disclaimer statute.

As reported in Memorandum 82-20 at the Commission's March meeting, the Probate, Trust and Estate Planning Committee of the Beverly Hills Bar Association is actively engaged in a study of the disclaimer statute and hopes to introduce legislation to accomplish further reforms needed to make disclaimer a more effective post-mortem estate planning device, particularly taking into account the need to satisfy the requirements of the Internal Revenue Code. The bar committee is tentatively recommending amendments to clarify the time within which a disclaimer can be made, the place for filing a disclaimer, and the effect of filing a disclaimer.

For the time being, the staff proposes to continue the existing disclaimer statute without substantive change. We plan to renumber the sections as set out in the staff draft attached hereto as Exhibit 1, but we see this as essentially a placeholder. We make this recommendation in anticipation that the bar committee will continue its work on the disclaimer statute and that the Commission will have the benefit of the bar committee's work for inclusion in the comprehensive revision of the provisions relating to wills and intestate succession.

One substantive matter remains. At the March meeting the Commission decided that the exercise of a disclaimer should not affect the amount of the share taken by intestate succession in a case where the disclaimant

is the last member of a generation. For example, if a decedent had two children, one of whom predeceased the decedent, and if the surviving child has five children and the deceased child has one child, the exercise of a disclaimer could have a significant effect since the property descends as if the disclaimant had predeceased the decedent. Prob. Code § 190.6. Hence, in this example, if the surviving child does not disclaim, the child of the predeceased child would take one-half by right of representation; but if the surviving child disclaims, the six grandchildren would take per capita, thereby reducing the share of the child of the predeceased child from one-half to one-sixth. Of course, from the point of view of one of the five children of the surviving child, the non-exercise of the disclaimer reduces the amount of the property he or she might ultimately take from one-sixth to one-tenth (one-fifth of one-half). However, if it is the effect of the exercise of the disclaimer on the shares of the next generation that we wish to restrict, the staff proposes the following (to be added to the intestate succession provisions as approved at the last meeting, not to the disclaimer statute):

2-106. (a) If representation is called for by this code, the estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survive the decedent, each surviving heir in the nearest degree receiving one share and the share of each deceased person in the same degree being divided among his or her issue in the same manner.

(b) Notwithstanding Section [281.070], the last member of a generation who disclaims his or her share is not treated as having predeceased the decedent for the purpose of determining the generation at which the division of the estate is made.

Comment.

Subdivision (b) is new, and is not found in the Uniform Probate Code. Subdivision (b) is added to prevent an heir from disclaiming property for the purpose of increasing the intestate share of his or her line at the expense of other lines of the decedent's descendants. For example, suppose the decedent has two children: The disclaimant (C-1) is living and has two children (GC-1 and GC-2, the decedent's grandchildren). The decedent's other child (C-2) has predeceased the decedent leaving one child (GC-3). But for the disclaimer, C-1's share is one-half and GC-3 takes the other half. If the disclaimant (C-1) is treated as having predeceased the decedent as provided by Section [281.070] and the per capita rule of subdivision (a) is applied, the estate would be divided at the grandchildren's generation, with GC-1, GC-2, and GC-3 each taking

one-third. Subdivision (b) precludes the disclaimer from reducing the share to which GC-3 would otherwise be entitled were the disclaimer not exercised.

Respectfully submitted,

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EXHIBIT 1

STAFF DRAFT

DISCLAIMERS

Probate Code §§ 190-190.10 (repealed). Disclaimers

Comment. Former Sections 190-190.10 are continued in [Article 2 (commencing with Section 281.010) of Chapter 8 of Division 2] without substantive change. For a table showing the disposition of former law, see the Comment to [Article 2 (commencing with Section 281.010) of Chapter 8 of Division 2].

Probate Code §§ 281.010-281.110 (added). Disclaimers

Article 2. Disclaimer of Testamentary and
Nontestamentary Interests

Comment. [Article 2 (commencing with Section 281.010)] continues former Sections 190-190.10 without substantive change. The following table shows the corresponding sections of this article and former law.

| <u>Former Probate Code Sections 190-190.10</u> | <u>New Probate Code Sections 281.010-281.110</u> |
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| 190 [as amended, 1982 Cal. Stats. ch. 41, § 1] | 281.010 |
| 190.1 | 281.020 |
| 190.2 | 281.030 |
| 190.3 | 281.040 |
| 190.4 | 281.050 |
| 190.5 | 281.060 |
| 190.6 | 281.070 |
| 190.7 | 281.080 |
| 190.8 | 281.090 |
| 190.9 | 281.100 |
| 190.10 | 281.110 |

§ 281.010. Definitions

281.010. As used in this chapter, unless otherwise clearly required by the context:

(a) "Beneficiary" means and includes any person entitled, but for his or her disclaimer, to take an interest (1) by intestate succession, (2) by devise, (3) by legacy or bequest, (4) by succession to a disclaimed interest, (5) by virtue of an election to take against a will, (6) as beneficiary of a testamentary trust, (7) pursuant to the exercise or nonexercise of a power of appointment, (8) as donee of any power of appointment, (9) as beneficiary of an inter vivos gift, whether outright or in trust, (10) by grant, (11) as surviving joint tenant, (12) as beneficiary of or payee under an insurance, annuity, endowment, employment,

deferred compensation, or other contract or arrangement, (13) as beneficiary of or payee under any pension, profit sharing, thrift, stock bonus, life insurance, survivor income, incentive, or other plan or program providing retirement, welfare, or fringe benefits with respect to employees or self-employed individuals, (14) as beneficiary of or payee under any testamentary or nontestamentary instrument, or (15) in any other manner not specifically enumerated herein.

(b) "Interest" means and includes the whole of any property, real or personal, legal or equitable, or any fractional part, share, or particular portion or specific assets thereof, or any estate in any such property, or power to appoint, consume, apply, or expend property, or any other right, power, privilege, or immunity relating thereto.

(c) "Disclaimer" means a written instrument which declines, refuses, renounces, or disclaims any interest which would otherwise be succeeded to by a beneficiary.

(d) "Disclaimant" means a person who executes a disclaimer on his or her own behalf or on behalf of another.

§ 281.020. Disclaiming interest; contents of disclaimer

281.020. A beneficiary may disclaim any interest, in whole or in part, by filing a disclaimer as provided in this chapter. The disclaimer shall (i) identify the decedent or donor, (ii) describe the property or part thereof or interest therein disclaimed, (iii) declare the disclaimer and the extent thereof, and (iv) be signed by the disclaimant.

§ 281.030. Disclaimer by guardian, conservator or representative

281.030. A disclaimer on behalf of a minor, conservatee, or decedent shall be made by the guardian of the estate of the minor, the conservator of the estate of the conservatee, or the personal representative of the decedent.

§ 281.040. Effectiveness of disclaimer

281.040. A disclaimer to be effective shall be filed within a reasonable time after the person able to disclaim acquires knowledge of the interest.

(a) Except as otherwise provided in subsection (c), a disclaimer shall be conclusively presumed to have been filed within a reasonable time if filed as follows:

(1) In case of interests created by will, within nine months after the death of the person creating the interest, or within nine months

after the interest becomes indefeasibly vested, whichever occurs later. Interests resulting from the exercise or nonexercise of a testamentary power of appointment shall be deemed created by the donee of the power for purposes of this article.

(2) In case of interests arising from intestate succession, within nine months after the death of the person dying intestate.

(3) In case of interests created by inter vivos trusts, within nine months after the interest becomes indefeasibly vested. Interests resulting from the exercise or nonexercise of a nontestamentary power of appointment shall be deemed created by the donee of the power for purposes of this article.

(4) In other cases, within nine months after the first knowledge of the interest is obtained by a person able to disclaim, or within nine months after the interest becomes indefeasibly vested, whichever occurs later.

(b) If the disclaimer is not filed within the time set forth in subdivision (a), the disclaimant shall have the burden to establish the disclaimer was filed within a reasonable time after he acquired knowledge of the interest.

(c) A disclaimer shall be conclusively presumed not to have been filed within a reasonable time after the person able to disclaim acquired knowledge of the interest if:

(1) An interest in the property which is in whole or in part sought to be disclaimed has been acquired by a purchaser or encumbrancer for value subsequent to or concurrently with the creation of the interest sought to be disclaimed and prior to such disclaimer, and

(2) One year has elapsed from the death of the person dying intestate or creating by will the interest sought to be disclaimed, or from the date of the transfer by inter vivos gift, whether outright or in trust.

§ 281.050. Filing of disclaimers

281.050. The disclaimer shall be filed as follows:

(a) In case of interests created by will or arising from intestate succession, with the superior court in the county in which the estate of the decedent is administered; if there is no administration, with the superior court in the county in which administration would be proper.

(b) In case of interests created by an inter vivos trust, with the trustee then acting.

(c) In other cases, with the person creating the interest.

Disclaimers made pursuant to this article which affect real property or obligations secured by real property shall be acknowledged and proved, and may be certified and recorded, in like manner and with like effect as grants of real property, and all statutory provisions relating to the recordation or nonrecordation of conveyances of real property and to the effect thereof shall apply to such disclaimers with like effect, without regard to the date when the disclaimer was filed, if at all, pursuant to subdivisions (a) through (c) of this section. Failure to so file a disclaimer which is recorded pursuant to this section shall not affect the validity of any transaction with respect to such real property or obligation secured thereby, and the general laws of this state on recording and its effect shall govern any such transaction.

§ 281.060. Binding effect of disclaimer; waiver

281.060. A disclaimer, when effective, shall be binding upon the beneficiary and all persons claiming by, through or under him. A person who, under this article could file a disclaimer, may instead file a written waiver of a right to disclaim and such waiver, when filed, shall be binding upon the beneficiary and all persons claiming by, through or under him.

§ 281.070. Disposition of interest disclaimed

281.070. Unless otherwise provided in the will, inter vivos trust, exercise of the power of appointment, or other written instrument creating or finally determining an interest, the interest disclaimed and any future interest which is to take effect in possession or enjoyment at or after the termination of the interest disclaimed, shall descend, go, be distributed or continued to be held as if the beneficiary disclaiming had predeceased the person creating the interest. In every case, the disclaimer shall relate back for all purposes to the date of the creation of the interest.

§ 281.080. Restriction on making disclaimer

281.080. A disclaimer may not be made after the beneficiary has accepted the interest to be disclaimed. An acceptance does not preclude a beneficiary from thereafter disclaiming all or part of any interest to which he became entitled because another person disclaimed an interest and of which interest the beneficiary or person able to disclaim on his behalf had no knowledge. For the purposes of this article, if a disclaimer has not theretofore been filed, a beneficiary has accepted an interest if he, or someone acting on his behalf, (1) makes a voluntary assignment

or transfer of, or contract to assign or transfer, the interest or part thereof, or (2) executes a written waiver of the right to disclaim the interest, or (3) sells or otherwise disposes of the interest or any part thereof pursuant to judicial process.

§ 281.090. Right to disclaim not affected by spendthrift or other restrictions

281.090. The right to disclaim shall exist irrespective of any limitation imposed on the interest of a beneficiary in the nature of an expressed or implied spendthrift provision or similar restriction.

§ 281.100. Operative effect of article

281.100. Any interest created prior to August 16, 1972, which has not been accepted, may be disclaimed on or after August 16, 1972, in the manner provided herein; provided, however, that no interest which has arisen prior to August 16, 1972, in any person other than the beneficiary, shall be destroyed or diminished by any action of the disclaimant taken pursuant to this article.

§ 281.110. Savings clause

281.110. This article shall not limit or abridge the presently existing rights of any person to assign, convey, release or disclaim any property or interest therein.