

Memorandum 82-47

Subject: Study L-604 - Probate Law (Family Protection--Election to Take Against Will)

Under existing California law the surviving spouse is entitled to half of the community property and half of the quasi-community property on the death of the decedent; the other half is subject to testamentary disposition by the decedent. Prob. Code §§ 201, 201.5. Sometimes the decedent purports to will away more than the decedent's half of the community and quasi-community property. This often arises where the decedent creates a trust out of all the marital property for tax or other estate planning reasons. It also arises where the decedent wills away the property in the mistaken belief that the decedent owns the property or otherwise has a right of testamentary disposition over it.

In such situations the surviving spouse is entitled to take not only the benefits provided to the spouse in the will but also the statutory half share in any community or quasi-community property the decedent attempted to will away. To avoid such disruption of an estate plan, the decedent's will may require the surviving spouse to make an election: the benefits given the spouse under the will are given only if the spouse does not elect to take the statutory half share. This is known as the "widow's election," even though it can be applied to widowers as well as widows. Even if the decedent's will does not require the surviving spouse to make an election, the court may imply such a requirement in cases where it will thwart the decedent's estate plan to take benefits both under and against the will. These rules do not apply where the will expressly permits the surviving spouse to take both under and against the will. Nor do they apply where the surviving spouse has previously waived statutory rights, which may well occur as part of a well-planned estate.

Although this scheme has developed mainly through case law, California has at least one statute governing the election to take a statutory share. Probate Code Section 201.7 requires an election by the surviving spouse to take quasi-community property either under or against a will where the decedent "has made provision by a valid will for the surviving spouse."

The required election of Section 201.7 appears sound in principle to the staff and we recommend it be extended to every case where the decedent leaves a valid will, not just where quasi-community property is involved. This would have a number of beneficial effects: (1) It would treat estates of married persons the same regardless whether the estates contain quasi-community property. (2) It would effectuate the presumed intent of most testators who may not have thought to require the election in the will but who had a specific estate plan in mind when drawing the will. (3) It would avoid litigation over whether the decedent's estate plan would be "thwarted" by the surviving spouse taking both under and against the will. (4) It would solve a sensitive practical problem under existing law where a spouse may intend a complete estate plan but is reluctant to require an election for fear of offending the other spouse.

Attached to this memorandum is a draft of provisions to implement a mandatory election scheme. The draft also includes provisions from existing law governing restoration of quasi-community property to the estate for purposes of the statutory share of the surviving spouse. Under the proposed legislation the surviving spouse is put to a mandatory election any time a decedent domiciled in this state leaves a valid will, unless the will permits the surviving spouse to take both under and against it. If the surviving spouse elects to take against the will, the statutory share consists of half of the community and quasi-community property plus quasi-community property restored to the estate under the recapture scheme of existing law. The election must be made within six months after the will is probated and is irrevocable once a court order is made determining the statutory share of the surviving spouse and apportioning the obligation among the beneficiaries under the will. The obligation to satisfy the statutory share is apportioned equitably among the beneficiaries in proportion to the value of their interests. Electing to take the statutory share does not deprive the surviving spouse of any other statutory rights such as probate homestead, exempt property, and family allowance. The right to take against a will can be waived, however, by a written prenuptial or postnuptial agreement. See UPC § 2-204 (previously approved by Commission).

The staff believes that these provisions make a simple yet workable statutory election scheme that is not too radical a departure from the

existing rules on election to take against a will. We do note, however, that this scheme is quite different from the elective share provisions of the Uniform Probate Code. Under the Uniform Probate Code the surviving spouse has an elective right to a statutory portion of the decedent's "augmented estate." The augmented estate consists of all property in the estate (including separate property) plus the value of inter vivos transfers by the decedent that are will substitutes. The surviving spouse's elective share is offset by will and other transfers to the surviving spouse such as insurance proceeds and joint tenancy, so that if the surviving spouse receives greater value than the elective share, there would be no right to the elective share--the surviving spouse would have to take under the will. The elective share in the augmented estate would also apply to the case of an intestate spouse. The Commission has previously considered and rejected the Uniform Probate Code scheme.

Respectfully submitted,

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CHAPTER 2. ELECTION TO TAKE AGAINST WILL

§ 220.010. Scope of chapter

220.010. (a) This chapter applies upon the death of a married person domiciled in this state who leaves a valid will.

(b) Upon the death of a married person not domiciled in this state who leaves a valid will disposing of real property in this state that is not community property, the surviving spouse has the same right to elect to take a portion of or interest in the property against the will of the decedent as though the property were situated in the decedent's domicile at death. As used in this subdivision real property includes a leasehold interest in real property.

Comment. Subdivision (a) of Section 220.010 makes clear that the statutory share provisions of this chapter apply only to an election to take against a will and not to cases where the decedent dies intestate. Contrast UPC §§ 2-201 to 2-207 (elective share of surviving spouse).

Subdivision (b) continues the substance of former Section 201.6.

§ 220.020. Mandatory election

220.020. The surviving spouse shall make an irrevocable election whether to take under the will of the decedent or to take a statutory share of the estate against the will of the decedent, unless it appears by the will that the decedent intended that the surviving spouse might take both under the will and against it.

Comment. Section 220.020 continues the substance of former Section 201.7, which provided a mandatory election as to quasi-community property. Section 220.020 extends the mandatory election to community property in the estate of the decedent as well. This continues the effect of existing law where the will requires an election or an election is impliedly required. See, e.g., 7 B. Witkin, Summary of California Law, Wills and Probate § 22 (1974). Under Section 220.020, an election is required as to the community and quasi-community property in the estate, regardless whether the will expressly or impliedly requires an election. This overrules prior law enabling the surviving spouse to take both under and against the will in situations where the will does not expressly or impliedly require an election. See, e.g., Estate of Gilmore, 81 Cal. 240, 22 Pac. 655 (1889); Estate of Prager, 166 Cal. 450, 137 Pac. 37 (1913); Estate of Wolfe, 48 Cal.2d 570, 311 P.2d 476 (1957). The right to take against the will is subject to waiver by the surviving spouse. See Section ____ (waiver of right to elect and of other rights).

§ 220.030. Statutory share

220.030. The statutory share of a surviving spouse who elects to take against the will is all of the following property remaining after

payment of funeral and administration expenses, exempt property, family allowance, and enforceable claims:

(a) One-half of the community property and one-half of the quasi-community property in the estate.

(b) All of the quasi-community property restored to the estate pursuant to Section 220.040.

Comment. Section 220.030 continues existing law as to the statutory share of a surviving spouse who takes against a will. See former Sections 201 (community property), 201.5 (quasi-community property), and 201.8 (quasi-community property restored to estate).

§ 220.040 Restoration of quasi-community property

220.040. (a) A surviving spouse who elects to take against the will may require the transferee of quasi-community property in which the surviving spouse had an expectancy at the time of the transfer to restore to the decedent's estate one-half of the property, its value, or its proceeds, if all of the following conditions are satisfied:

(1) The decedent made a transfer of the property to a person other than the surviving spouse without receiving in exchange a consideration of substantial value.

(2) The decedent had a substantial quantum of ownership or control of the property at death.

(b) All property restored to the estate under this section is part of the statutory share of the surviving spouse and goes to the surviving spouse pursuant to this chapter as though the transfer had not been made.

Comment. Section 220.040 continues the substance of former Section 201.8.

§ 220.050. Proceedings on election

220.050. (a) The surviving spouse may elect to take the statutory share in the decedent's estate by filing in the court and mailing or delivering to the personal representative, if any, a petition for the statutory share and disclaiming the right to benefits under the will within six months after the probate of the will. The petition shall include a statement describing all of the quasi-community property that is required to be restored to the estate pursuant to the election. The court may extend the time for election as it sees fit for good cause shown by the surviving spouse before the time for election has expired.

(b) The surviving spouse shall give notice of the time and place set for hearing to persons interested in the estate, to the distributees and recipients of portions of the estate whose interests will be adversely affected by the taking of the statutory share, and to transferees of quasi-community property sought to be restored to the estate.

(c) The surviving spouse may withdraw the petition for a statutory share at any time before entry of a final determination by the court.

(d) After notice and hearing, the court shall determine the statutory share and order its payment from the estate. If it appears that a fund or property included in the statutory share (including quasi-community property required to be restored to the estate) has not come into the possession of the personal representative, or has been distributed by the personal representative, the court nevertheless shall fix the obligation for contribution of any person who has any interest in or possession of the fund or property, whether as a trustee or otherwise. The proceeding to fix the obligation may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any greater amount than if relief had been secured against all persons subject to contribution.

(e) The order or judgment of the court may be enforced as necessary in suit for contribution or payment in other courts of this state or other jurisdictions.

Comment. Section 220.050 is drawn from Section 2-205 of the UPC.

§ 220.060. Effect of election on benefits provided by statute

220.060. A surviving spouse is entitled to probate homestead, exempt property, and family allowance to the extent provided by statute whether or not the surviving spouse elects to take a statutory share.

Comment. Section 220.060 is drawn from Section 2-206 of the UPC.

§ 220.070. Liability of others for balance of statutory share

220.070. Property of the estate is so applied that the obligation for the statutory share of, and right to benefits under the will disclaimed by, the surviving spouse are equitably apportioned among the affected recipients of the estate in proportion to the value of their interests therein.

Comment. Section 220.070 is drawn from subsection (b) of UPC Section 2-207.