#L-604 4/23/82

Memorandum 82-64

Subject: Study L-604 - Probate Law (Pretermission)

Pretermission statutes generally provide an intestate share for a child (and sometimes a grandchild) of the testator omitted from the testator's will where it does not appear from the will that the omission was intentional. See T. Atkinson, Handbook of the Law of Wills § 36, at 141-45 (2d ed. 1953).

Although pretermission was on the agenda for the Commission's last meeting, consideration was deferred until this meeting so pretermission could be considered along with a draft of family maintenance legislation (see Memo 82-41). The California pretermission sections (Prob. Code §§ 90-91) are set forth in Exhibit 1 to this Memorandum, and the UPC section (§ 2-302) is set forth in Exhibit 2.

Should the Purpose of the Pretermission Statute Be to Effectuate the Testator's Intent or to Prevent Disinheritance of Children?

The cases reveal some confusion over whether the purpose of the pretermission statute is to carry out the parent's presumed intent not to disinherit a child by protecting against the parent's forgetfulness, or is to thwart the parent's apparent intent to disinherit by requiring the parent to fulfill the social obligation to children. Compare In re Estate of Callaghan, 119 Cal. 571, 574, 51 P. 860 (1898), with Estate of Torregano, 54 Cal.2d 234, 248-49, 352 P.2d 505, 5 Cal. Rptr. 137 (1960). In the staff's view, the pretermission statute is justifiable only as an intent-effectuating device to protect against an inadvertent or mistaken omission. It is unsatisfactory as a means of giving effect to the public policy against disinheritance of children for two reasons:

(1) The pretermission statute only applies where it does not appear from the will that the omission was intentional. It is easily circumvented by the testator who uses express words of disinheritance.

(2) The changes to intestate succession laws being recommended by the Commission will make the pretermission statute meaningless in the case where the testator is married and all of the testator's children are of that marriage. This is because the pretermission statute gives the omitted child an intestate share. The omitted child has no intestate share in community property. And, under the Commission's recommendation, all of the decedent's separate property will pass by intestacy to the

surviving spouse if the decedent leaves no children of another union. Thus if the testator is married and all of the testator's children are of that marriage, the omitted child will have no intestate share, and the pretermission statute will afford no protection. The pretermission statute will be meaningful only if the testator either dies unmarried or, if married, leaves one or more children of another union and has substantial separate property.

The conclusion that the pretermission statute should protect against the testator's forgetfulness and not try to prevent disinheritance is strengthened by the Commission's decision to recommend family maintenance legislation to provide long-term support for children based on need. The pretermission provision operates very crudely by giving the omitted child an intestate share which may be more or less than the child needs, and may be larger or smaller than the share given to other children by the testator's will (probably larger in the usual case). See Mathews, Pretermitted Heirs: An Analysis of Statutes, 29 Colum. L. Rev. 748, 768 (1929); Sweet, Rights of a Pretermitted Heir in California Community Property--A Need for Clarification, 13 Stan L. Rev. 80, 88 (1960).

Comparison of California and UPC Pretermission Provisions

There are three substantive differences between the California and the UPC pretermission provisions. In each of these three respects the UPC does not provide protection against pretermission while the California statute does. In the staff's view, in each of these three respects the UPC section is superior to the California provisions as an intent-effectuating device. These substantive differences are:

(1) Unlike California law, the UPC pretermission provision does not apply if the testator had at least one child when the will was made and willed substantially the whole estate to the other parent of an omitted child.

(2) California provides an intestate share for an omitted child living when the will was made, as well as for afterborn children. The UPC protects afterborn children as does California law, but protects a child living when the will was made only if the omission was solely because the testator mistakenly believed the child to be dead.

(3) California protects omitted issue of a deceased child of the testator; the UPC is limited to the testator's children.

These three differences are discussed below.

Whole estate devised to omitted child's other parent. The UPC provides nothing to an omitted child if the testator had one or more children when the will was made and devised substantially the whole estate to the child's other parent. This provision is sound both because it carries out the testator's probable intent and is not inconsistent with public policy. According to empirical evidence, the surviving parent who receives the decedent's property will provide for the child in the usual case. Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. B. Foundation Research J. 319, 355. If the child is a minor, to give the child an intestate share may require the cumbersome and expensive appointment of a guardian; in such a case, the child will be better protected and have more funds available if the child's parent receives the property. Id. at 356.

For these reasons, the staff recommends this aspect of the UPC pretermission provision over the California rule. The same reasoning supports a modification of the UPC provision to eliminate the requirement that, before the omitted child will be denied an intestate share where the whole estate goes to the child's parent, it must be shown that the testator had one or more children when the will was executed. Presumably the purpose of this requirement is to ensure that the testator thought about his or her children before deciding to leave the estate to the other parent. However, the fact that the property is going to the child's surviving parent would seem to be sufficient protection for the child, suggesting that the child should be denied an intestate share in such a case whether or not the testator had children at the time the will was made. The staff has made such a revision in the draft statute below.

No protection for omitted child living when will was made. The California provision, which gives an intestate share to an omitted child who was living when the will was made, is intention-defeating in the usual case, since it is much more likely that the omission was deliberate than that it resulted from an oversight. See Evans, Should Pretermitted Issue Be Entitled to Inherit?, 31 Calif. L. Rev. 263, 265, 269 (1943); Niles, Probate Reform in California, 31 Hastings L.J. 185, 197 (1979). The UPC, by protecting an omitted child living when the will was executed only if the omission was solely because the testator believed the child to be dead, is more likely to carry out the testator's probable intent.

In its 1973 critique of the Uniform Probate Code, the State Bar found "considerable merit to the [UPC] proposal to eliminate the present California protection for the child that is alive at the time the will was executed." State Bar of California, The Uniform Probate Code: Analysis and Critique 34 (1973).

The staff recommends this aspect of the UPC pretermission section over the California rule. The staff would modify the UPC to incorporate a suggestion made by Professor Niles that the UPC could be improved by including protection for a child living when the will was made if the testator was unaware of the birth of the child. Niles, supra at 197. This is closely analogous to protecting a child the testator believed was dead. The staff has included such a revision in the draft statute below.

No protection for omitted grandchildren. The California pretermission statute protects omitted "issue of any deceased child" of the testator. The UPC limits its protection to children of the testator. The staff finds the UPC rule preferable.

If the parent of the testator's grandchild (i.e., the testator's child) is living when the will is made, is a named beneficiary under the will, and dies before the testator, the anti-lapse statute will substitute the testator's grandchildren for their parent. In such a case, the anti-lapse statute takes precedence over the pretermission statute. In re Estate of Todd, 17 Cal. 2d 270, 276-77, 109 P.2d 913 (1941). The anti-lapse statute produces fairer results than the pretermission statute, since the anti-lapse statute gives the testator's grandchildren the share that was intended for their parent rather than taking property which the testator has expressly left to others as the pretermission statute does. See Evans, supra at 268.

If at the time the will is executed the testator's child has died leaving surviving children (i.e., the testator's grandchildren) and the latter are not mentioned in the will, the situation is the same as when the testator omits to mention a living child: It is reasonable to assume that the omission was intentional in the usual case. Also, the public policy against disinheritance of issue is weaker in the case of grandchildren than in the case of children, since a grandparent ordinarily owes no duty of support to grandchildren. See 6 B. Witkin, Summary of California Law Parent and Child §§ 115-116, at 4636-37 (8th ed. 1974).

Both Professors Niles and Evans have suggested that grandchildren and more remote issue of the testator be eliminated from the protection of the pretermission statute. See Niles, supra at 197; Evans, supra at 269. The staff recommends the UPC provision which does not protect grandchildren in place of the California provision which does.

Staff Draft of Revised UPC Pretermission Section

Based on the foregoing discussion and recommendations, the staff proposes to repeal the California pretermission provisions and replace them with the UPC pretermission section modified as follows (strikeout and underscore indicate the revisions to the UPC language):

§ 254.020. Pretermitted children

254.020. (a) If a testator fails to provide in his or her will for any of his or her children born or adopted after the execution of ~~his~~ the will, the omitted child receives a share in the estate equal in value to that which ~~he~~ the child would have received if the testator had died intestate unless any of the following conditions exist:

(1) ~~It~~ It appears from the will that the omission was intentional ~~;~~ .

(2) ~~when the will was executed the testator had one or more children and~~ The testator devised substantially all his or her estate to the other parent of the omitted child ~~;~~ .

(3) ~~the~~ The testator provided for the child 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) If at the time of execution of the will the testator fails to provide in ~~his~~ the will for a living child solely because ~~he~~ the testator believes the child to be dead or is unaware of the birth of the child , the child receives a share in the estate equal in value to that which ~~he~~ the child would have received if the testator had died intestate.

(c) In satisfying a share provided by this section, the devises made by the will abate as provided in ~~Section 3/902~~ Chapter 13 (commencing with Section 750) of Division 3 .

Comment. Section 254.020 supersedes former Sections 90 and 91 and is drawn from UPC Section 2-302. Unlike the former provisions, Section 254.020 does not protect an omitted child living when the will was made. In such a case, it is more likely than not that the omission was intentional. See Evans, Should Pretermitted Issue Be Entitled to Inherit?, 31 Calif. L. Rev. 263, 265, 269 (1943); Niles, Probate Reform in California, 31 Hastings L.J. 185, 197 (1979).

Unlike the former provisions, Section 254.020 does not protect omitted grandchildren or more remote issue of a deceased child. If the testator's child is deceased at the time the will is made and

the testator omits to provide for a child of that child (i.e.,the testator's grandchild), the omission would seem to be intentional in the usual case. If the testator's child is living at the time the will is made, is a named beneficiary under the will, and dies before the testator, the testator's grandchild will be protected by the anti-lapse statute (Section 204.050) which substitutes the deceased child's issue.

Unlike the former provisions, Section 254.020 does not protect omitted children where the testator's will leaves substantially all of the estate to the other parent of the omitted child. It may be expected that the other parent will provide for the needs of the omitted child, and, where the omitted child is a minor, this avoids the need to appoint a guardian to manage the estate of the child.

Is the Pretermission Statute Rendered Entirely Superfluous by Family Maintenance Legislation?

Arguably the pretermission statute, which operates crudely by giving the omitted child an intestate share which may be more or less than the child needs and may be larger or smaller than the share given to other children by the testator's will, should be entirely replaced by the support provisions of the family maintenance sections which are based on need (see Memo 82-41). However, family maintenance legislation will not protect an adult child of the decedent who is not disabled or incompetent. The pretermission statute may give such a child who is born after the making of the will an intestate share if it does not appear from the will that the omission was intentional. Although this may be an unusual case because the decedent will have had a couple of decades in which to revise the will, the pretermission statute may prevent an occasional injustice in such a case. As a result, the staff recommends that we retain the pretermission section notwithstanding family maintenance legislation.

Respectfully submitted,

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EXHIBIT 1

§ 90. Omitted children and grandchildren

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.

§ 91. Omitted children and grandchildren; sources of share; apportionment

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.

EXHIBIT 2

Section 2-302: [Pretermitted Children.]

(a) If a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the omitted child receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless:

(1) it appears from the will that the omission was intentional;

(2) when the will was executed the testator had one or more children and devised substantially all his estate to the other parent of the omitted child; or

(3) the testator provided for the child 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) If at the time of execution of the will the testator fails to provide in his will for a living child solely because he believes the child to be dead, the child receives a share in the estate equal in value to that which he would have received if the testator had died intestate.

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

COMMENT

This section provides for both the case where a child was born or adopted after the execution of the will and not foreseen at the time and thus not provided for in the will, and the rare case where a testator omits one of his existing children because of mistaken belief that the child is dead.

Although the sections dealing with advancement and ademption by satisfaction (2-110 and 2-612) provide that a gift during lifetime is not an advancement or satisfaction unless the testator's intent is evidenced in writing, this section permits oral evidence to establish a testator's intent that lifetime gifts or nonprobate transfers such as life insurance or joint accounts are in lieu of a testamentary provision for a child born or adopted after the will. Here there is no real contradiction of testamentary intent, since there is no provision in the will itself for the omitted child.

To preclude operation of this section it is not necessary to make any provision, even nominal in amount, for a testator's present or future children; a simple recital in the will that the testator intends to make no provision for then living children or any the testator thereafter may have would meet the requirement of (a) (1).

Under subsection (c) and Section 3-902, any intestate estate would first be applied to satisfy the share of a pretermitted child.

This section is not intended to alter the rules of evidence applicable to statements of a decedent.