

7/8/82

Twelfth Supplement to Memorandum 82-70

Subject: Study L-625 - Probate Code (Tentative Recommendation--Spouse
Unprovided for in Will §§ 254.010-254.030)

Attached are statutory provisions recommended by the staff to deal with the problem created where a person makes a will and subsequently marries. If the new spouse of the testator is not mentioned in the will, to what extent is the will to be given effect if the testator dies? What share should the surviving spouse of the testator take?

Memorandum 82-71 discusses this problem and recommends that the omitted spouse take all of the testator's property unless the decedent leaves children by a marriage other than the marriage to the surviving spouse. This solution cuts out completely the testator's parents, brothers and sisters, and issue of brothers and sisters, who might be very close to the testator. Since the surviving spouse will take all the community and quasi-community property, the question is the extent to which testamentary dispositions of separate property to close relatives of the testator and others are to be given effect.

Upon reviewing the problem, the staff has concluded that something closer to existing law would be a better solution to the problem than giving all the separate property to the omitted spouse. We recommend that the omitted spouse be given at least one-half of the separate property. This is an increase in some cases over what the omitted spouse would receive under existing law. Under existing law, the omitted spouse receives either one-half or one-third of the separate property, depending on the relationship and number of close relatives of the testator who survive. The staff believes that giving the omitted spouse a minimum of one-half of the separate property is simple and appropriate, especially since we are not continuing the existing intestate succession law from which the one-third or one-half share is drawn. The staff proposal also changes existing law in that it gives a preference to the omitted spouse over any devisee in the will other than the testator's issue, parents, brothers, sisters, and issue of brothers and sisters. Subject to the one-half share minimum, the omitted spouse receives all of the separate property not passing to one of the designated relatives. This would, for example, give preference to the omitted spouse over a close friend of the testator who is not one of the designated relatives.

The staff believes that this scheme would be more acceptable to the public generally than one that in effect voids the testator's will except where the testator has issue by a marriage other than the marriage to the omitted spouse.

If the family maintenance provisions are approved in a form that gives a surviving spouse a right to family maintenance, the needy omitted spouse will be able to obtain support from the separate property that otherwise would go to one of the designated relatives of the testator.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Spouse Omitted from Pre-Marital Will

A testator may marry after making a will and the will may fail to provide for the spouse. Under existing law, on the testator's death the omitted spouse is entitled to an intestate share unless it appears from the will that the omission was intentional or unless there is an applicable provision in a marriage contract.¹ However, the testator may have provided for the spouse by a transfer outside the will, and the testator's intent that the transfer was to be in lieu of a testamentary provision may be apparent from statements of the testator, from the amount of the transfer, or from other evidence. The proposed law expands California law to allow evidence generally that the testator's omission of a spouse from a will made before marriage was intentional because other provision was made for the spouse.² This will more effectively carry out the testator's intent³ and reduce the number of instances where the spouse omitted from the testator's pre-marital will may nonetheless claim a share of the estate.

The proposed law also modifies somewhat the share of the decedent's estate received by the surviving spouse. Existing law gives the surviving spouse an intestate share of the decedent's property, which in the case of the decedent's separate property is all the property if the

1. See Prob. Code § 70. Although California law speaks in terms of the will being "revoked" as to the omitted spouse, the effect of the provision is to give the omitted spouse an intestate share. Estate of Stewart, 69 Cal.2d 296, 298, 444 P.2d 337, 70 Cal. Rptr. 545 (1968); French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 374 (1976).
2. This is the rule of Uniform Probate Code § 2-301; see French & Fletcher, *supra* note 1, at 374. In its 1973 critique of the Uniform Probate Code, the State Bar expressed concern that this provision would not permit the testator to provide for the omitted spouse by marriage contract as does present California law unless the marriage contract were accompanied by an actual transfer of property. See State Bar of California, The Uniform Probate Code: Analysis and Critique 33 (1973). However, this concern is dealt with by the provision in the proposed law that gives effect to a waiver of all the benefits under a will executed before the waiver.
3. See Joint Editorial Board for the Uniform Probate Code, Response of the Joint Editorial Board 7 (1974).

decedent leaves no issue, parents, siblings, or their descendants,⁴ one-half if the decedent leaves any of these relatives,⁵ and one-third if the decedent leaves two or more children or their descendants.⁶ One consequence of incorporating this scheme for the omitted spouse is that even though relatives of the decedent may take nothing under the will, the amount received by the spouse varies with the existence of the relatives. The proposed law remedies this anomaly by giving the omitted spouse all the separate property except to the extent the decedent's will leaves the property to issue, parents, siblings, or their descendants, but in no case does the spouse receive less than one-half. This is not only simpler and more sound in concept than existing law, but it is also more protective of the omitted spouse without unreasonably depriving the other close relatives of the decedent of their benefits under the will.

4. Prob. Code § 224.

5. Prob. Code § 223.

6. Prob. Code § 221.

CHAPTER 6. SPOUSE AND CHILDREN UNPROVIDED
FOR IN WILL

Article 1. Omitted Spouse

§ 254.010. Share of omitted spouse

254.010. Except as provided in Section 254.020, if a testator fails to provide by will for his or her surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive a share in the estate consisting of the following property in the estate:

(a) The one-half of the community property that belongs to the testator under Section 110.010.

(b) The one-half of the quasi-community property that belongs to the testator under Section 110.020.

(c) All of the separate property of the testator if the testator dies leaving neither issue, parent, brother, sister, nor issue of a brother or sister.

(d) A share of the separate property of the testator equal to whichever of the following is the greater amount if the testator dies leaving surviving issue, parent, brother, sister, or issue of a brother or sister:

(1) One-half of the separate property of the testator.

(2) All of the separate property of the testator which does not pass to the testator's surviving issue, parent, brother, sister, or issue of a brother or sister, under the testator's will or under Section 254.110.

Comment. Section 254.010 supersedes the portion of former Section 70 which had the effect of giving an omitted spouse the same share as the omitted spouse would have taken if the testator had died intestate. Section 254.010 does not adopt the intestate share for a surviving spouse as the omitted spouse's share. Instead, Section 254.010 specifies the share of the omitted spouse. The omitted spouse is not entitled to this share if the spouse was intentionally omitted from the will or has been otherwise provided for. See Section 254.020.

As in the case of intestate succession, the omitted spouse takes all of the community and quasi-community property that is included in the testator's estate. In addition, the omitted spouse takes all the separate property in the testator's estate unless the testator dies leaving one or more close relatives (issue, parent, brother, sister, or issue of a brother or sister). Where the testator dies without leaving any such close relatives, the omitted spouse takes in preference to

other devisees under the will. Where the testator dies leaving one or more of such close relatives, the omitted spouse takes all of the separate property which does not pass to the close relatives and, in any case, at least one-half of the separate property. Section 254.010 continues former law insofar as it gives the omitted spouse all of the separate property where the testator does not leave one or more of the close relatives described in the statute. Former Prob. Code § 224. Where the testator dies leaving one or more of the close relatives, former law was less favorable to the omitted spouse: The share of the omitted spouse was one-third or one-half of the separate property, depending on who the close relatives are. See former Prob. Code § 221. Under Section 254.010, the omitted spouse always takes at least one-half of the separate property. And the omitted spouse takes all of the separate property not passing to one of the close relatives described in the statute. This scheme gives a preference to an omitted spouse over devisees in the will that are not close relatives. At the same time, it gives some recognition to the dispositions made in the will to close relatives by giving effect to such dispositions so long as they do not in the aggregate exceed one-half of the separate property in the estate.

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§ 254.020. No share if spouse intentionally omitted or otherwise provided for

254.020. The spouse does not receive a share of the estate under Section 254.010 if any of the following is established:

- (a) The testator's failure to provide for the spouse in the will was intentional and that intention appears from the will.
- (b) The testator provided for the spouse by transfer outside the will and the intention 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 by other evidence.
- (c) The spouse made a valid agreement waiving the right to share in the testator's estate.

Comment. Section 254.020 supersedes a portion of former Section 70 and is drawn in part from Section 2-301 of the Uniform Probate Code.

Subdivision (a) continues the substance of a portion of former Section 70. Subdivision (a) is consistent with the comparable provision of Section 2-301 of the Uniform Probate Code.

Unlike former Section 70, subdivision (b) provides that the spouse does not receive a share if the testator provided for the spouse by a "transfer outside the will" that was intended to be in lieu of a testamentary provision; former Section 70 recognized only the case where "provision has been made for the spouse by marriage contract." Subdivision (b) is the same in substance as a provision of Section 2-301 of the Uniform Probate Code.

Subdivision (c) recognizes that a spouse may waive the right to take property of the other spouse by testate or intestate succession. See Sections 111.010-111.080.

§ 254.030. Manner of satisfying share of omitted spouse

254.030. In satisfying a share provided by this article, the devise made by the will abate as provided in Chapter 13 (commencing with Section 750) of Division 3.

Comment. Section 254.030 provides that the general California abatement rules apply for the purpose of satisfying the share of the omitted spouse.