#L-625 10/20/82

Memorandum 82-92

Subject: Study L-625 - Probate Law and Procedure (Tentative Recommendation Relating to Wills and Intestate Succession--Draft of Preliminary Portion)

Attached to this memorandum is a staff draft of the preliminary portion of the tentative recommendation relating to wills and intestate succession. The draft reflects decisions of the Commission as of the September 1982 meeting. We will revise the draft to reflect any further decisions made at the November 1982 meeting. If you have any substantive or editorial suggestions, please give them to the staff at the November meeting so that we can incorporate them in the final printed version of the draft.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

#L-625 10/19/82

STAFF DRAFT

STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION

relating to

WILLS AND INTESTATE SUCCESSION

November 1982

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94306

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LETTERHEAD

November 6, 1982

To: THE HONORABLE EDMUND G. BROWN, JR.
Governor of California, and
THE LEGISLATURE OF CALIFORNIA

This tentative recommendation proposes the enactment of a new comprehensive statute governing wills and intestate succession. The new statute will replace the comparable portions of the California Probate Code. Conforming revisions in other statutory provisions are also proposed.

The new statute is drawn in part from the Uniform Probate Code. It makes some significant changes in existing California law. These changes are designed primarily to simplify the administration of an intestate estate, to carry out more effectively the intent of the decedent who dies leaving a will, and to provide needed protection for the surviving spouse and minor children of the decedent. In some instances, the new statute adopts a Uniform Probate Code rule because national uniformity in that area of the law is particularly desirable and the Uniform Probate Code offers a sound rule that would help achieve national uniformity.

This tentative recommendation is submitted pursuant to Resolution Chapter 37 of the Statutes of 1980. That chapter directs the Commission to study "[w]hether the California Probate Code should be revised, including but not limited to whether California should adopt, in whole or in part, the Uniform Probate Code."

Respectfully submitted,

Robert J. Berton
Chairperson

ACKNOWLEDGMENTS

In preparing the proposed law, the Commission consulted with the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar of California. Members of the committee reviewed materials prepared by the Commission's legal staff and preliminary drafts of the proposed law. James D. Devine, Monterey, and William H. Plageman, Jr., San Francisco, regularly attended Commission meetings as representatives of the committee. The Commission has benefited from the comments and the practical experience and expertise of the committee members. However, there should be no implication that the State Bar either approves or disapproves of the proposed law.

Nine law professors served as expert consultants on this project. Each is an expert in one or more of the following: probate law, community property law, real and personal property law, tax law. The consultants regularly attended Commission meetings and assisted the Commission in preparing the proposed law. They are listed below.

Paul E. Basye
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While the contribution of the State Bar Section, the consultants listed above, and others who assisted in this project is gratefully acknowledged, the members of the Commission necessarily must assume the sole responsibility for the content of the proposed law.

In preparing the proposed law, the Commission also drew on the wealth of published material relating to the Uniform Probate Code and the existing California law. The materials listed below were particularly useful:

Niles, Probate Reform in California, 31 Hastings L.J. 185 (1979).

French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 331 (1976).

Turrentine, Introduction to the California Probate Code, in West's Annotated California Codes, Probate Code 1 (1956).

Evans, Comments on the Probate Code of California, 19 Calif. L. Rev. 602 (1931) (Professor Evans was the draftsman of the 1931 Probate Code).

An analysis of the Uniform Probate Code by the State Bar of California and a response by the Joint Editorial Board for the Uniform Probate Code provided an insight as to significant policy issues involved in preparing the proposed law. See State Bar of California, The Uniform Probate Code: Analysis and Critique (1973); Joint Editorial Board for the Uniform Probate Code, Response of the Joint Editorial Board (1974).

Published empirical information was helpful in developing recommendations consistent with modern conditions and desires. Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. Bar Foundation Research J. 321 (1978). This article reports the results of a study conducted using a scientifically-designed telephone survey of 750 families in five states, including California. Other published empirical information was taken into consideration.

An excellent recent report of the Law Reform Commission of British Columbia contained valuable suggestions and statistical data. See Law Reform Comm'n of British Columbia, Report on the Making and Revocation of Wills (1981). Other published material, not listed above, was also reviewed and taken into consideration in the course of preparing the proposed law.

Summary of Report

This report proposes a comprehensive new statute governing wills and intestate succession. The proposed law continues a substantial portion of existing law, but many changes are made to minimize delay and expense in probate, to carry out more effectively the testator's intent, and to promote national uniformity of law. The proposed law would become operative on January 1, 1985, and would apply to cases involving persons who die on or after that date. Some of the more significant changes made by the proposed law are summarized below.

Share of Surviving Spouse

Under existing law governing intestate succession, the surviving spouse takes a half or a third of the decedent's separate property, depending on the circumstances, with the balance passing to the decedent's children, parents, brothers, sisters, or descendants of a deceased brother or sister; the surviving spouse takes all the separate property only if the decedent is survived by none of these relatives. The proposed intestate succession provisions give the surviving spouse all the decedent's separate property without regard to the other relatives left by the decedent, unless the decedent left children who are not also children of the surviving spouse. In this case the surviving spouse takes one-half and the decedent's children take one-half.

Dissolution Revokes Disposition to Former Spouse

Existing law is that dissolution of marriage has no effect upon a will made before dissolution--a disposition made to the former spouse remains in effect even though the testator may have remarried. The proposed law reverses this rule--any disposition to a former spouse in a will made before dissolution is ineffective unless the will expressly provides otherwise.

Family Allowance

In cases where the decedent does not make adequate provision by will for the surviving spouse and children, existing law protects the family by other means such as a family allowance during probate. However, the family allowance is limited in duration and does not satisfy the support needs of the decedent's dependent family after the estate is closed. The proposed law permits the probate court to hold the

estate open for a limited period to enable the family allowance to continue to provide the necessaries of life of the dependents.

Pay-On-Death Clauses

The proposed law expressly validates pay-on-death beneficiary designations in notes, deeds of trust, and other instruments. The law thus makes clear that such designations are valid even though not executed with all the formalities of a will. Existing law with respect to some types of designations is not clear.

Simultaneous Death

A person must survive the decedent in order to take from the decedent by will, succession, or survivorship. Where the death of the person and the death of the decedent occur simultaneously (as in a common accident), neither is deemed by existing law to have survived the other, and the property of the decedent passes to other heirs, devisees, and successors.

The proposed law requires that a potential heir or devisee of the decedent survive the decedent by 120 hours in order to take under the decedent's will (subject to an express provision in the will governing the matter) or by intestate succession. If it cannot be established that the heir or devisee has survived for the required period, he or she is treated as having predeceased the decedent and the decedent's property will pass to others. A similar rule is applied to nonprobate property such as life insurance. If the property is jointly owned property (such as community property or joint tenancy property) and the two joint owners die within 120 hours of each other, half the property will pass to heirs or devisees of one joint owner, and the other half will pass to heirs or devisees of the other.

Filing Notice of Will

The proposed law permits a testator to file with the Secretary of State a notice that the testator has a will and where the will is to be kept. A certificate from the Secretary of State may be filed in a probate proceeding where appropriate stating what information is on file or that no information is on file.

Exoneration

Under existing law, an encumbrance on real property given by will must be discharged out of estate assets (unless the will directs otherwise or the encumbrance is one for which the decedent was not personally liable). The proposed law reverses this rule so that in the ordinary case property given by will passes subject to all encumbrances.

Ancestral Property Doctrine

The proposed law does not continue the special rules of succession found in existing law that govern the descent of certain property acquired by the decedent from specified ancestors or from a predeceased spouse. Under the proposed law, all property descends on the basis of the relationship of the successors to the decedent, not on the basis of the source of the property.

Laughing Heir

Under existing law, if the decedent dies intestate the property may pass to remote collateral relatives of the decedent if no close relatives survive the decedent. The proposed law cuts off inheritance by relatives more remote than grandparents and their descendants.

Right of Heirs of Predeceased Spouse

If property would otherwise escheat for lack of heirs of a decedent, existing law allows relatives of a predeceased spouse to inherit. The proposed law replaces this provision with a rule that permits stepchildren of the decedent to inherit but provides an administrative procedure for more remote relatives of a predeceased spouse to claim property of the decedent that has escheated.

Inheritance Rights of Adopted Person

Ordinarily an adopted person inherits from or through the adoptive parents but not from or through the natural parents who gave the person up for adoption. The proposed law permits a person who is adopted in a stepparent adoption to continue to inherit from and through the natural parents as well as the adoptive parents.

Interested Witness

Under existing law, a disposition in a will to a person who witnessed the will is not valid. The proposed law eliminates this restriction but protects from disinheritance a person who challenges a gift to an interested witness.

Will Contracts

The Statute of Frauds requires that an agreement to make or not to revoke a will or to die intestate must be in writing, but existing rules permit proof of an oral agreement in a number of situations. The proposed law tightens these rules by permitting an oral agreement to be established only where some form of written evidence is available to show that the agreement actually exists.

Pretermitted Child

The proposed law continues to provide an intestate share for the decedent's child omitted from a will made before the child was born, but eliminates the intestate share formerly provided for the decedent's omitted child living when the will was made and for the decedent's omitted grandchildren.

Spouse Omitted From Will

If a spouse is unintentionally omitted from a will because the marriage occurred after the will was made, existing law gives the omitted spouse all the community property and one-third, one-half, or all of the decedent's separate property depending on the existence of other heirs of the decedent. The proposed law continues this basic scheme but gives the omitted spouse a fixed half share of the decedent's separate property regardless of the existence of other heirs.

Residue of a Residue

If one of several named residuary takers under the decedent's will predeceases the decedent without issue, the proposed law passes the failed gift to the other residuary taker or takers. This changes the existing rule that the failed gift passes by intestacy.

Waiver of Rights by Surviving Spouse

Existing case law strictly construes a waiver of rights by the surviving spouse in the estate of the decedent. The proposed law, generally consistent with existing case law, makes clear that a waiver must be in writing and to be enforceable must be either (1) made upon full disclosure of assets with advice of counsel or (2) found by the court to be voluntary, knowing or fair, and not unconscionable.

Election to Take Quasi-Community Property Against Will

The proposed law treats quasi-community property the same as community property by deleting the requirement that the surviving spouse must elect whether to take the statutory share of quasi-community property or property given under the will.

Execution Formalities

The proposed law eliminates the existing ritual of will execution in favor of the basic requirements that the will be in writing and signed by the testator and that it be witnessed by two witnesses whom the testator has made to understand the will is the testator's. As an alternative, the testator may execute the will before a notary public as sole witness.

Revocation Formalities

The proposed law eliminates technicalities that restrict proof of the terms of a missing will or of the fact of revocation or revival of a will. Under the proposed law, evidence of the terms of a will and of the testator's intent is admissible without limitation and regardless of presumptions.

#L-625 10/19/82

STAFF DRAFT

RECOMMENDATION

relating to

WILLS AND INTESTATE SUCCESSION

INTRODUCTION

This tentative recommendation relating to wills and intestate succession is one of a series of recommendations by the California Law Revision Commission for revision of the Probate Code.[1] The probate law revision project is the result of a 1980 legislative directive that the Commission study "whether the California Probate Code should be revised, including but not limited to whether California should adopt, in whole or in part, the Uniform Probate Code."[2]

The Commission has identified a number of major objectives in the revision of the law of wills and intestate succession. The law should seek to avoid intestacy and to carry out the intent of the decedent as expressed in the decedent's will or, if the decedent has no will, the presumed intent of the decedent. The law should attempt to minimize the opportunity for fraud or undue influence on the decedent. The law should protect the surviving spouse and minor children of the decedent. The law should provide a system of probate that is efficient and expeditious. Where there appears to be no compelling reason for a special local rule, the law should promote national uniformity.[3]

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1. Other current recommendations relating to probate law and procedure include: Emancipated Minors; Disclaimer of Testamentary and Other Interests; Missing Persons; and Nonprobate Transfers. See Recommendation Relating to Probate Law and Procedure, 16 Cal. L. Revision Comm'n Reports 0000 (1982).

2. 1980 Cal. Stats. res. ch. 37.

3. As a result of the mobility of contemporary society and the frequency of interstate property transactions, a decedent may leave property in several jurisdictions. Uniformity of the law of wills and intestate succession will help ensure that the decedent's intent is effectuated with a minimum disruption of the estate. Uniformity also enables use of cases from other jurisdictions construing the law. The importance of national uniformity of probate and related law is recognized by the adoption in California of such laws as the Uniform Simultaneous Death Act (Prob. Code §§ 296-296.8), Uniform Testamentary Additions to Trusts Act (Prob. Code §§ 170-173), Uniform Gifts to Minors Act (Civil Code 1154-1165), and Uniform Durable Power of Attorney Act (Civil Code §§ 2400-1407).

The Commission has found the Uniform Probate Code a useful model of contemporary thought in the probate field that accomplishes many of these objectives and that has been adopted in a substantial number of states.[4] However, the Commission has also found that the Uniform Probate Code, as it relates to wills and intestate succession, is inferior to present California law in many respects. The proposed law retains much of the existing California law of wills and intestate succession but makes a number of significant changes either drawn from the Uniform Probate Code[5] or based on unfavorable experience under existing law.

Major changes made by the proposed law to achieve the identified objectives include simplification of the formalities for executing or revoking a will or proving the contents of a missing will, establishing a central registry for filing notice of the existence and location of a will, authorizing many types of accounts and funds to be paid on death to a designated beneficiary without the need for a will, cutting off inheritance by remote heirs, splitting property between heirs of decedents who die within a few days of each other as the result of a common accident, assuring the surviving spouse a larger share of the decedent's separate estate, and extending the duration of the family allowance in cases of need by the decedent's dependents.

These and other significant changes in the California law of wills and intestate succession that would be made by the proposed law are discussed below.[6] The proposed law renumbers and relocates the wills and intestate succession statute in the Probate Code in a manner that will accommodate future expansion in the law. The new law would apply only to cases where the decedent dies on or after the operative date; old law would continue to govern cases where the decedent dies before

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4. Currently 14 states have enacted the Uniform Probate Code.

5. Some of the substantive rules of the Uniform Probate Code are preferable to existing California law. In some cases the proposed law uses the language of the Uniform Probate Code in preference to existing California language even though no substantive change is intended; the language may be clearer and simpler or uniformity of language in the particular area may be desirable.

6. Less significant and technical changes to existing law are noted in the Comments following each section of the proposed law.

the operative date. The proposed law is drawn with a deferred operative date of one year--January 1, 1985--in order to give the bench, bar, and public time to become familiar with its provisions.

WILLS

Execution of Wills

Formal requirements. Unless a will is in the handwriting of the testator,[7] certain formalities of execution of a will are necessary to ensure that the will is genuine and not executed under duress. The basic requirements for execution of a will are that it be in writing, signed by the testator, and signed by two witness.[8] In addition to these basic requirements, California law also imposes a ritual: The testator must gather both witnesses together at the same time, tell the witnesses that it is his or her will, sign at the end and in the presence of the witnesses and request them to sign, and the witnesses must sign at the end and in the testator's presence.[9]

The execution ceremony adds little to the basic requirements that a will be in writing, signed, and witnessed. In most cases there is no reasonable doubt about the testator's intent and no suspicion of fraud.[10] The technical requirements make it more difficult to execute a will and may invalidate an otherwise valid will for failure to comply with the strict formalities.

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7. The proposed law continues the existing provisions relating to holographic wills (Prob. Code § 53) without substantive change. California also has statutory provisions governing international wills (Prob. Code §§ 60-60.8) and California statutory wills (Prob. Code §§ 56-56.14). The proposed law continues the provisions relating to international wills without substantive change. The provisions relating to California statutory wills are continued with conforming and technical revisions. See discussion under "California Statutory Will" infra.

8. Prob. Code § 50.

9. Although each witness must sign the will in the testator's presence, the witnesses need not necessarily sign in the presence of each other. In re Estate of Dow, 181 Cal. 106, 107, 183 P. 794 (1919); In re Estate of Armstrong, 8 Cal.2d 204, 209, 64 P.2d 1093 (1937); In re Estate of Miner, 105 Cal. App. 593, 595, 288 P. 120 (1930).

10. See Niles, Probate Reform in California, 31 Hastings L.J. 185, 210 (1979).

For purposes of ensuring testamentary intent and preventing fraud, it should be sufficient that the testator make known to the witnesses that the will is the testator's, whether or not the testator signs the will in the presence of the witnesses. It should be unnecessary that the testator sign in the presence of the witnesses or that all signatures be affixed at the same time or at the end of the will.

As an alternative, it should be sufficient that the testator sign the will in the presence of a notary public. This will not only simplify the execution requirements by eliminating the need for two witnesses, but will also authenticate the signature and the date of signing.

The proposed law adopts these revised execution formalities. This makes California law consistent with that of other jurisdictions that have omitted needless execution formalities that have the effect of invalidating wills.[11]

Interested witness. Under existing law, a witness is disqualified from taking under the will unless there are two other disinterested witnesses.[12] The intent of this rule is to prevent fraud or undue influence. However, in most cases of fraud or undue influence the malefactor is careful not to sign as a witness.[13] The disqualification

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11. The relaxed approach to execution of wills represents the overwhelming weight of modern judicial and scholarly opinion. See Niles, Probate Reform in California, 31 Hastings L.J. 185, 210 (1979); Uniform Probate Code § 2-502.

12. Prob. Code § 51. If the interested witness would be entitled to an intestate share of the estate if the will were not established, the disqualification is limited so that the interested witness may take the lesser of (1) the amount provided in the will or (2) the intestate share. It should be noted that under California law the fact that a subscribing witness is "interested" does not invalidate the will. Estate of Tkachuk, 73 Cal. App.3d 14, 139 Cal. Rptr. 55 (1977).

    Section 22.1 of the Probate Code invalidates a testamentary gift to a nonprofit charitable corporation if the corporation is subsequently appointed as guardian or conservator of the testator and the will was executed within six months prior to the filing of the petition for guardianship or conservatorship. The proposed law does not continue this limitation, since it is easily circumvented. Cf. 7 B. Witkin, Summary of California Law Wills and Probate § 34, at 5557 (8th ed. 1974) (discussing repeal of analogous provisions); Review of Selected 1971 California Legislation, 3 Pac. L.J. 191, 197 (1972) (same).

13. Comment to Uniform Probate Code § 2-505.

of a witness from taking under the will tends rather to penalize an innocent member of the testator's family who witnesses a home-drawn will.

Under the proposed law, an interested person is permitted to witness the will without forfeiting any benefits under the will.[14] A substantial gift by will to a witness would, however, be a suspicious circumstance that could be challenged on grounds of undue influence. The extent to which a witness is interested should go to the credibility of the witness without requiring an automatic forfeiture of benefits under the will.[15]

One concern with this approach is that when considered along with the relaxation of execution formalities it could provide increased opportunity for fraud or undue influence to be exerted on the testator.[16] However, the proposed law makes clear that undue influence may be inferred from the circumstances of the case. Moreover, a will contestant would be able to bring all salient facts to the court's attention,[17] and the proposed law protects a will contestant who challenges a gift to an interested witness from the operation of a will contest disinheritance clause.[18]

Choice of law. If a will executed outside California is offered for probate in California, the will is valid if it was executed in accordance with the law of any of the following states:[19] (1) California; (2) the state where the will was executed; (3) the state where the

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14. This is the approach of Uniform Probate Code § 2-505.

15. Niles, Probate Reform in California, 31 Hastings L.J. 185, 210 (1979).

16. State Bar of California, The Uniform Probate Code: Analysis and Critique 44 (1973).

17. Joint Editorial Board for the Uniform Probate Code, Response of the Joint Editorial Board 13 (1974).

18. The Commission plans to study the general question of burden of proof in will contests as part of its study of administration of estates. The Commission hopes to develop comprehensive burden of proof rules that will govern other matters such as proof of revocation. Cf. Uniform Probate Code § 3-407.

19. Prob. Code § 26.

testator was domiciled on the date the will was executed; or (4) the state where the testator was domiciled at the time of death. However, if a will executed in California is offered for probate in California, the will is valid only if it was executed in accordance with California law, even though the testator may have been domiciled in another state at the time of execution and the will would be valid under the law of that state.

Public policy favors law that carries out the testator's intent by validating the will whenever possible. To this end, the California rule that recognizes the validity of a will executed outside California if valid under the law of another appropriate jurisdiction should be extended. Under the proposed law, a will executed inside California is likewise valid for California purposes if it would be valid under the law of another appropriate jurisdiction. This is consistent with the Uniform Probate Code choice of law rule[20] in an area where national uniformity is plainly advantageous.

Revocation of Wills

Proof of destruction. Under California law, a will may be revoked by being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it, either by the testator or by another person in the testator's presence and by the testator's direction.[21] However, California law requires two witnesses if the will is destroyed by another person at the testator's direction but not if the will is destroyed by the testator in person.[22]

The reason for this difference in treatment is obscure. The rule does not prevent fraud--a person who fraudulently destroys a will after the testator's death need only allege that the testator destroyed it in

20. Uniform Probate Code § 2-506.

21. Prob. Code § 74.

22. See Prob. Code § 74; 7 B. Witkin, Summary of California Law Wills and Probate § 151, at 5667 (8th ed. 1974). It is not clear under Section 74 whether the witnesses must be eyewitnesses and whether the person who destroyed the will is a qualified witness. See French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 347 n.51 (1976).

person in order to avoid the two-witness rule. The rule serves mainly to frustrate the testator's intent by excluding proof by a single credible witness that the will was destroyed in the testator's presence and at the testator's direction for the purpose of revoking it. Accordingly, the proposed law eliminates the two-witness requirement.[23]

Revival of revoked will. Under California law, if the testator's first will is revoked by a second will and the second will is then revoked, whether the first will is thereby revived depends upon the manner of revocation: If the second will is revoked by an instrument, the first will is not revived unless the revoking instrument contains terms showing that the testator intended the first will to be revived.[24] If the second will is revoked not by an instrument but by a physical act such as destruction, the revocation does not revive the first will, regardless of what the testator intended; extrinsic evidence of the testator's intent to revive the first will is inadmissible.[25]

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23. This is consistent with Uniform Probate Code § 2-507. Section 79 of the Probate Code which provides that "revocation of a will revokes all its codicils" is also repealed. This apparently absolute rule is qualified by a case holding that if the codicil is sufficiently complete to stand on its own as a will and the underlying will is revoked by the testator with the intent that the comprehensive terms of the codicil be given effect as the testator's final testamentary expression, the codicil becomes a will. Estate of Cuneo, 60 Cal.2d 196, 202, 384 P.2d 1, 32 Cal. Rptr. 409 (1963). Repeal of Section 79 would leave the matter to be resolved as a question of the testator's intent in the particular case and would thus be more consistent with present California law than the somewhat inaccurate statement of Section 79.

24. Prob. Code § 75. Under California law, revocation may sometimes be accomplished in an instrument which is not executed with the formalities of a will. See Prob. Code § 73. The proposed law omits this provision. See discussion under "Ademption of Specific Gifts" infra. Also, the California anti-revival rule does not apply to a codicil which does not revoke an entire will and is itself later revoked; revocation of such a codicil leaves the original will intact. Estate of Hering, 108 Cal. App.3d 88, 166 Cal. Rptr. 298 (1980); Bird, Revocation of a Revoking Codicil: The Renaissance of Revival in California, 33 Hastings L.J. 357, 370-74 (1981).

25. See In re Estate of Lones, 108 Cal. 688, 689, 41 P. 771 (1895); Bird, supra note 24, at 362 n.34; Prob. Code § 75. The only relief that might be afforded in California would be to avoid the revocation of the second will by applying the doctrine of dependent relative revocation. Niles, Probate Reform in California, 31 Hastings L.J. 185, 214 (1979).

Existing law frustrates the intent of the testator who destroys a second will intending thereby to revive the first.[26] The proposed law provides instead that if the testator revokes the second and revoking will by a physical act such as destruction, the first will may be revived if it is evident from the circumstances of the revocation or from the testator's contemporary or subsequent declarations that the testator intended the first will to take effect as executed.[27] This rule is subject to the general hazard of admitting parol evidence in probate proceedings.[28] However, it is more likely than existing law to effectuate the testator's actual intent and to avoid intestacy.

Revocation by dissolution or annulment. The California rule is that dissolution or annulment of the testator's marriage has no effect on dispositive provisions in the will in favor of the former spouse.[29] This rule generally produces results contrary to what the average person would have wanted had the person thought about the matter. In most cases where the testator fails to change a will following dissolution of marriage, the failure is inadvertent.[30]

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26. See Evans, Comments on the Probate Code of California, 19 Calif. L. Rev. 602, 611-12 (1931); Ferrier, Revival of a Revoked Will, 28 Calif. L. Rev. 265, 273, 276 (1940); Niles, supra note 25, at 214.

27. This is the rule of Uniform Probate Code § 2-509.

28. See Bird, supra note 24, at 377 n.117; T. Atkinson, Handbook of the Law of Wills § 92, at 477 (2d ed. 1953).

29. See In re Estate of Patterson, 64 Cal. App. 643, 646, 222 P. 374 (1923); 7 B. Witkin, Summary of California Law Wills and Probate § 150, at 5666 (8th ed. 1974). The California Legislature recently reaffirmed this rule. See 1980 Cal. Stats. ch. 1188, § 1 (codified as Civil Code § 4352).

30. The attorney representing a party to a marriage dissolution or annulment proceeding will review the party's will, insurance beneficiaries, joint tenancies, and the like in connection with the property settlement agreement. However, the number of dissolution cases that are handled by the parties themselves without the benefit of legal counsel appears to be increasing, and this development makes it more likely that a party will overlook changing his or her will following the dissolution of the marriage.

Under the proposed law, dissolution or annulment of marriage revokes any disposition made by will to the former spouse unless the will expressly provides otherwise.[31] This rule is consistent with the weight of scholarly opinion[32] and with the rule of the Uniform Probate Code.[33] The rule corresponds to what most persons would intend in such a situation.

Missing Wills

Filing notice of will. A practical problem after the death of a person is to ascertain whether the person made a will and, if so, its location. Even if the existence and location of a will are known, it is still necessary to search for codicils and possible subsequent wills.[34] This task is greatly simplified in the case of a will executed in conformity with the Uniform International Wills Act[35] by voluntary registration with the California Secretary of State of a notice which may indicate the intended place of deposit or safekeeping of the will.[36] The information in the notice is kept in strict confidence until the death of the maker. After the death of the maker, the Secretary of State makes the

31. The recommended legislation makes a conforming revision in the recently enacted provision of the Family Law Act (Civil Code § 4352) requiring that notice of the effect of dissolution or annulment of marriage be included in every final judgment of dissolution or annulment.

32. See Niles, Probate Reform in California, 31 Hastings L.J. 185, 212 (1979); Evans, Comments on the Probate Code of California, 19 Calif. L. Rev. 602, 610 (1931); Turrentine, Introduction to the California Probate Code, in West's Annotated Codes, Probate Code 38 (1956). Accord, State Bar of California, The Uniform Probate Code: Analysis and Critique 45 (1973). But see Note, The Effect of Divorce on Wills, 40 So. Cal. L. Rev. 708, 714-15 (1967).

33. Uniform Probate Code § 2-508. The proposed law also adopts the Uniform Probate Code rule that dissolution or annulment revokes any provision conferring a general or special power of appointment on the former spouse and any nomination of the former spouse as executor, trustee, conservator, or guardian, unless the will expressly provides otherwise.

34. Farrand, Immediate Arrangements, in 1 California Decedent Estate Administration § 1.16, at 16 (Cal. Cont. Ed. Bar 1971).

35. Prob. Code §§ 60-60.8. Use of an international will is intended to facilitate proving the validity of the will in countries which are signatories to the international convention. The proposed law continues the Uniform International Wills Act without substantive change.

36. Prob. Code § 60.8.

information available to any person who presents a death certificate or other satisfactory evidence of the testator's death.[37]

The proposed law permits filing of information concerning wills generally, not just international wills.[38] Filing of information is voluntary, as in the case of an international will; failure to file does not affect the validity of the will. The will itself is not filed, only certain identifying information and a statement of the location of the will. A petitioner for probate of a will or for letters of administration may request the Secretary of State to search the file for information concerning the decedent's will and may file a certificate reporting the information in the court proceeding. It is anticipated that this procedure, involving a relatively modest cost,[39] will result in finding wills that otherwise might not have been found.[40]

Probate of valid but missing will. A valid, unrevoked will that cannot be found after the testator's death is denied probate under existing California law unless it is established that the will was in existence at the testator's death or that the will was destroyed during the testator's lifetime and without the testator's knowledge, either fraudulently or by public calamity.[41] The rule that denies probate to a missing will under these circumstances--in cases where there is no reasonable doubt that there was such a will and that it was valid and

37. Prob. Code § 60.8.

38. Such a scheme has been adopted in British Columbia. See Wills Act, B.C. Rev. Stat. ch. 434, §§ 33-40 (1979).

39. The fee for filing the notice of will or for requesting a certificate is five dollars.

40. This has been the result in British Columbia, which has had a favorable experience with such a scheme. See Law Reform Comm'n of British Columbia, Report on the Making and Revocation of Wills 114 (1981).

41. See Prob. Code § 350; French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 351-54 (1976); Niles, Probate Reform in California, 31 Hastings L.J. 185, 213 (1979).

unrevoked at the testator's death--is a substantial defect in California law.[42] The proposed law repeals the rule so that any valid, unrevoked will is provable whether or not the will is physically in existence.[43]

Proof requirements for missing will. If a missing will is admitted to probate, California law requires that the will provisions be "clearly and distinctly proved by at least two credible witnesses."[44] This extraordinary proof requirement increases the hazard that the terms of a valid, unrevoked will may not be provable.[45] The requirement that at least two witnesses prove the provisions of a missing will has not worked satisfactorily in those states that have such a rule.[46] The quality of evidence cannot be measured in terms of the number of witnesses; the question is rather one of the credibility of the witnesses.

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42. See Niles, supra note 41, at 213-14, 218; Turrentine, Introduction to the California Probate Code, in West's Annotated California Codes, Probate Code 38 (1956); Note, Statutory Restrictions on Probate of Lost Wills: Judicial Inroads on Restrictions, 32 Calif. L. Rev. 221 (1944). The California rule which excludes a valid but missing will from probate has also been criticized as "legal sophistry" (Niles, supra at 213), and a "misguided statute" (9 J. Wigmore, Evidence in Trials at Common Law § 2523, at 577 (Chadbourn rev. ed. 1981). Not only does California law sometimes have the undesirable effect of excluding a valid, unrevoked will from probate, but it may also prevent the court from applying the ameliorative doctrine of dependent relative revocation to avoid injustice. For example, if the testator destroys a first will in the mistaken belief that a second will is valid, the law will presume that the testator intended to revoke the first will only if the second will were valid. In other words, the revocation is not absolute, but is relative to and dependent on the validity of the second will. 7 B. Witkin, Summary of California Law Wills and Probate § 155, at 5670 (8th ed. 1974). By requiring the will to be "in existence" at the testator's death, Section 350 appears to preclude application of the doctrine of dependent relative revocation to save the destroyed first will. L. Simes & P. Basye, Problems in Probate Law 300 (1946).

43. This is the common law rule. L. Simes & P. Basye, Problems in Probate Law 298 (1946). This is also the rule under the Uniform Probate Code. See French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 351 (1976).

44. Prob. Code § 350.

45. French & Fletcher, supra note 43, at 354.

46. L. Simes & P. Basye, Problems in Probate Law 302-03 (1946).

There may well be cases in which only one witness is available, but the witness is of such credibility that no further proof is necessary, and none should be required.

The proposed law repeals California's extraordinary proof and two-witness requirements for proof of the terms of a missing will. It adopts the rule that proof is by a preponderance of the evidence and requires no minimum number of witnesses. This will avoid the situation where the terms of a valid and unrevoked will are known but nonetheless not provable.

Interpretation of Wills

Choice of law as to interpretation. Under California law, a testator may in the will select the law of any state to be used in construing the will with respect to real and personal property located in California.[47] If the property is located outside California, a disposition of real property is construed under the law of the place where the property is located and a disposition of personal property is construed under the law of the testator's domicile.[48]

The proposed law permits the testator to designate in the will the law to be applied in construing the will.[49] This will enable consistent treatment of the testator's property in all jurisdictions in which the property may be located.

Exoneration. Under existing law, if a will devises land that is subject to a mortgage, deed of trust, or other lien, and the will makes clear whether the testator intended that the devisee take the land subject to or free of the encumbrance, the clearly expressed intention controls.[50] However, if the testator's intention does not appear from

47. See Prob. Code § 100; 7 B. Witkin, Summary of California Law Wills and Probate § 49, at 5573 (8th ed. 1974).

48. 7 B. Witkin, Summary of California Law Wills and Probate § 49, at 5573 (8th ed. 1974).

49. This is also the rule adopted in the Uniform Probate Code § 2-602. The Uniform Probate Code makes clear that the law selected by the testator may not contravene the forum state's provisions for protection of the testator's family or "any other public policy" of the forum state. The proposed law would additionally make clear that the testator may not contravene the interests of the surviving spouse in community or quasi-community property.

50. See 7 B. Witkin, Summary of California Law Wills and Probate § 456, at 5895-96 (8th ed. 1974).

the will and the debt is one for which the testator is personally liable, the devisee is entitled to "exoneration," that is, to receive the land free of the encumbrance by having the debt paid out of other assets of the estate.[51]

The proposed law abolishes the doctrine of exoneration.[52] It is unrealistic to presume the testator would intend to give encumbered property free of an encumbrance the testator had no thought of discharging during lifetime.[53] The proposed law conforms more closely to the intent of the average testator than existing California law.

Ademption by extinction. Under existing law, if a will makes a gift of specific property and the property no longer exists at the testator's death or is no longer a part of the estate, the gift is said to be "adeemed" (revoked). No monetary equivalent is substituted for the gift, with the result that the testamentary provision is nullified.[54]

Because of the harsh effects of ademption, the California courts have sought to avoid ademption whenever possible by applying various

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51. 7 B. Witkin, supra note 50; French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 379-80 (1976). The impact of this rule is diminished in California because of anti-deficiency legislation which provides that on a purchase money mortgage or deed of trust for real property, no personal liability may be imposed on the debtor. Code Civ. Proc. § 580b. Hence, in such a case no exoneration is required. 7 B. Witkin, supra § 457, at 5896; French & Fletcher, supra at 380. Moreover, exoneration does not apply to one who takes as a surviving joint tenant unless the will so provides, and a direction in the will to "pay all debts" is not a sufficient statement of the testator's intent that the surviving joint tenant should take the property free and clear of the encumbrance. 7 B. Witkin, supra.

52. This is consistent with Uniform Probate Code § 2-609. Under the proposed law, the testator may indicate in the will that the devisee is to take the property free of encumbrances, and the testator's intent controls.

53. 7 B. Witkin, supra note 50, § 457, at 5896.

54. See 7 B. Witkin, Summary of California Law Wills and Probate § 218, at 5728 (8th ed. 1974); Note, Ademption and the Testator's Intent, 74 Harv. L. Rev. 741, 741 (1961). If it is the testator's intent to give a general legacy rather than a specific one, there will be no ademption, since a general legacy is not subject to ademption. 7 B. Witkin, supra § 218, at 5729.

constructional rules.[55] In addition, several statutes state special rules that save a testamentary gift from ademption.[56]

The Uniform Probate Code identifies a number of other special situations where a specific gift should not be adeemed. This is where a stock split, merger, or the like, alters the character of the securities given,[57] where there are unpaid proceeds of sale, condemnation, or

55. See 7 B. Witkin, supra note 54, § 218, at 5729; French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 385 (1976).

56. Prob. Code §§ 77 (no ademption of specific gift that is subject of executory contract of sale), 78 (no ademption of specific gift if testator alters but does not wholly divest interest in property by conveyance, encumbrance, or other act).

Probate Code Section 73, which is cast in terms of revocation, is more accurately viewed as an ademption provision. It provides that a gift of specific property is revoked if the testator alters his or her interest in the property and the instrument that makes the alteration either expresses the testator's intent to revoke or contains provisions wholly inconsistent with the will. Section 73 is superfluous. If the property is wholly conveyed away by the testator, the matter will be adequately covered by the common law doctrine of ademption by extinction, and the gift will be considered to be adeemed in such a case. 7 B. Witkin, supra note 54, § 218, at 5728; Comment to Uniform Probate Code § 2-612. If the property is only partly conveyed away, Probate Code Section 78 will apply, and the testamentary gift would not be adeemed. Section 73 has also sometimes been applied in the context of determining the effect on a will of a marital settlement agreement incident to dissolution. French & Fletcher, supra note 55, at 344 n.48 (1976). However, this application of Section 73 has been superseded by Section 80 specifically to deal with this problem.

Probate Code Section 72 includes a provision that when a second will contains dispositive provisions wholly inconsistent with the dispositive provisions of a prior will, the court need not give effect to the appointment of an executor in the first will even though the second will is silent on the matter if that appears consistent with the testator's intent. This special provision is also unnecessary since it is consistent with the general rule that the testator's intent governs.

57. Uniform Probate Code § 2-607. The problem of changes before the testator's death in securities that have been specifically given by will is a recurring problem in California. State Bar of California, The Uniform Probate Code: Analysis and Critique 52 (1973). To the extent that the California cases have dealt with the problem, California decisional law is closely similar to the UPC. French & Fletcher, supra note 55, at 383.

insurance on damaged or destroyed property that was devised,[58] or where a secured note given by will has been foreclosed and the property used as security is in the testator's estate as a result of the foreclosure.[59] The proposed law adds these Uniform Probate Code rules of nonademption to the existing California statutes. The Uniform Probate Code rules deal with matters not covered by California statute and are generally consistent with California decisional law. To the extent California decisional law has not dealt with all these matters, the provisions will clear up uncertainties and provide useful rules.

Ademption by satisfaction. Under existing law, if the testator makes an inter vivos gift to a person who also is given a general legacy under the will, the inter vivos gift is not deducted from the general legacy unless the testator's intent that it be deducted is expressed in writing or unless the donee so acknowledges in writing.[60] The proposed law continues existing law but makes clear that if the testator's writing is other than a will the writing must be contemporaneous with the gift,[61] and delays the date of valuation of the property if the donee's possession or enjoyment of the property is delayed.[62]

Failed residuary gift. Under California law, if the residuary clause of a will makes a gift to two or more named persons and one of them predeceases the testator, the anti-lapse statute is first applied

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58. Uniform Probate Code § 2-608(a). California decisional law is roughly similar. French & Fletcher, supra note 55, at 384; State Bar of California, The Uniform Probate Code: Analysis and Critique 52-53 (1973).

59. Uniform Probate Code § 2-608(a)(4).

60. Prob. Code § 1050. Section 1050 also provides that if an inter vivos gift is made of specific property also given by will, an ademption will occur. This special application of the doctrine of ademption is redundant and is not codified in the proposed law. See generally Comment to Uniform Probate Code § 2-612 ("[i]f the devise is specific, a gift of the specific property during lifetime would adeem the devise by extinction rather than by satisfaction, and this section would be inapplicable").

61. Although Probate Code Section 1050 does not require that the testator's writing be contemporaneous with the gift, one California case appears to have accepted that rule. See In re Estate of Hayne, 165 Cal. 568, 574, 133 P. 277 (1913).

62. In this case, the property is valued as of the time the donee comes into possession or enjoyment or the date of the testator's death, whichever time is the earlier. This clarification is drawn from Uniform Probate Code § 2-612.

to make a substitution for the predeceased taker.[63] However, if the residuary gift does not come within the anti-lapse statute (either because the named taker is not kindred of the testator[64] or dies without issue) and thus cannot be saved, the failed gift is a "residue of a residue" and passes by intestacy.[65]

The proposed law avoids intestacy by abolishing the residue of a residue rule and providing instead that the failed gift passes to the surviving residuary beneficiary or to two or more surviving residuary beneficiaries in proportion to their interests in the residue.[66] This provision conforms more closely to the intent of the average decedent than does existing law, and also avoids intestacy.

California Statutory Will

Legislation enacted in 1982[67] provides for a "California statutory will"--a will executed by the testator on a printed will form.[68] The proposed law continues the substance of the 1982 statute with a few

63. French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 372 (1976); Niles, Probate Reform in California, 31 Hastings L.J. 185, 215 (1979).

64. Prob. Code § 92; cf. In re Estate of Sowash, 62 Cal. App. 512, 516, 271 P. 123 (1923). In California, "kindred" includes those related by adoption. 7 B. Witkin, Summary of California Law Wills and Probate § 226, at 5737 (8th ed. 1974); French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 370 n.112 (1976).

65. French & Fletcher, supra note 63, at 372-73; Niles, supra note 63, at 215.

66. This is the rule of Uniform Probate Code § 2-606.

67. 1982 Cal. Stats. ch. 1401 (codified at Prob. Code §§ 56-56.14).

68. The statute sets out two printed will forms. The printed forms give the testator a limited choice of dispositive clauses and permit the testator to nominate one or more persons or institutions as executor or as guardian of the testator's minor children. One of the forms includes provisions for a trust and permits the testator also to nominate one or more persons or institutions as trustee. No alteration may be made in the printed form except in accordance with the instructions for execution of the form.

revisions needed to conform it to the proposed provisions applicable to wills generally.[69]

INTESTATE SUCCESSION

Share of Surviving Spouse

Under existing law, in the event of intestacy all of the community property[70] and quasi-community property[71] goes to the surviving spouse, but the disposition of the decedent's separate property depends upon the decedent's family situation. If the decedent dies leaving one or more issue, parents, brothers, sisters, or descendants of a deceased brother or sister, the share of the surviving spouse in the separate property of the decedent is one-half or one-third depending upon who the survivors are.[72] If the decedent dies leaving no such relatives, the surviving spouse takes all of the decedent's separate property.[73]

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69. The significant revisions of the 1982 statute made by the proposed law are:

    (1) The requirements for witnessing the will are conformed to those generally applicable to wills under the proposed law. See discussion under "Formal Requirements" supra.

    (2) A provision is added that a disposition of property by the will to the testator's spouse or a nomination of the testator's spouse as an executor, trustee, or guardian is revoked if the marriage of the testator terminates after execution of the will as a result of dissolution or annulment. This adopts the general rule of the proposed law that dissolution revokes a disposition to or a nomination of a former spouse. See discussion under "Revocation by Dissolution or Annulment" supra.

    (3) References to the laws relating to the succession of separate property "not acquired from a parent, grandparent, or predeceased spouse" are omitted, consistent with the repeal of the ancestral property doctrine by the proposed law. See discussion under "Ancestral Property Doctrine" infra.

    Conforming revisions have been made in other provisions of the 1982 statutes to reflect these changes, and other technical revisions have been made.

70. Prob. Code § 201.

71. Prob. Code § 201.5.

72. The surviving spouse receives one-half of the intestate decedent's separate property if the decedent is survived by only one child or only the issue of one deceased child (Prob. Code § 221) or if the decedent dies without issue but is survived by one or both parents or the issue of one or both parents (Prob. Code § 223).

    The surviving spouse receives one-third of the intestate decedent's separate property if the decedent is survived by two or more children, by one child and the issue of one or more deceased children, or by the issue of two or more deceased children. Prob. Code § 221.

73. Prob. Code § 224.

This scheme causes a number of problems:

(1) Empirical studies show that most persons want the entire estate to go to the surviving spouse in preference to children, parents, and brothers and sisters.[74] Existing law defeats this desire; for example, if the decedent is survived by a spouse and a grandnephew, the grandnephew takes as much of the separate property as the spouse.

(2) A portion of the separate property estate may go to adult children or other relatives of the decedent who have little or no need for the property. The surviving spouse is deprived of a portion of the decedent's estate that may be required to maintain the surviving spouse during lifetime. This problem is becoming greater as the incidence of second marriages, involving substantial amounts of separate property, increases.

(3) Division of the separate property often engenders litigation over such matters as the value of the property.

(4) Treating separate property differently from community property causes delay and expense to determine claims as to the community or separate nature of property. Difficult problems of tracing, commingling, and apportionment often arise in litigation concerning the community or separate nature of property.

(5) An award to minor children is unnecessary, since the surviving spouse has the duty to support them.[75] Moreover, awarding property directly to children often involves the expense of establishing and administering court supervised guardianships for minors who receive property of the decedent.

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74. See Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. B. Foundation Research J. 321, 348-64; Niles Probate Reform in California, 31 Hastings L.J. 185, 192 n.47 (1979). This preference applies in the case of children of the marriage, not in the case of the decedent's children of a former marriage. It is reasonable to expect that a surviving spouse will deal fairly with his or her own children and grandchildren, both during the surviving spouse's lifetime and upon the surviving spouse's death, particularly where they devote attention to and show concern for the welfare of the surviving spouse after the death of the decedent. Where the decedent has concern that the other spouse may not deal fairly with the children or other relatives, the decedent may provide for them by will.

75. Civil Code §§ 196-196a.

The proposed law cures these problems by giving all of the intestate decedent's separate property to the surviving spouse. The only exception to this rule is where the decedent is survived by children or other lineal descendants of a former marriage. In this case, one-half of the decedent's separate property goes to the surviving spouse and the other half is divided among all of the decedent's children and descendants of predeceased children (including those who are descendants of both spouses as well as those who are descendants only of the decedent). This scheme is designed to protect children of a prior marriage and their offspring who might otherwise not be provided for by the surviving spouse; it is consistent with the findings of empirical studies that most persons want the children to receive a portion of the estate in this situation.[76]

The "Laughing Heir"

Under existing California intestate succession law, a blood relative of the decedent may inherit no matter how remote the heir may be.[77] A remotely related heir has been described as a "laughing heir" because such a person is thought unlikely to feel a sense of bereavement at the decedent's death.[78]

Unlimited inheritance has been described as an absurd anachronism and has long been the subject of scholarly criticism. The proposed law limits inheritance by intestate succession to lineal descendants of the decedent, parents and their lineal descendants, and grandparents and their lineal descendants; it eliminates inheritance by more remote relatives traced through great-grandparents and other more remote ancestors.[79] This rule cuts off the "laughing heir" and limits inheritance to relatives whom the decedent probably knew and had an interest in.

The proposed law has a number of advantages over existing law:

(1) It simplifies the administration of estates (and of trusts where there is a final gift to "heirs") by avoiding the delay and

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76. Fellows, Simon & Rau, supra note 74, at 366.

77. See Prob. Code § 226.

78. See Cavers, Change in the American Family and the "Laughing Heir," 20 Iowa L. Rev. 203, 208 (1935).

79. This is also the rule of Uniform Probate Code § 2-103 (1977 version).

expense of attempting to find remote missing heirs and by minimizing problems of service of notice.[80]

(2) It eliminates the standing of remote heirs to bring will contests (or trust litigation) and thus minimizes the opportunity for unmeritorious litigation brought for the sole purpose of coercing a settlement.[81]

(3) It removes a significant source of uncertainty in land titles.[82]

(4) It is consistent with the decedent's probable desire in a case where the decedent had a predeceased spouse, since it reduces the number of remote relatives who take in preference to stepchildren and close in-laws.[83] The result is that the property will go to persons for whom the decedent is likely to have had real affection in preference to remote relatives who probably were not acquainted with the decedent.

Ancestral Property Doctrine

Modern intestate succession statutes are based on the relationship of the decedent to possible successors; property goes to certain relatives of the decedent regardless of the source from which the decedent acquired the property.[84] Notwithstanding this general rule, there are a number of situations under California law where inheritance is governed not by the relationship of the heirs to the decedent but by the source of the property in the decedent's estate, where the property was received from certain ancestors. This is referred to as the "ancestral property" doctrine.

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80. Niles, Probate Reform in California, 31 Hastings L.J. 185, 200 n.98 (1979).

81. From time to time there is prolonged litigation in California, brought by remote heirs to establish their relationship to the decedent. Evans, Comments on the Probate Code of California, 19 Calif. L. Rev. 602, 613 (1931). Eliminating the standing of remote heirs to bring will contests will not result in the probate of invalid wills merely because there is no one with standing to contest the will, since the Attorney General may contest any will where the state stands to benefit by escheat. In re Estate of Peterson, 138 Cal. App. 443, 32 P.2d 423 (1934).

82. Cavers, supra note 78, at 211, 214.

83. See discussion under "Right of Heirs of Predeceased Spouse" infra.

84. Niles, Probate Reform in California, 31 Hastings L.J. 185, 203 (1979).

For example, the usual rule is that on the death of a person without spouse or issue, property passes to the person's parents.[85] But under the ancestral property doctrine:

(1) Property received from a particular parent or grandparent goes to that parent or grandparent or, if dead, to the heirs of the parent or grandparent.[86]

(2) Property received from a predeceased spouse goes to near relatives of the predeceased spouse.[87]

(3) Property received from a parent by an unmarried minor goes to other children of the same parent.[88]

Likewise, the usual rule is that half blood relatives of a decedent[89] are entitled to inherit equally with whole blood relatives of the same degree. But under a California variant of the ancestral property doctrine a half blood relative is excluded from inheriting property that came to the decedent from an ancestor.[90]

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85. Prob. Code § 225.

86. Prob. Code § 229(c).

87. See Prob. Code §§ 229, 296.4. First preference is given to children of the predeceased spouse and their descendants by right of representation. If there are no issue of the predeceased spouse, the property goes to the parents of the predeceased spouse equally, or the survivor. If there is no surviving issue or parent of the predeceased spouse, the property goes to the brothers and sisters of the predeceased spouse equally and their descendants by right of representation. If none of the foregoing survive, the property goes to blood relatives of the decedent. Prob. Code § 230; Estate of McDill, 14 Cal.3d 831, 537 P.2d 874, 122 Cal. Rptr. 754 (1975). If none of the foregoing survive, the property goes to relatives of the predeceased spouse more remote than the issue of parents. If none of the foregoing survive, the property escheats to the state. Prob. Code § 231.

88. Prob. Code § 227. If children of the parent are deceased, the property goes to the issue of deceased children.

89. The term "half blood" is used broadly to describe all those who share one common ancestor with the decedent, but not two. Thus, for example, if the decedent's brother had the same father as the decedent but a different mother, the brother would be a half blood kindred of the decedent. Similarly, all descendants of the brother are included within the term "half blood." See Estate of Ryan, 21 Cal.2d 498, 133 P.2d 626 (1943).

90. Prob. Code § 254.

The proposed law does not continue the ancestral property doctrine currently found in California law.[91] Elimination of the ancestral property doctrine will reduce the cost of probate, because this doctrine injects complexity into administration of intestate estates and often causes difficult problems of tracing, commingling, and apportionment.[92] The estate must be sorted out so that the ancestral property may pass by the special rules of succession. When a portion of the decedent's estate goes to relatives of a predeceased spouse, the problems of tracing heirs and giving notice are substantially increased. When property goes to children of a parent there is a likelihood that a guardian must be appointed. Delay, expense, and inconvenience result.

Moreover, the ancestral property rules violate the basic purpose of the intestate succession laws, which is to provide a will substitute for a person who dies intestate. The laws of succession should correspond to the manner in which the average decedent would dispose of property by will. As a general rule, if the decedent were making a will, it is likely that the relationship of possible beneficiaries to the decedent would be a more important factor than the source of the property.

While the ancestral property principles create problems of administration and violate the basic policy of the intestate succession laws, they have been justified on the ground that they provide a measure of equity in some cases. However, whether the principles in fact operate

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91. This is consistent with the position of scholars who have studied intestate succession law and concluded that the ancestral property doctrine should be abolished. See Niles, supra note 84, at 207-08; Reppy & Wright, infra note 92, at 135; Evans, Comments on the Probate Code of California, 19 Calif. L. Rev. 602, 614 (1931); Turrentine, Introduction to the California Probate Code, in West's Annotated California Codes, Probate Code 35 (1956); Fellows, Simon & Rau, infra note 92, at 344. The majority of American States have never adopted any form of ancestral property inheritance. Those that have, generally confined it to real property as under English common law. Reppy & Wright, supra at 112-13.

92. Reppy & Wright, California Probate Code § 229: Making Sense of a Badly Drafted Provision for Inheritance by a Community Property Decedent's Former In-Laws, 8 Community Prop. J. 107, 134 (1981). Accord, Niles, supra note 84, at 206; Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. B. Foundation Research J. 321, 344.

equitably is disputable; the courts have stated that the rules are discriminatory and illogical, and have narrowly construed them.[93] Moreover, the rules are easily defeated by will or where the decedent dies intestate leaving spouse or issue. The minimal beneficial effect the rules may have in a few cases is outweighed by their overall disadvantages and the complexity in the probate law that they generate.

Right of Heirs of Predeceased Spouse

California law gives certain relatives[94] of a predeceased spouse a right to inherit any portion of the decedent's estate that would otherwise escheat.[95] This scheme creates a burdensome problem of having to locate and give notice to relatives of a predeceased spouse in every case where there are such relatives, even though they may not be entitled to inherit in the particular case.[96]

The proposed law eliminates inheritance by relatives of a predeceased spouse, other than the decedent's stepchildren, in favor of a procedure permitting such persons to claim property that has escheated.[97] This avoids the location and notice problem but still gives those who may have been close to the decedent a share of the decedent's property. The decedent's stepchildren are continued as heirs rather than as claimants to escheated property because of the likelihood of their closeness to the decedent and because of the minimal location and notice problems for them. The proposed law provides a simple administrative procedure for determining claims by other relatives of a predeceased spouse to escheated property.[98]

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93. See, e.g., Estate of Ryan, 21 Cal.2d 498, 504, 512, 133 P.2d 626 (1943); In re Estate of Sayles, 215 Cal. 207, 8 P.2d 1009 (1932).

94. The relatives of the decedent's predeceased spouse who are entitled to inherit are the issue, parents, brothers, sisters, and issue of deceased brothers and sisters of the predeceased spouse. Prob. Code § 229(a).

95. Prob. Code § 229(d). This supplements the ancestral property provisions of existing law. See Prob. Code § 229. See also Prob. Code § 296.4.

96. See Prob. Code § 328.

97. A relative of a predeceased spouse is entitled to receive the escheated property only if the property is not claimed by an heir or devisee of the decedent.

98. These administrative procedures are found in existing law. See Code Civ. Proc. § 1352.

Representation

Under existing law, if all of the decedent's surviving descendants are in the same generation (for example, if all are children or all are grandchildren), they all share the decedent's intestate property equally (per capita).[99] This result is consistent with a strong popular preference for having all descendants in the same generation share equally.[100]

However, the California rule is that, if the decedent's surviving descendants are not all of the same degree of kindred to the decedent, they take by right of representation--that is, the decedent's estate is divided into as many shares as there are children of the decedent either living or deceased but leaving descendants, and each share of a deceased child leaving descendants is further divided in the same manner at each generation.[101] Because predeceased descendants of the decedent may have had different numbers of children from each other, there is a likelihood that members of the same generation may take unequal shares, contrary to popular preference.

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99. Prob. Code §§ 221, 222. Under this rule, if all of the decedent's surviving descendants are grandchildren, they share equally without reference to the share that their deceased parent would have taken if living. This rule does not apply to collateral kindred of the decedent. The stocks of the decedent's brothers and sisters are maintained through all generations, even though no brothers or sisters survive and all of their surviving offspring are of the same generation. Prob. Code § 225; Niles, Probate Reform in California, 31 Hastings L.J. 185, 202 (1979). If the decedent's nearest relatives are an aunt or uncle and cousins who are the children of a deceased aunt or uncle, there is no representation at all, since "the estate goes to the next of kin in equal degree." Prob. Code § 226; Niles, supra at 203.

100. See Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. B. Foundation Research J. 321, 383-84; Niles, supra note 99, at 202 n.111.

101. See Prob. Code §§ 221, 222. Under this scheme the primary division of the estate is made at the children's generation, even though there may be no living members of that generation. Maud v. Catherwood, 67 Cal. App.2d 636, 155 P.2d 111 (1945); Niles, supra note 99, at 202. Although this situation occurs relatively infrequently in the context of intestate succession, it does occur in the trust context where the ultimate gift is made long after the death of the settlor to "heirs" as determined under the laws of intestate succession. See id.; Lombardi v. Blois, 230 Cal. App.2d 191, 40 Cal. Rptr. 899 (1964).

The Uniform Probate Code handles this problem by making the primary division of the estate at the generation nearest to the decedent having at least one living member.[102] Once the estate is divided into primary shares, it descends thereafter by right of representation the same as under California law, with one exception: If a descending share of the estate reaches a generation all of whose members have predeceased the decedent, the share is redivided per capita at the next generation having any living members.[103] The result is that with respect that descending share, the members of that generation share equally.

The proposed law adopts the Uniform Probate Code rule of representation in place of the California rule. This brings California law closer to a per capita distribution scheme and thus corresponds more closely to popular preference.[104]

Stepparent Adoption

Under existing California law, when a child is adopted the child is deemed to be a descendant of the adopting parent for all purposes of succession by, from, or through the adopting parent, and inheritance by, from, or through blood relatives of the adopted child is cut off by the adoption.[105] However, if the adoption is by the spouse of a natural parent (i.e., a stepparent adoption), it is desirable that the adopted child inherit not only from or through the adoptive parent but also from

102. See Uniform Probate Code § 2-106 and Comment thereto. The Uniform Probate Code follows the same rule of representation with respect to collateral heirs (descendants of the decedent's parents or grandparents) as it does with respect to descendants of the decedent, except that if both paternal and maternal grandparents survive the decedent, or leave descendants who do, one-half of the decedent's estate goes to each line. See Uniform Probate Code §§ 2-106, 2-103 (1977 version); Niles, supra note 99, at 201-02.

103. See Uniform Probate Code § 2-106; Waggoner, A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants, 66 Nw. U.L. Rev. 626, 630-31 (1971).

104. The Commission also considered a system of "per capita at each generation" as recommended by Professor Lawrence Waggoner. See Waggoner, supra note 103. The Commission found Professor Waggoner's scheme theoretically appealing, but chose the Uniform Probate Code rule in the interest of national uniformity of intestate succession law.

105. Prob. Code § 257; 7 B. Witkin, Summary of California Law Wills and Probate § 62, at 5585 (8th ed. 1974).

or through the natural parent who gave up the child for adoption. For example, if a natural grandparent of the adopted child dies intestate, the child should be entitled to inherit; it is unlikely that the grandparent would disinherit the child, had the grandparent made a will, simply because the child was adopted by a stepparent.[106] Accordingly, under the proposed law a stepparent adoption does not cut off inheritance by, from, or through the natural parent who gave up the child for adoption.[107]

Advancements

If a person makes a gift during lifetime to a potential heir and later dies intestate, the gift is sometimes treated as an "advancement" to the donee and is deducted from the donee's intestate share on the theory that that is what the donor intended.[108] Under existing law, if the donee predeceases the donor, the advancement is deducted from the share the donee's heirs would take, just as if the advancement had been made directly to them.[109] The proposed law reverses this rule and does not charge the advancement against the donee's heirs unless the donor or donee expressly intended that this be done.[110] Most inter vivos transfers are either intended to be absolute gifts or are a carefully integrated part of a comprehensive estate plan. In addition, the predeceased donee

106. See Estate of Garrison, 122 Cal. App.3d 7, 175 Cal. Rptr. 809 (1981).

107. This is also the rule of Uniform Probate Code § 2-109 (1977 version). This rule creates the possibility that the adopted child could inherit from the same person both as a natural and as an adopted child. See Comment to Uniform Probate Code § 2-114. The Uniform Probate Code precludes this by a provision that a person who is related to the decedent through two lines is entitled only to a single share. Uniform Probate Code § 2-114. The proposed law this provision.

108. See Prob. Code § 1050; 7 B. Witkin, Summary of California Law Wills and Probate § 35, at 5557-58 (8th ed. 1974).

109. Prob. Code § 1053.

110. This is also the rule of Uniform Probate Code § 2-110. Under this rule the donor's writing declaring the gift to be an advancement must be "contemporaneous" with the gift. Although there is now no such express requirement in California law, the accepted rule appears to be that the writing must be either contemporaneous with the gift or embodied in a subsequent testamentary instrument. See In re Estate of Hayne, 165 Cal. 568, 574-75, 133 P. 277 (1913).

may have disposed of the property during lifetime; to charge the gift against the donee's heirs in such a case would be unfair to them.

FAMILY PROTECTION

Family Allowance

The decedent's surviving spouse and minor children, and also the decedent's adult children who are incapacitated and dependent on the decedent for support, are entitled to an allowance out of the estate necessary for their support during probate administration.[111] The decedent's adult children who are dependent on the decedent for support but who are not incapacitated may be given an allowance in the court's discretion.[112] An allowance may be granted only to those who do not have reasonable maintenance from other sources.[113]

The family allowance protects family members to whom the decedent owes a support obligation[114] against hardship during the period immediately following the decedent's death. However, the family allowance statute, as presently drawn, fails to provide for parents of the decedent who may have been actually supported by the decedent and to whom the decedent may also have been legally obligated for support.[115] The proposed law broadens the persons eligible for a family allowance to include, in the discretion of the court, parents actually supported by the decedent. This will help take care of hardship situations without causing an undue strain on the estate in every case.

A problem under the family allowance statute is that the allowance is limited in duration to the settlement of the probate estate,[116] and the estate must generally close within 18 months after issuance of letters.[117] The family members dependent on the decedent and whom the

111. Prob. Code § 680.

112. Prob. Code § 680.

113. Prob. Code § 682.

114. Civil Code §§ 196 (child), 5100 (spouse).

115. Civil Code § 206 (parent, other adult children).

116. Prob. Code § 680; Pigott, Family Allowance, in 1 California Decedent Estate Administration § 11.28, at 410 (Cal. Cont. Ed. Bar 1971).

117. See Prob. Code § 1025.5.

decedent was legally obligated to support may need support for longer than 18 months, however. Early close of probate may cause serious hardship by terminating the family allowance. There is no sound policy reason why the support obligation of the decedent incurred during lifetime should be cut off by early close of probate where the estate is otherwise sufficient. The proposed law permits the court to hold the probate estate open for a limited period in order to continue the family allowance if the allowance is needed to supply the necessaries of life for the family.

Pretermitted Children

California has a broad pretermission statute that provides an intestate share for a child of the testator, or issue of a deceased child, who is omitted from the testator's will.[118] The statute applies not only to a child born after the will was made but also a child living at that time. The statute does not apply if the will includes express words of disinheritance or strong and convincing language that the omission was intentional.[119]

The purpose of the pretermission statute is to carry out the testator's presumed intent and protect against disinheritance where it appears that the omission from the will was unintentional.[120] For this purpose the proposed law makes changes in the California statute so it will operate in a manner more consistent with the intent of most testators:

(1) The proposed law continues to protect a child born after the making of the will but no longer protects a child living when the will was made.[121] It is more likely than not that omission of a child living when the will was made was intentional.[122]

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118. Prob. Code § 90.

119. See, e.g., Estate of Smith, 9 Cal.3d 74, 78-79, 507 P.2d 78, 106 Cal. Rptr. 774 (1973); 7 B. Witkin, Summary of California Law Wills and Probate § 5, at 5524 (8th ed. 1974).

120. 7 B. Witkin, Summary of California Law Wills and Probate § 5, at 5524 (8th ed. 1974).

121. The proposed law would protect a child living when the will was made if the testator mistakenly believed the child to be dead or was unaware of its birth.

122. 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).

(2) The protection of the proposed law is limited to an omitted child of the testator; it does not extend to omitted grandchildren or more remote issue of the testator. If the testator's child is alive when the will is made, more remote issue are protected by the anti-lapse statutes; if the testator's child is not alive when the will is made, the omission of more remote issue is ordinarily intentional.

(3) The rule that the pretermission statute applies unless the testator's intent to omit a child is shown clearly on the face of the will may defeat the testator's intent. The proposed law permits the court to look to surrounding circumstances in determining the testator's intent when the language of the will is doubtful; this is consistent with the general rules for construction of a will.[123]

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.[124] 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 that the testator's omission of a spouse from a will made before marriage was intentional because the testator made provision for the spouse outside the will.[125] This will

123. See 7 B. Witkin, Summary of California Law Wills and Probate § 160, at 5676 (8th ed. 1974).

124. 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).

125. This is the rule of Uniform Probate Code § 2-301. See French & Fletcher, supra note 124, 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

more effectively carry out the testator's intent[126] and reduce the number of instances where the spouse omitted from the testator's premarital will may 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 decedent leaves no issue, parents, siblings, or their descendants,[127] one-half if the decedent leaves any of these relatives,[128] and one-third if the decedent leaves two or more children or their descendants.[129] 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. In addition, the omitted spouse may take all the separate property in preference to a close friend or favorite charity to which the decedent made a specific and reasonable devise. The proposed law remedies these anomalies by giving the omitted spouse one-half the separate property in every case. 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 and devisees of the decedent of all benefits under the will.

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property. See State Bar of California, The Uniform Probate Code: Analysis and Critique 33 (1973). However, this concern is dealt with by a separate provision in the proposed law that gives effect to a waiver of all the benefits under a will executed before the waiver.

126. See Joint Editorial Board for the Uniform Probate Code, Response of the Joint Editorial Board 7 (1974).

127. Prob. Code § 224.

128. Prob. Code §§ 221, 223.

129. Prob. Code § 221.

RELATED PROVISIONS

Simultaneous Death and Survival

When two or more persons die in a common accident, there may be difficulty determining the order of death for purposes of survivorship and inheritance. Under the California version of the Uniform Simultaneous Death Act,[130] if there is no sufficient evidence that the decedents died other than simultaneously, the property of each person is disposed of as if each had survived.[131] If there is evidence that one person survived the other, even if it is circumstantial evidence of survival only for an extremely short period,[132] the simultaneous death act does not apply and the property passes accordingly. This may result in speculative litigation to prove survival by an instant by those who stand to gain thereby. If an instant of survival can be shown, the property may be subject to administration and taxation in the estates of both decedents. In some cases, such as where a husband and wife are childless or both have children of a former marriage, the property may pass to only one side of the family, contrary to the wishes of the decedents.

The Uniform Probate Code adopts the rule that a person must survive a decedent by 120 hours for the purpose of intestate succession or taking under a will (subject to a contrary provision in the will).[133]

130. See Prob. Code §§ 296-296.8.

131. Prob. Code § 296. If there is no sufficient evidence that two joint tenants have died other than simultaneously, the joint tenancy property is split between the two estates. Prob. Code § 296.2. If a husband and wife die and there is no sufficient evidence that they died other than simultaneously, one-half of the community property is dealt with in each spouse's estate. Prob. Code § 296.4. If an insured and a beneficiary die and there is no sufficient evidence that they died other than simultaneously, the proceeds are distributed as if the insured survived the beneficiary. Prob. Code § 296.3.

132. See, e.g., Estate of Rowley, 257 Cal. App.2d 324, 65 Cal. Rptr. 139 (1967) (Simultaneous Death Act held inapplicable in case where testimony that one passenger in a car was killed 1/150,000 of a second before the other).

133. See Uniform Probate Code §§ 2-104 (intestate succession), 2-601 (wills).

Provisions of this type have been adopted in a significant number of states in recent years.[134]

The proposed law adopts the 120-hour survival period for wills and intestate succession. The short period of five days avoids litigation over survival for short periods of time, avoids double administration and taxation in many cases, and also achieves a more equitable result for the heirs of both decedents. At the same time, the five-day period is not so long that it interferes with the ability of the survivor to deal with the property when a need arises, nor does it delay administration of the estate.

The proposed law also adopts a 120-hour survival rule for nonprobate transfers upon death, such as survivorship under a joint tenancy[135] and taking as a beneficiary of life or accident insurance,[136] subject to a contrary provision concerning survival in the governing instrument. The rule of survival applicable to nonprobate transfers should be the same as the rule governing survival under a will or by intestate succession. Otherwise, capricious results will occur, as well as litigation over which rule is applicable, particularly in cases where married persons die in a common accident.[137]

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134. At least 13 states have adopted a 120-hour survival rule--Alaska, Arizona, Colorado, Idaho, Maine, Michigan, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Texas, and Utah. Ohio has a 30-day survival rule.

135. The 120-hour survival rule would not alter the power of the survivor to withdraw funds from a deposit account unless the deposit agreement provides otherwise.

136. This rule would not apply to insurance contracts in existence before the operative date of the proposed law.

137. For example, if the spouses hold real property in joint tenancy form and the husband dies intestate several hours after the wife, the disposition of the property may be in doubt. If the property is true joint tenancy property, it will, in the absence of a 120-hour survival rule applicable to joint tenancy property, be administered in the husband's estate, and if both spouses had children of a former marriage, the children of the wife will take nothing, the children of the husband everything. But if it can be shown that the property was actually community property held in joint tenancy form, the 120-hour survival rule would apply and the property would be divided in half between the two sets of children. See Hemmerling, Death in a Common Disaster and Establishing Simultaneous Death, in 2 California Decedent Estate Administration § 22.14, at 983 (Cal. Cont. Ed. Bar 1975).

Effect of Homicide

California by statute disqualifies one who commits an intentional homicide from taking the victim's property by will or intestate succession.[138] By case law, California also disqualifies the killer from taking benefits from the victim through life insurance, joint tenancy, family allowance, and retirement and survivor benefits.[139] The proposed law deals comprehensively with these matters by disqualifying the killer from taking from the victim by will, intestate succession, joint tenancy, joint bank account, life insurance, bond, other contractual arrangement, or any other means.[140]

The proposed law makes three significant substantive changes in existing California law:

(1) The proposed law applies the civil burden of proof (preponderance of the evidence) in the civil proceeding to disqualify the killer, in place of the existing criminal burden of proof (beyond a reasonable doubt).[141] Different policies apply in civil and criminal proceedings; the extraordinary burden of proof attached to a criminal penalty is not appropriate where civil matters and the competing interests of heirs are concerned.

(2) Existing law gives conclusive effect in the civil proceeding to an acquittal of the killer in a prior criminal proceeding. The proposed law does not give such an acquittal any effect in a later civil proceeding. The acquittal establishes only that the extraordinary burden of proof beyond a reasonable doubt was not met; it does not establish a lack of evidence to satisfy the civil standard of proof.[142]

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138. Prob. Code § 258.

139. See French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 367 n.105 (1976).

140. These provisions are drawn in part from Uniform Probate Code § 2-803.

141. Estate of McGowan, 35 Cal. App.3d 611, 619, 111 Cal. Rptr. 39 (1973).

142. This is analogous to tax law, where a taxpayer acquitted of tax fraud in a criminal proceeding may be found to have committed fraud in a civil proceeding. See Comment to Uniform Probate Code § 2-803.

(3) Existing law disqualifies the killer from taking from one who is killed accidentally during the commission of specified felonies.[143] The proposed law disqualifies the killer only if the killing was intentional. The accidental killing aspect of existing rule is of extremely limited application[144] and does not promote the purpose of eliminating any financial incentive for the killing.

Waiver of Rights by Surviving Spouse

There may be an agreement between the decedent and the surviving spouse in which the surviving spouse purports to waive rights in the estate of the decedent. Such a waiver commonly occurs in an antenuptial agreement, an integrated estate plan, or a marital termination agreement. The agreement may waive such specific items as rights in community property or the right to receive exempt property, family allowance, or probate homestead, or may broadly waive "all rights" in the estate of the decedent.

Although there is little statutory law governing such a waiver,[145] the case law is quite strict in construing a waiver agreement to prevent the loss of valuable statutory property rights.[146] Because husband and wife occupy a confidential and fiduciary relationship, the opportunity for undue influence and duress is great. An effective waiver of rights must be clear and explicit,[147] and the person making the waiver must understand its practical and legal consequences.[148]

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143. The felonies are arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288 of the Penal Code. These are the felonies included within the felony murder rule. See Penal Code § 189; 1 B. Witkin, California Crimes Crimes Against the Person § 311, at 283-84 (1963).

144. See Wild, The Felonious Heir in California, 49 Cal. St. B.J. 528, 528 n.2 (1974).

145. See Prob. Code § 80 (effect of waiver of rights in marital termination agreement).

146. 7 B. Witkin, Summary of California Law Wills and Probate § 532, at 5947-48 (8th ed. 1974).

147. See, e.g., Annot., 9 A.L.R.3d 955 (1966); Annot., 30 A.L.R.3d 858 (1970).

148. Wolfe & Hellman, Handling Surviving Spouse's Share of Marital Property, in California Will Drafting Practice § 5.31, at 205-06 (Cal. Cont. Ed. Bar 1982).

It has been suggested that in order for a waiver of rights by a spouse to be effective, the waiver should be made only after complete disclosure of all pertinent facts and upon advice of competent counsel.[149] The proposed law adopts this suggestion[150] and provides that a written agreement of the surviving spouse that waives rights in the estate of the decedent is enforceable unless it is shown that the waiver was made without full and complete disclosure of the property of the decedent or that the surviving spouse was not represented by independent counsel. In cases where there has not been full disclosure or counsel, the waiver should nonetheless be enforceable (except as to any provision the court finds is unconscionable) if it can be shown that (1) the surviving spouse understood the effect of the waiver and voluntarily executed it and (2) either the surviving spouse had an adequate knowledge of the property of the decedent or the waiver made a fair disposition of the property. These rules are generally consistent with the strict construction of existing law, but will provide express statutory standards for the guidance of the parties and the courts.

Contracts Relating to Wills

A promise to make a will, or not to revoke a will already made, comes within the Statute of Frauds.[151] Such a promise must therefore as a general rule be in writing and is unenforceable if oral.[152] However, the courts have developed a number of doctrines to permit enforcement of

149. Kahn & Gallo, The Widow's Election: A Return to Fundamentals, 24 Stan. L. Rev. 531, 543-44 (1972).

150. The text of the proposed law is adapted from the July/August 1982 draft of the Uniform Antenuptial Agreement Act.

151. Civil Code § 1624; Zaring v. Brown, 41 Cal. App.2d 227, 231, 106 P.2d 224 (1940).

152. Notten v. Mensing, 3 Cal.2d 469, 473, 45 P.2d 198 (1935); 1 B. Witkin, Summary of California Law Contracts § 223, at 197 (8th ed. 1973); 7 B. Witkin, Summary of California Law Wills and Probate § 94, at 5611 (8th ed. 1974).

an oral promise to make or not to revoke a will in order to avoid the harshness that would be caused by a strict application of the Statute of Frauds.[153]

Where an oral agreement to make or not to revoke a will is alleged after promisor is deceased and unable to testify, there is an opportunity for the fabrication of testimony concerning the existence of the agreement.[154]

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153. These doctrines include:

(1) An oral agreement concerning a will that is unenforceable when made may become enforceable if a written note or memorandum is later made--the later writing relates back to the earlier oral agreement. See Potter v. Bland, 136 Cal. App.2d 125, 131, 288 P.2d 569 (1955). See generally 1 B. Witkin, Summary of California Law Contracts § 205, at 186 (8th ed. 1973).

(2) Oral testimony is admissible in a court proceeding concerning points on which a written agreement is silent, so long as the testimony does not contradict the writing. Potter v. Bland, 136 Cal. App.2d 125, 132, 288 P.2d 569 (1955).

(3) In an extreme case where the decedent has made an oral promise to make or not to revoke a will and has induced another to change position in reliance on the oral promise, the courts will find an estoppel and will enforce the oral promise. See, e.g., Walker v. Calloway, 99 Cal. App.2d 675, 222 P.2d 455 (1950). In the context of mutual wills, the court has held that if two people execute mutual wills and orally agree not to revoke them, one of them dies, the survivor accepts the benefits under the decedent's will, and then the survivor revokes his or her own will, a constructive fraud sufficient to raise an estoppel has been practiced, and equity will enforce a constructive trust on the property. Notten v. Mensing, 3 Cal.2d 469, 45 P.2d 198 (1935); Daniels v. Bridges, 123 Cal. App.2d 585, 589, 267 P.2d 343 (1954); see Potter v. Bland, 136 Cal. App.2d 125, 132-33, 288 P.2d 569 (1955).

(4) In some cases, the courts have enforced an oral promise to leave property to another by finding an oral express trust. See Maddox v. Rainoldi, 163 Cal. App.2d 384, 329 P.2d 599 (1958).

(5) If the court cannot find a sufficient basis to award to the plaintiff the property in the decedent's estate which was promised to be left by will under one of the foregoing theories, the court may nonetheless award the plaintiff the reasonable value of services rendered to the decedent. Drvol v. Bant, 183 Cal. App.2d 351, 356-57, 7 Cal. Rptr. 1 (1960). See generally 1 B. Witkin, Summary of California Law Contracts § 49, at 60, § 223, at 198, § 259, at 225 (8th ed. 1973).

154. To some extent, this danger is ameliorated by the rule in California that there must be clear and convincing evidence to prove an oral agreement to make or not to revoke a will. See Notten v. Mensing, 3 Cal.2d 469, 477, 45 P.2d 198 (1935); Lynch v. Lichtenthaler, 85 Cal. App.2d 437, 441, 193 P.2d 77 (1948).

Sound policy requires some form of written evidence that such an agreement actually exists.

Under the Uniform Probate Code, for example, a contract to make a will or devise, or not to revoke a will or devise, or to die intestate,[155] can be established only by (1) provisions of a will stating material provisions of the contract, (2) an express reference in the will to the contract and extrinsic evidence proving the terms of the contract, or (3) a writing signed by the decedent evidencing the contract.[156] Under this provision all of the terms of the contract need not be in writing; it is sufficient that there is some written evidence that the contract exists. The evidence may be as minimal as an "express reference" in the will to the contract, the terms of which are entirely oral. This allows adequate room for the courts to develop reasonable interpretations of the writing requirement and thereby avoid harsh results.[157]

The proposed law adopts the Uniform Probate Code provision governing contracts concerning a will in place of the applicable portion of the Statute of Frauds. This will provide a clearer, more detailed statutory statement than the present Statute of Frauds and will limit the opportunity for fraud by fabricated proof of an oral agreement.

Pay-on-Death Provisions in Contracts and Instruments

The proposed law includes a statutory provision taken from the Uniform Probate Code that authorizes pay-on-death provisions in bonds, mortgages, promissory notes, and conveyances, as well as other contractual instruments, and deems such provisions to be nontestamentary.[158] In particular, the statute validates contractual provisions that money or other benefits payable to or owned by the decedent may be paid after death to a person designated by the decedent in either the instrument or

155. There are no California cases concerning an agreement to die intestate. See generally 79 Am. Jur.2d Wills § 63 (1975).

156. Uniform Probate Code § 2-701. Under this provision the execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills. This is consistent with California decisional law. See Daniels v. Bridges, 123 Cal. App.2d 585, 589, 267 P.2d 343 (1954) (joint will); Lich v. Carlin, 184 Cal. App.2d 128, 133, 7 Cal. Rptr. 555 (1960) (mutual wills).

157. L. Averill, Uniform Probate Code in a Nutshell § 11.01, at 115 (1978).

158. Uniform Probate Code § 6-201.

a separate writing, including a will, executed at the same time as the instrument or subsequently. This validates contractual arrangements that might be held testamentary and invalid under existing law because not made in a valid will.[159]

The sole purpose of the statute is to eliminate the testamentary characterization of arrangements falling within its terms.[160] The statute avoids the need to execute the contract in compliance with the requirements for a will and avoids the need to have the instrument probated. There appears to be no sound reason for holding these types of provisions in written instruments to be invalid merely because the instrument has not been executed in accordance with the formalities of the will statutes. Experience with insurance contracts, revocable living trusts, multiple-party bank accounts, and United States government bonds with "pay-on-death" provisions demonstrates that the evils envisioned if will statutes are not rigidly enforced simply do not materialize.[161]

Disclaimers

The recipient of an interest by will, intestate succession, or other means may disclaim or renounce the interest.[162] The disclaimant

159. This provision would codify California case law that a promissory note may contain a provision for the cancellation of the debt on the death of the payee. Bergman v. Ornbaun, 33 Cal. App.2d 680, 92 P.2d 654 (1939). It would also codify the rule that an employment contract may provide for ownership of a business to pass to the employee-manager on the death of the owner. Estate of Howe, 31 Cal.2d 395, 189 P.2d 5 (1948). See generally 7 B. Witkin, Summary of California Law Wills and Probate §§ 87-89, at 5607-09 (8th ed. 1974). It may expand California law by validating a provision in a promissory note that on the payee's death the note shall be paid to another person. Although the issue has not been decided in California, most courts treat as testamentary and therefore invalid a provision in a promissory note that on the payee's death the note shall be paid to another person. Comment to Uniform Probate Code § 6-201.

160. Nothing in the provision limits the rights of creditors under other laws of the state.

161. Comment to Uniform Probate Code § 6-201.

162. Prob. Code §§ 190-190.10. The Law Revision Commission has made a separate recommendation for revision of the law of disclaimers. Recommendation Relating to Disclaimer of Testamentary and Other Interests, 16 Cal. L. Revision Comm'n Reports 0000 (1982).

is treated as having predeceased the person who created the interest.[163] This treatment could have the effect, in some situations, of increasing the intestate share of the disclaimant's issue to the detriment of other intestate heirs, contrary to the general rules of intestate succession.[164] The proposed law makes clear that exercise of a disclaimer may not operate to defeat the general provisions governing intestate succession.

Community Property Acquired Elsewhere

The proposed law makes clear that property is to be treated as community property under California law if the property was community property under the law of the state where the acquiring spouse was domiciled at the time of its acquisition.[165] This ensures treatment in California generally comparable to that given it in the other community property state.

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163. Prob. Code § 190.6.

164. For example, if the disclaimant is the last surviving member of a generation, the disclaimer could alter the shares received by the next generation, who would take per capita rather than by right of representation. See discussion of "Representation," supra. Likewise, if the disclaimant has received an advancement on his or her intestate share, exercise of the disclaimer could avoid the rule that the advancement is deducted from the share, thereby increasing the intestate share of the disclaimant's issue. See discussion of "Advancements," supra. A debt owed to the decedent by an heir is deducted from the intestate share of the heir; by disclaiming, the heir may avoid this rule and thereby pass a larger share to the heir's issue.

165. Existing law is not entirely clear. See generally Recommendation and Study Relating to Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled Elsewhere, 1 Cal. L. Revision Comm'n Reports at E-5 (1957). Under the proposed law, community property acquired by a domiciliary of another community property jurisdiction retains its community character in California even though the property might not have been community if acquired while domiciled in California. For example, if the income of separate property is community under the laws of the place where the spouse owning the separate property is domiciled at the time the income is earned, the income will be classified as community property under California law also.

Election to Take Quasi-Community Property Against Will

Under existing law the surviving spouse must elect whether to claim the statutory half share of the decedent's quasi-community property or to take the benefits provided by the decedent's will.[166] This requirement is contrary to general principles governing community property which permit the surviving spouse to claim the statutory share without sacrificing benefits under the will.[167] The requirement also is inconsistent with the decedent's probable intent in most cases. The proposed law does not continue the special quasi-community property election requirement.

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166. Prob. Code § 201.7. The election is not required if the will permits the surviving spouse both to claim the statutory share and to take under the will.

167. See 7 B. Witkin, Summary of California Law Wills and Probate §§ 21-22, at 5542-44 (8th ed. 1974). An election is necessary if the will expressly requires an election or if the decedent's intent to require an election may be implied from the fact that not to require an election would thwart the decedent's estate plan.