

First Supplement to Memorandum 82-95

Subject: Study L-625 - Probate Law (Time for Determination of Class
When Possession is Postponed)

Under existing California law, if the testator's will makes a gift for life with the remainder to the testator's "heirs," the class entitled to the remainder includes both those living at the testator's death (whether or not they survive until possession vests) and those coming within the class description after the testator's death but before possession vests. In other words, the class may be enlarged after the testator's death by birth or adoption, but is not diminished by the death of class members. Prob. Code § 123 (continued in the proposed law as Section 204.090); 7 B. Witkin, Summary of California Law Wills and Probate § 201, at 5712 (8th ed. 1974). If a class member dies before possession vests, the heirs or devisees of the deceased class member take the latter's share. 7 B. Witkin, supra.

Professor Jesse Dukeminier advises us that when a class member dies before possession vests and the remainder interest passes to heirs or devisees of the deceased class member, the remainder interest is valued and taxed in the estate of the deceased class member, as would be expected. Professor Dukeminier suggests that the estate tax can be avoided by changing California law to provide instead that the membership of the class is not determined until the time to which possession is postponed, thereby excluding all those who fail to survive until possession vests. Professor Dukeminier suggests as a model the Pennsylvania statute set out in Exhibit 1.

Although the Pennsylvania scheme does avoid taxes, it may change who the ultimate takers of the remainder interest will be. For example, assume that the testator (T) wills a life estate, remainder to T's heirs. T has three children at his death, but one predeceases the life tenant leaving a surviving spouse but no issue. Under existing California law, the remainder interest goes one-third to each of T's children, including the one who predeceased the life tenant. The predeceased child's share would pass through that child's estate, be taxed, and pass to the surviving spouse by intestacy or would pass under that child's will (probably to the surviving spouse). The Pennsylvania scheme excludes the child who predeceased the life tenant, passing the remainder interest

one-half each to T's two children who survived the life tenant; the predeceased child's spouse takes nothing. It is debatable whether the Pennsylvania scheme produces results in this example more consistent with the intent of the average testator.

In other cases, the Pennsylvania scheme permits tax avoidance without changing who the ultimate takers are. For example, assume in the example above that T's child who failed to survive the life tenant dies without spouse but leaving two children (T's grandchildren). Under California law which does not exclude the predeceased child, the remainder interest goes one-third to each child of T. The interest of the predeceased child goes into that child's estate, is taxed, and passes to that child's two children (T's grandchildren) by intestacy or passes under that child's will, probably to that child's two children. Under the Pennsylvania scheme, nothing would pass to T's child who failed to survive the life tenant. However, T's grandchildren are heirs of T, and each would therefore take a one-sixth share directly from T without the share passing through the estate of his or her deceased parent. In this case, the Pennsylvania scheme produces desirable results (tax avoidance) with no offsetting disadvantage.

Policy Question

Since the rules for determining class membership are rules of construction to assist in carrying out the testator's probable intent, the class should be determined in a manner consistent with what most testators would want, taking tax consequences into account. When possession is postponed, would the average testator want to exclude heirs or devisees of T's child who does not survive the life tenant when those heirs or devisees are not also heirs of T (1) apart from tax consequences and (2) taking tax consequences into account?

If the Commission determines that the Pennsylvania scheme should be adopted in California, proposed Section 204.090 could be revised as follows:

§ 204.090. Scope of disposition to a class; afterborn member of class

204.090. (a) Except as provided in subdivision (b), a testamentary disposition to a class includes every person answering the description at the testator's death; but when the possession is

postponed to a future period, it includes also all persons coming within the description before the time to which possession is postponed.

(b) A testamentary disposition, whether directly or in trust, to the testator's or another designated person's "heirs," "next of kin," "relatives," or "family," or to "the persons entitled thereto under the intestate succession laws," or to persons described by words of similar import, means "heirs" as defined in Section 100.190 determined as if the testator or other designated person were to die intestate at the time when the testamentary disposition is to take effect in enjoyment.

~~(b)~~ (c) A person conceived before but born after a testator's death, or any other period when a disposition to a class vests in right or in possession, takes if answering to the description of the class.

Comment. Subdivisions (a) and (c) of Section 204.090 continue the substance of former Section 123. See generally 7 B. Witkin, Summary of California Law Wills and Probate §§ 194, 201, 204, at 5705-06, 5712, 5715-16 (8th ed. 1974).

Subdivision (b) is new and is drawn from Section 2514 of the Pennsylvania Consolidated Statutes, title 20. Subdivision (b) applies to a class gift to "heirs" or a similarly described class when possession is postponed to some future time, and postpones the determination of class membership until that future time. This changes the former California rule that death of a class member after the testator's death but before possession vests does not diminish the class. See former Section 123; 7 B. Witkin, *supra* § 201, at 5712. The effect of subdivision (b) is to prevent the future interest from passing through the estate of one who does not survive until possession vests, and avoids estate taxation.

Subdivision (c) is comparable to the rule in intestate succession. See Section 220.080.

The rules of Section 204.090 yield to a contrary intent expressed in the testator's will. See Section 204.015.

Respectfully submitted,

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EXHIBIT 1

Pennsylvania Statutes Annotated, title 20, § 2514

§ 2514. Rules for interpretation of wills

2514. In the absence of a contrary intent appearing therein, wills shall be construed as to real and personal estate in accordance with the following rules:

. . .

(4) A devise or bequest of real or personal estate, whether directly or in trust, to the testator's or another designated person's "heirs" or "next of kin" or "relatives" or "family" or to "the persons thereunto entitled under the intestate laws" or to persons described by words of similar import, shall mean those persons, including the spouse, who would take under the intestate laws if the testator or other designated person were to die intestate at the time when such class is to be ascertained, a resident of the Commonwealth, and owning the estate so devised or bequeathed: Provided, however, That the share of a spouse, other than the spouse of the testator, shall not include the allowance under the intestate laws. The time when such class is to be ascertained shall be the time when the devise or bequest is to take effect in enjoyment.