

Memorandum 82-111

Subject: Study L-625 - Probate Law and Procedure (Miscellaneous Problems in Wills and Intestate Succession Recommendation)

This Memorandum covers miscellaneous problems left over from the September meeting.

§ 114.040. Survival of joint tenants

Section 114.040 requires that to take by survivorship a joint tenant must survive a deceased cotenant by 120 hours. Subdivision (d) of that section makes clear that, despite the 120-hour survival requirement, the surviving joint tenant may have access to funds on deposit in a joint account or other multiple-party account in a financial institution. The Commission decided that subdivision (d) should be expanded to provide immediate access to funds on deposit in a money market fund or with a brokerage house, and asked the staff to consider whether the appropriate language should be added to subdivision (d) or added to the general definition of "financial institution" in Section 100.150. The defined terms "account" and "financial institution" are presently used in four substantive sections of the draft. The staff thinks that a general definition of these terms is unnecessary. Accordingly, the staff proposes to delete the general definitions of "account" (proposed Section 100.015) and "financial institution" (proposed Section 100.150), and to revise subdivision (d) of Section 114.040 as follows:

(d) Nothing in this article limits or affects any right a party to a joint account or other multiple-party account ~~in a financial institution~~ may have to withdraw funds from the account, whether or not the withdrawal is made within 120 hours after the death of another party to the account. If a person having the right to do so withdraws funds from a joint account or other multiple-party account within 120 hours after the death of another party to the account and subdivision (b) or (c) applies, the amount to which subdivision (b) or (c) applies is the amount remaining in the account after the withdrawal. As used in this subdivision, "account" means an account containing funds held by a financial institution, stock broker, money market fund, or the like.

§ 220.030. Intestate share of heirs other than surviving spouse

At the last meeting, the Commission decided to revise proposed Section 220.030 to give a right to inherit intestate property to stepchildren of the decedent but not to extend this right to issue or other relatives of the stepchildren.

The decision not to extend the right of inheritance to issue or other relatives of the decedent's stepchildren was to minimize problems of notice in intestate estates. However, it may not carry out the intent of the average intestate decedent where a stepchild has predeceased the decedent leaving issue, and at least one other stepchild does survive. Under the Commission's proposal, the surviving stepchild will take to the exclusion of the issue of the deceased stepchild. Does the Commission wish to reconsider this decision, and perhaps permit the issue of a deceased stepchild of the decedent to inherit?

§ 254.010. Share of omitted spouse

§ 254.110-254.130. Share of pretermitted child

The Commission asked the staff to furnish some examples of how the estate is to be divided up when there are specific devises under the testator's will and where there are also claims of an omitted spouse and one or more pretermitted children.

Both the statutory share for an omitted spouse (proposed Section 254.010) and the statutory share for a pretermitted child (proposed Section 254.110) take precedence over the dispositive provisions of the testator's will. See proposed Sections 254.030, 254.140. These shares come first out of the residuary estate and out of property not disposed of by the will, then out of property expressly designated by the will to pay specific legacies. See Prob. Code § 751. So the only question is whether the omitted spouse's claim might conflict with the pretermitted children's claim by adding up to more than 100% of the estate.

Proposed Section 254.010 now provides that the omitted spouse shall receive all of the community property and half the separate property. The pretermitted children take an intestate share, which is nothing at all if all the surviving issue of the decedent are also issue of the surviving spouse, or half the separate property (but none of the community property) if there are surviving issue of a prior union of the decedent. Hence, the omitted spouse's share and the share of pretermitted children

cannot add up to more than 100% of the estate. The following examples illustrate representative cases:

Example 1. Testator's will leaves his entire estate to two children of his first marriage. Then testator remarries and has a third child without revising the will. On testator's death, the new spouse is entitled to all of the community property and half the separate property. The pretermitted child is entitled to an intestate share--one-sixth of the separate property. The remaining two-sixths of the separate property goes under the will to testator's two children by the prior marriage.

Example 2. Testator's will leaves her entire estate to her alma mater. She then marries and has a child without revising her will. On her death, her surviving husband is entitled to all the community property and half the separate property. The intestate share of her pretermitted child is zero, so that child takes nothing. The gift to testator's alma mater is given effect to the extent of half the separate property.

§ 372.5 (added). Challenge of gift to witness despite no-contest clause

The Commission has approved the section that permits a witness to the will to take as a beneficiary under the will (proposed Section 201.030). However, an inference of undue influence may be drawn from these facts. The Commission was concerned that, if the will contained the standard no-contest clause, there might be no one willing to challenge the testamentary gift to the witness. The Commission decided to include a section to nullify the no-contest clause in such a case. The staff proposes the following to accomplish this:

272.5. Notwithstanding a provision in the will that one who contests or attacks the will or any of its provisions shall take nothing under the will or shall take a reduced share, any person interested may, without forfeiting any benefits under the will, contest a provision of the will which benefits a witness to the will if that witness is needed to establish the validity of the will.

Comment. Section 372.5 is new, and is added to ensure that a testamentary gift to a witness to the will may be challenged without penalty despite a no-contest clause in the will. Under prior law, a witness needed to establish the validity of the will was disqualified from taking under the will a share larger than his or her intestate share, without regard to whether there was any actual wrongdoing. See former Section 51. Under the new law, a witness is disqualified from taking under the will only if wrongdoing sufficient to nullify the gift is shown. See Sections 201.030 (who may witness), 328.3 (duress, menace, fraud, undue influence).

§ 1026 (added). Delay in closing estate to pay family allowance

At the last meeting, the Commission decided not to recommend a family maintenance scheme, but instead to permit the court to hold the estate open to continue an award of family allowance if needed by the recipient to pay for necessities of life. This may be accomplished by adding a new Section 1026 as follows:

1026. Continuation of the administration of the estate as provided in Section 1025.5 for the purpose of paying a family allowance is not in the best interests of the estate or the persons interested therein unless the court finds both of the following:

(a) That the family allowance is needed by the recipient to pay for necessities of life, including education so long as pursued to advantage.

(b) That the needs of the recipient for continued family allowance outweigh the needs of the decedent's heirs or devisees whose interests would be adversely affected by continuing the administration of the estate for this purpose.

Comment. Section 1026 is new and provides standards for the court in determining whether to continue administration of the estate to pay family allowance. Nothing in Section 1026 limits the power of the court to order a preliminary distribution of the estate. See Section 1000.

Respectfully submitted,

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