

Memorandum 83-1

Subject: Study L-625 - Probate Law (Wills and Intestate Succession Recommendation)

Introduction

Assembly Bill No. 25 was introduced to effectuate the Commission's recommendation relating to wills and intestate succession. You have a copy of this bill. This memorandum discusses various matters relating to the bill. Please bring your copy of AB 25 to the meeting.

Execution of Witnessed Will

At the last meeting, the Commission decided to eliminate the provision in the draft statute which permitted a testator to sign a will and then to acknowledge the signature to two witnesses at two different times. The Commission wanted both witnesses to be present at the same time for the execution ceremony. To accomplish this, Section 6110 and the Comment thereto were revised to read as set out in Exhibit 1 to this Memorandum. This is the form in which the section is set out in AB 25 and is the form in which the section and Comment will be set out in our printed tentative recommendation.

There was some sentiment at the meeting for restricting Section 6110 still further by eliminating the provision for the testator to sign the will out of the presence of witnesses and then to "acknowledge" the signature to the witnesses. However, this sentiment may have been based on an incorrect assumption that the acknowledgment was a Uniform Probate Code innovation not found in existing California law. In fact, California does provide for an acknowledgment by the testator of an already-signed will. Prob. Code § 50. Accord, Prob. Code § 60.2 (international will). While the UPC may permit the acknowledgment to each witness to take place at two different times, California law requires the acknowledgment to be made to both witnesses present at the same time. Section 6110 (Exhibit 1) as set out in AB 25 is now consistent with existing California law in this respect.

The staff assumes that the Commission will want to retain the acknowledgment option if both witnesses must be present at the same time as under existing California law. Is this assumption correct?

Admissibility of Extrinsic Evidence to Show Testator's Intent to Disinherit a Child

The staff has had second thoughts about a change the staff previously recommended be made in the California and UPC provisions on a pretermitted child. Both California law and the UPC require that the testator's intent to omit the child be shown from the will. Prob. Code § 90; UPC § 2-302. The staff previously recommended that this rule be liberalized to permit the testator's intent to omit the child to be shown not only from the will but also by statements of the testator or by other evidence. The problem with this revision is that it made the pretermission statute inconsistent with the statute relating to the testator's omitted spouse: There it is provided that the testator's intent to omit must be shown from the will. See Section 6561(a) of AB 25 (consistent both with existing Probate Code Section 70 and UPC Section 2-301). Accordingly, the staff revised the pretermission section--Section 6571(a)--so that the section as set out in AB 25 requires that the testator's intent to omit the child be shown from the will. This makes Section 6571(a) consistent with California law and the UPC provisions on pretermitted children and an omitted spouse.

Recapture of Gifts of Quasi-Community Property

Section 102 of AB 25 continues the provision of existing Section 201.8 of the Probate Code that permits the surviving spouse to recapture gifts of quasi-community property made by the deceased spouse if the deceased spouse had a substantial quantum of ownership or control of the property at death. State Bar representatives and our consultant, Professor Gail Bird, have asked what "substantial quantum of ownership or control" means. Previously the staff's view has been that this language was satisfactory, and that its meaning should be addressed by the courts on a case by case basis. However, if the Commission is not satisfied with this view, Section 102 could be revised to make it more detailed and specific, drawing from the augmented estate provisions of the Uniform Probate Code (UPC § 2-202) and from Idaho's quasi-community property statute (Idaho Code § 15-2-202). Such a revision is set out in Exhibit 2 attached to this Memorandum.

This possible revision of Section 102 of AB 25 (set out in Exhibit 2) presents three policy questions:

(1) Should we have a more detailed and specific statement (as in Exhibit 2) of the kinds of retained interests by the decedent that may result in recapture to replace the "substantial quantum of ownership or control" test of existing law?

(2) Should life insurance, accident insurance, annuities, and pension benefits be expressly excluded from recapture as the staff draft of a new subdivision (b) of Section 102 (Exhibit 2) does? The UPC excludes such benefits, but Professor Bruch argued in her study that such benefits should be subject to recapture.

(3) Should the surviving spouse be precluded from recapture only when his or her consent or joinder is in writing? Written consent is required by the UPC augmented estate provisions (UPC § 2-202) and by the California community property provisions (Civil Code §§ 5125, 5127). Idaho, on the other hand, precludes recapture of quasi-community property if the surviving spouse has consented to the transfer, whether or not the consent was in writing. See Idaho Code § 15-2-202.

Notice of Will

AB 25 contains new provisions for voluntary filing with the Secretary of State of a notice of the existence and location of the testator's will (Sections 6360-6366). It has recently come to the staff's attention that a private organization--Will Find, Incorporated--is gearing up to provide a similar service. A copy of a solicitation letter from Will Find, Incorporated, is attached as Exhibit 3, and a later, more detailed letter from Will Find is attached as Exhibit 4.

The staff has discussed the proposed legislation with Robert Rosenstein, President of Will Find, and sent Mr. Rosenstein a copy of the bill. Mr. Rosenstein indicated that some \$60,000 has been invested in getting ready to provide this service. He expressed concern that the proposed legislation could put him out of business. The staff invited Mr. Rosenstein to submit written comments and attend a Commission meeting if he so desires.

Surviving Spouse's Waiver of Rights

AB 25 contains new provisions governing waiver by a surviving spouse of rights arising at the death of the other spouse. See Sections 140-147 of AB 25. The staff proposes to add language to Section 147 to

make clear that these provisions set forth the exclusive rules for waiver of rights at death. The proposed language is set out in Exhibit 5.

There are provisions in the Family Law Act which apply to "marriage settlements" (held to be limited to prenuptial agreements made in contemplation of marriage--Marvin v. Marvin, 18 Cal.3d 660, 673-74, 557 P.2d 106, 134 Cal. Rptr. 815 (1976)) and require notarization and recording. See Civil Code §§ 5133-5137, attached to this Memorandum as Exhibit 6. The staff thinks we need a conforming revision to make clear that the new Probate Code provisions (which do not require notarization or recording) prevail over the Family Law Act provisions to the extent rights at death are concerned. The staff has drafted a new section to go in the Family Law Act to accomplish this. The proposed new section is attached as Exhibit 7.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

EXHIBIT 1

§ 6110. Execution of witnessed will

6110. (a) Except as provided in this part, a will shall be in writing and satisfy the requirements of this section.

(b) The will shall be signed either (1) by the testator or (2) in the testator's name by some other person in the testator's presence and by the testator's direction.

(c) The will shall be witnessed by one of the following methods:

(1) Be signed by at least two persons who (i) being present at the same time, witnessed either the signing of the will or the testator's acknowledgment of the signature or of the will and (ii) understand that the instrument they sign is the testator's will.

(2) Be acknowledged before a notary public at any place within this state.

Comment. Section 6110 supersedes former Section 50. Section 6110 relaxes the formalities required under former Section 50 by eliminating the requirements (1) that the testator's signature be "at the end" of the will, (2) that the testator "declare" to the witnesses that the instrument is his or her will, (3) that the witnesses' signatures be "at the end" of the will, (4) that the testator "request" the witnesses to sign the will, and (5) that the witnesses sign the will in the testator's presence. Section 6110 continues the requirements of former Section 50 that (1) the will be in writing, (2) that the will be signed by the testator or by someone else who signs the testator's name in the testator's presence and by the testator's direction, (3) that the will be signed or the testator acknowledge the signature in the presence of two witnesses who are present at the same time, and (4) that the witnesses sign the will.

Paragraph (1) of subdivision (c) requires that the signing or acknowledgment take place in the presence of the witnesses, present at the same time, but does not require that the witnesses sign in the presence of each other. This is consistent with prior law. See, e.g., *In re Estate of Armstrong*, 8 Cal.2d 204, 209-10, 64 P.2d 1093 (1937).

The requirement of subdivision (c) (1) (ii) that the witness understand that the instrument being witnessed is a will replaces the former requirement that the testator "declare" to the witnesses that the instrument is his or her will. The new requirement codifies California decisional law which did not apply the former declaration requirement literally and held the requirement satisfied if it is apparent from the testator's conduct and the surrounding circumstances that the instrument is a will. See 7 B. Witkin, *Summary of California Law Wills and Probate* § 118, at 5633-34 (8th ed. 1974). The witness may obtain the necessary understanding by any means. For example, the witness may know that the instrument is a will by examining the

instrument itself or from the circumstances surrounding the execution of the will. Nothing in Section 6110 requires that the testator disclose the contents of the will.

Paragraph (2) of subdivision (c), which permits the testator to use a single witness when that witness is a notary public, is new. See generally Civil Code § 1189 (form of notary's certificate of acknowledgment); Gov't Code §§ 8200-8230 (provisions governing notaries public). Under paragraph (2), the acknowledgment must be made before a notary, and not before one of the various other officers referred to in Civil Code Section 1181 (judge, district attorney, etc.).

The introductory clause of Section 6110 recognizes that the validity of the execution of a will may be determined pursuant to some other provision of this part. See Sections 6111 (holographic will), 6221 (California statutory will), 6381-6385 (international will).

EXHIBIT 2§ 102. Recapture by surviving spouse of certain quasi-community property

102. (a) The decedent's surviving spouse may require the transferee of property in which the surviving spouse had an expectancy under Section 101 at the time of the transfer to restore to the decedent's estate one-half of the property if the transferee retains the property or, if not, one-half of its proceeds or, if none, one-half of its value at the time of transfer, if all of the following requirements are satisfied:

(1) The decedent died domiciled in this state.

(2) The decedent made a transfer of the property to a person other than the surviving spouse without receiving in exchange a consideration of substantial value and without the written consent or joinder of the surviving spouse.

(3) ~~The decedent had a substantial quantum of ownership or control of the property at death,~~ transfer is any of the following types:

(i) A transfer under which the decedent retained at the time of death the possession or enjoyment of, or right to income from, the property.

(ii) A transfer to the extent that the decedent retained at the time of death a power, either alone or in conjunction with any other person, to revoke or to consume, invade, or dispose of the principal for the decedent's own benefit.

(iii) A transfer whereby property is held at the time of the decedent's death by the decedent and another with right of survivorship.

(b) Nothing in this section requires a transferee to restore to the decedent's estate any life insurance, accident insurance, joint annuity, or pension payable to a person other than the surviving spouse.

~~(b)~~ (c) All property restored to the decedent's estate under this section belongs to the surviving spouse pursuant to Section 101 as though the transfer had not been made.

Comment. Subdivisions (a) and (b) of Section 102 supersede the first sentence of former Section 201.8. Subdivision (c) continues the substance of the last sentence of former Section 201.8. The second sentence of former Section 201.8 which required the surviving spouse to elect to take under or against the decedent's will is not continued. Under the law as revised, the rule for quasi-community property is the

same as for community property: The surviving spouse is not forced to an election unless the decedent's will expressly so provides or unless such a requirement should be implied to avoid thwarting the testator's apparent intent. See 7 B. Witkin, Summary of California Law Wills and Probate §§ 21-22, at 5542-44 (8th ed. 1974).

Section 102 provides that a transfer may be set aside only if the decedent made it without receiving in exchange a consideration of "substantial" value. Where the consideration is not substantial and the transfer is set aside, no provision is made for return of the insubstantial consideration given by the transferee when property is restored to the decedent's estate because only one-half of the property transferred is required to be restored. It is not expected that a transfer will be set aside under the statute if the transferee gave a consideration equal to one-half or more of the value of the property received. Thus, in cases in which the transfer is set aside the one-half which the transferee keeps will be at least equal in value to any consideration given.

The provision of Section 102 that only one-half of the property transferred is to be restored is applied when the decedent dies intestate as well as when the decedent dies testate. This is because the decedent has manifested an intention to deprive the surviving spouse of the property. The intent of the intestate decedent should be given effect to the extent he or she could have accomplished the same result by will.

Paragraph (3) of subdivision (a) of Section 102 replaces the provision of former Section 201.8 that required as a condition of recapture that the decedent had a "substantial quantum of ownership or control of the property at death." Paragraph (3) is drawn from a portion of Uniform Probate Code Section 2-202 and Idaho Code Section 15-2-202. Paragraph (3) is intended to provide a clearer standard for determining the kinds of retained interests by the decedent that will result in the application of the recapture provisions of this section.

Subdivision (b) is new and is drawn from a portion of Uniform Probate Code Section 2-202.

Section 102 provides that all of the property restored to the estate belongs to the surviving spouse pursuant to Section 101. Such property is, in effect, the one-half which the surviving spouse could have claimed against the decedent's will. The one-half which the transferee is permitted to retain is, in effect, the one-half which the decedent could have given to the transferee by will. The surviving spouse is entitled to all of the first half.

Section 102 provides that the property shall be restored to the decedent's estate rather than that the surviving spouse may recover it directly from the transferee. This is to make the property available to creditors of the decedent to the extent that it would have been available to them if no inter vivos transfer had been made.

Section 102 is limited in application to transfers made at a time when the surviving spouse has an expectancy under Section 101--i.e., at a time when the transferor is domiciled in California. This is to avoid the application of the statute to transfers made before the transferor moved here, when the transferor could not reasonably have anticipated that the transfer would later be subjected to California law.

EXHIBIT 3

WILL FIND, INCORPORATED

NATIONAL REGISTRY OF WILLS

5757 W. CENTURY BLVD., SUITE 800

LOS ANGELES, CALIFORNIA 90045

(213) 410-1197

November 16, 1982

Dear Colleague:

WOULD YOU LIKE TO INCREASE YOUR INCOME AND PROVIDE BETTER SERVICE TO YOUR CLIENTS? If so, we at Will Find have a service for you.

Being an attorney, I am aware that there is a loss of potential income daily because a client dies and the survivors do not know that the deceased had a special relationship with a specific attorney. If they had only known this fact, that attorney would more than likely have handled the decedents estate. In addition, many estates go by intestate succession because the survivors cannot locate the decedents Will which is usually in the possession of an attorney.

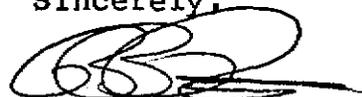
All these problems can now be avoided. Will Find, Incorporated is an organization whose primary purpose is to register the fact that a Will has been prepared by a specific attorney for their client. Thus, upon the death of a client, the survivors, by checking with Will Find will be able to locate the attorney who prepared the Will and then make contact with that attorney, if the Will has been registered.

In order to provide the greatest coverage of our system, the public will be informed of Will Find's service through continuous public advertising. You, as an attorney therefore, will be protecting your client base and also providing additional protection for your clients.

After a minimal enrollment fee, the costs of recording a Will is as low as \$5.00 per Will. These expenses can easily be transferred to a client.

If you would please fill out the enclosed card (postage paid), we will send you more information and have someone contact you about our program.

Sincerely,



Robert B. Rosenstein
President

EXHIBIT 4

WILL FIND, INCORPORATED

NATIONAL REGISTRY OF WILLS

5757 W. CENTURY BLVD., SUITE 800

LOS ANGELES, CALIFORNIA 90045

(213) 410-1197

December 20, 1982

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306
Atten: Bob Murphy

Dear Colleague:

Thank you for your interest in Will Find, Incorporated, the newest concept in the Legal Profession. I hope this letter will clarify our goals and the services which we can provide to you. Please take a moment to review the outstanding benefits of the Will Find system.

A void exists in our legal field in the tracing and locating of a decedent's will in the event of death. The primary purpose of Will Find is to fill this void by providing a needed registry for some very basic facts: that a particular person has written a Will, the date the Will was written, and the identity of the attorney who prepared it.

Now, in the event of death, survivors will be able to contact us and find out who you are and get in touch with you. As we all realize, if you are contacted by a client's survivors there is a great probability that you will be selected to be the attorney for the estate.

Will Find, Incorporated, by registering the facts stated above, will be able to help prevent your client's estate from being probated by Intestate Succession, will assure that your client's latest Will is probated and that his or her true wishes are fulfilled.

The cost of enrollment with Will Find is only \$300.00 (three hundred dollars) per attorney (firm), and during our introductory phase, we are waiving the normal \$5.00 (five dollar) registration fee for each existing Will. For all future Wills placed on the system, there will be a charge of only \$10.00 (ten dollars) each, which can be passed on to your clients.

The public will be informed of our service and will be able to make inquiries. The fee for anyone retrieving information from the system is \$10.00 (ten dollars). However, as a member of Will Find, you will be given a 50% discount in the event you need to retrieve information from the system.

We are all aware that a client's Will should be reviewed every three to five years and updated to reflect any changes in the law or in family situations. As part of our ongoing service, we will provide you with a list of all Wills you have registered on the system and the date that you prepared each Will. In this way you will be able to keep in touch with your clients' needs and prepare updated Wills when necessary.

If you would like to set up an appointment for one of our representatives to discuss your enrollment, or if you have any further questions, please feel free to call our offices. If we are out of your area, please call collect.

Sincerely,

A handwritten signature in black ink, appearing to be 'RBR', written over the word 'Sincerely,'.

Robert B. Rosenstein
President

RBR/mg

EXHIBIT 5

§ 147. Exclusive application of article after operative date; validity of waivers and agreements under prior law not affected

147. (a) A waiver, agreement, or property settlement made after December 31, 1984, is invalid insofar as it affects the rights listed in subdivision (a) of Section 141 unless it satisfies the requirements of this chapter.

(b) Nothing in this chapter affects the validity or effect of any waiver, agreement, or property settlement made prior to January 1, 1985, and the validity and effect of such waiver, agreement, or property settlement shall continue to be determined by the law applicable to the waiver, agreement, or settlement prior to January 1, 1985.

Comment. Subdivision (a) of Section 147 makes clear that, after the operative date, a waiver of the rights listed in Section 141 is governed exclusively by this chapter. Subdivision (b) makes clear that the provisions of this chapter have no effect on waivers, agreements, or property settlements made prior to the operative date of this chapter. See also Section 141(b) (nothing in chapter affects or limits the waiver of manner of waiver of rights other than those referred to in subdivision (a) of Section 141).

EXHIBIT 6

Civil Code §§ 5133-5137

§ 5133. Marriage settlements; effect on applicability of title

The property rights of husband and wife are governed by this title, unless there is a marriage settlement containing stipulations contrary thereto. (Added by Stats.1969, c. 1608, § 8.)

§ 5134. Marriage settlements; formalities

All contracts for marriage settlements must be in writing, and executed and acknowledged or proved in like manner as a grant of land is required to be executed and acknowledged or proved. (Added by Stats.1969, c. 1608, § 8.)

§ 5135. Marriage settlements; recording

When such contract is acknowledged or proved, it must be recorded in the office of the recorder of every county in which any real estate may be situated which is granted or affected by such contract. (Added by Stats.1969, c. 1608, § 8.)

§ 5136. Marriage settlements; effect of recording or nonrecording

The recording or nonrecording of such contract has a like effect as the recording or nonrecording of a grant of real property. (Added by Stats.1969, c. 1608, § 8.)

§ 5137. Marriage settlements; minors

A minor capable of contracting marriage may make a valid marriage settlement. (Added by Stats.1969, c. 1608, § 8.)

EXHIBIT 7

§ 5135.5 (added). Marriage settlements governed by Probate Code

5135.5. A marriage settlement which affects rights described in Section 141 of the Probate Code is to that extent governed by Chapter 1 (commencing with Section 140) of Part 3 of Division 2 of the Probate Code, and not by Section 5134 or 5135 of this code.

Comment. Section 5135.5 makes clear that a marriage settlement which affects the rights of a surviving spouse arising at the death of the other spouse is to that extent governed by Sections 140-147 of the Probate Code instead of Civil Code Section 5134 or 5135.