#L-625 3/8/83

Second Supplement to Memorandum 83-22

Subject: Study L-625 - Probate Law (Assembly Bill No. 25)

We have obtained copies of two letters to the Assembly Judiciary Committee containing comments on Assembly Bill No. 25. One letter (attached as Exhibit 1) is from three officers of the Probate and Trust Law Section of the Los Angeles County Bar Association: Keith A. Pursel, Leslie D. Rasmussen, and Robert D. Bannon. In this memorandum, the writers of this letter are referred to as the "officers." The other letter (attached as Exhibit 2) is from Valerie J. Merritt. In this supplement, the staff outlines each comment made by the writers of these letters and gives the staff's reaction. The Commission should plan to consider this supplement point by point at the meeting.

We have not received any communication from the Estate Planning, Trust and Probate Law Section of the State Bar which gives the views of the Section or even the Executive Committee of the Section. We have, of course, had the benefit of the regular attendance of representatives of the Section at our meetings and there has been a good interchange of views. However, it would be of great value if we could obtain a statement from the Section as to whether there are any changes the Section would like to have made in the bill. The Section has indicated support for only one of the seven bills that have been introduced at the current session as a part of our Probate Code package, that bill being the one relating to limited conservatorship. However, the Section has at a previous session supported our bill on nonprobate transfers, and we assume that this support applies to the bill on that subject introduced at the current session.

Attached to this supplement is the latest version of Assembly Bill No. 25 as amended in the Assembly on February 1, 1983.

The following is an analysis of each comment made in the attached letters.

Definitions

Valerie J. Merritt (Exhibit 2) is concerned that the definitions do not specifically require notice to the beneficiaries of a testamentary trust:

> The definition of "devisees" (§34) omits beneficiaries of testamentary trusts. They are not necessarily included under the

definition of "beneficiary" (§24) during the period of estate administration because there is not yet a trust in existence. I assume they are "interested persons" under §48(a)(1) as an "any other person". This may have adverse effects regarding notice, although this bill doesn't really affect many of the administrative proceedings. But note that §233(b) requires notice to heirs and devisees and would not require notice to the beneficiaries of a testamentary trust. That is also true in §6541(c).

Section 34 provides that the trustee, rather than the beneficiaries, is considered a devisee. Accordingly, the trustee of a trust described by will will receive the same notice as any other devisee. A beneficiary of a trust can request special notice and will then receive notice and is included among the persons who are considered an "interested person" under Section 48. The provisions in the bill are taken from the Uniform Probate Code definitions. The staff believes that the provisions are adequate.

§§ 140-147. Enforceability of premarital agreements

Sections 140-147 prescribe rules for premarital agreements to waive rights upon the death of one of the spouses. Section 143 provides that, for an agreement to be enforceable as a matter of right, each spouse must have independent legal counsel and in addition:

> (a) A full and complete disclosure of the property of the decedent was . . . provided to the surviving spouse prior to the execution of the waiver.

Section 146 imposes the same requirements in order to have an amendment or revocation of the premarital agreement.

Valerie J. Merritt (Exhibit 2) believes that the standard provided is too strict and that a spouse should be able to waive full disclosure after advice by independent legal counsel:

> I have serious reservations about §143 and §146(b), regarding the enforceability of premarital agreements. We have many clients who enter premarital agreements without a full and complete disclosure of property. Often, if both individuals are wealthy, even if their wealth is disparate, they have no interest in knowing the details of each other's affairs. I would add to §143(a) and the corresponding language in §146(b), "unless the surviving spouse waived such a full and complete disclosure after advice by independent legal counsel".

The staff strongly recommends that this change be made. The Commission should recognize that after marriage the husband and wife can transmute community property to separate property by an oral agreement

and there need be no independent counsel or awareness of the effect the change in the nature of the property will have on rights when one spouse dies. The Commission-recommended provision for premarital agreements is far too strict and the recommended change is a desirable one that will make the recommended provisions workable and flexible enough to meet the needs of parties who wish to make a premarital agreement. If this suggestion is adopted, Section 143 should be amended to read:

> 143. A waiver that complies with Section 142 is enforceable unless the court determines either of the following:
> (a) A full and complete disclosure of the property of the decedent was not provided to the surviving spouse prior to the execution of the waiver unless the surviving spouse waived such a full and complete disclosure after advice by independent legal counsel.
> (b) The surviving spouse was not represented by independent legal counsel at the time of execution of the waiver.

Section 146 (relating to an agreement altering, amending, or revoking a waiver) should be amended to conform. Subdivision (c) of that section should be amended to read:

> (c) An agreement is enforceable against a party to the agreement unless the court determines either of the following:
> (1) A full and complete disclosure of the property of the other spouse was not provided to the spouse against whom enforcement is sought prior to the execution of the agreement unless the spouse against whom enforcement is sought waived such a full and complete disclosure after advice by independent legal counsel.
> (2) The spouse against whom enforcement is sought was not represented by independent legal counsel at the time of execution of the agreement.

§ 160. Payable-on-death provisions in written instruments

Section 160 provides that certain payable-on-death provisions in written instruments are not invalid because the instrument was not executed in compliance with the requirements for execution of a will. This section is Section 6-201 of the Uniform Probate Code.

The officers (Exhibit 1) state:

> The expansion of the permitted payable on death provisions in Section 160 would permit beneficiaries designated informally and without advice to prevail over other beneficiaries of Wills that were carefully considered. Many testator's estate plans have been frustrated in the past because of beneficiary designations and forms of title that were created by persons who did not understand the ramifications of what they were doing. Section 160 would expand the chances of such errors. Section 160 also permits conniving and fraudulent persons to obtain informal designations as

beneficiaries since the protection now afforded by the technical requirements of Wills would be lacking.

Section 160 permits, for example, the following:

(1) An employee in an employment contract can designate the person to receive any earnings due to the employee upon the employee's death, without the need for probate.

(2) The employee can designate who is to receive benefits under a pension or profit-sharing plan in event of the employee's death.

(3) The depositor can designate a person to receive the funds on deposit upon the depositor's death.

(4) The owner of an insurance policy can designate the beneficiary who receive the insurance proceeds when the owner dies.

(5) The person who sells property and takes back a note can include in the note a provision that either forgives the payment of the note upon the seller's death or provides that upon the seller's death the remaining amount payable on the note is to be paid to another.

These are the kinds of provisions that are validated by Section 160. Considering the fact that a trust agreement can include probate-avoiding provisions and that insurance policies, deposit agreements, and the like can avoid probate, the staff is not persuaded that the dangers that the officers see in Section 160 are significant as compared to the benefits. Nothing in the section validates a contract or instrument that is not otherwise valid. The validity of the contract or instrument is essential to give the probate-avoiding provision effect; the only effect of Section 160 is to avoid a technical objection that the contract or instrument does not comply with the requirements for a will.

§§ 200-206. Effect of homicide

Under existing California law, a conviction or acquittal of a charge of murder or voluntary manslaughter is a conclusive determination of the unlawfulness or lawfulness of a causing of death for the purposes of Probate Code Section 258 (providing that a person who has unlawfully and intentionally caused the death of the decedent shall not inherit from the decedent). If there has been neither a conviction nor an acquittal of murder or voluntary manslaughter, the probate court must independently determine whether the person's conduct falls within Probate Code Section 258 as being unlawful and intentional. Estate of Kramme, 20 C.3d 567, 143 Cal. Rptr. 542, 573 P.2d 1369 (1978). See also In re McGowan's Estate, 35 C.A.2d 611, 111 Cal. Rptr. 39 (1973) (where wife

killed husband and was charged with murder but entered negotiated plea of nolo contenders to involuntary manslaughter, this was not an acquittal for purposes of Probate Code Section 258 and probate court properly determined that killer did not inherit).

The officers (Exhibit 1) object to the provisions of AB 25 that relate to the effect of homicide but the objection is based on a lack of understanding of the existing law as outlined above:

> Perhaps one of the greatest practical problems of AB 25 is its provisions regarding homicide. Section 204 present the possibility of murder trials in the probate courts with different standards of proof than in the criminal courts. A person acquitted or a person who was not prosecuted criminally because of the prosecutor's belief that a guilty verdict was not probable could be tried for murder in the probate court. The courts do not want this type of case. The public and the popular press will not understand how a person barred from inheritance by the probate court escaped criminal conviction or prosecution. We believe the forfeitures provided in Section 200, et seq., should be conditioned upon a final judgment of conviction in the criminal courts.

The staff doubts that the public will be able to understand the existing rule that permits a probate court to disinherit a killer who the district attorney declined to prosecute but not to disinherit a killer who was charged with murder but was not convicted because a key item of evidence was excluded under the exclusionary rule. The staff believes that the Commission recommended provisions make sense out of the existing provisions and that the objection of the officers is based on a lack of understanding of the existing law.

Valerie J. Merritt (Exhibit 2) understands how the existing statutory provisions work. She generally approves the new statutory scheme but would add a provision creating a presumption that the killing is not felonious and intentional if there is a judgment of acquittal in the criminal case:

> "Feloniously and intentionally," is not defined in § 204 or the related sections. Because of the high "beyond a reasonable doubt" standard, the conclusive presumption of § 204 is sound. I would add that a judgment of acquittal creates a presumption that the killing was not felonious and intentional. I would not make this presumption conclusive (because of the differing standards of proof), but I believe it would discourage litigation somewhat. The current Probate § 258 makes an acquittal conclusive. The courts would still be involved in trying criminal cases if there were a hung jury, failure to prosecute or murder-suicide. But they do it now.

The second sentence of proposed Section 204 provides that the court determines whether the killing was felonious and intentional "by a preponderance of evidence." The Commission may want to add a provision to Section 204 reading:

> The burden of proof is on the party seeking to establish that the killing was felonious and intentional for the purposes of this part.

This provision merely states the obvious, but it might discourage litigation.

§ 224. Simultaneous deaths; insurance

Section 224 provides that if the insured and beneficiary under a policy of life or accident insurance have died and it cannot be established by clear and convincing evidence that the beneficiary survived the insured, the proceeds of the policy go as if the insured had survived the beneficiary. This section changes existing law by requiring proof by clear and convincing evidence rather than the existing rule which applies where there is no sufficient evidence that the insured and beneficiary died other than simultaneously.

Subdivision (c) of Section 224 provides:

> (c) This section does not apply to an insurance policy issued prior to January 1, 1985, and any such insurance policy continues to be governed by the law applicable to the policy prior to January 1, 1985.

Valerie J. Merritt (Exhibit 2) comments:

> I suggest changing §224(c) to insurance policy beneficiary designations prior to 1/1/85, rather than policies issued prior to that date. Alternatively, I'd omit the subsection altogether as I'm not sure what policy it promotes.

The staff suggests that subdivision (c) be deleted.

§§ 6110-6123. Execution and revocation of wills

The officers (Exhibit 1) object to all of the following changes proposed by the Commission:

(1) The permitted substitution of a notarial acknowledgment for two witnesses.

(2) The permission for an interested witness to take under a will.

(3) The elimination of the requirement of two witnesses to prove revocation by act of someone other than the testator.

The objection is stated as follows:

> 2. Witness provisions. The permitted substitution of a notarial acknowledgment for the traditional witnesses (Section 6110(c)(2), the permission for an interested person to take under a Will witnessed by him or her (Section 6112(b) and the elimination of a requirement of witnesses to a revocation by destruction by someone other than the testator (Sections 6120 and 6121) we believe will create more problems than they solve. The requirement of two disinterested witnesses for such important acts as execution of Wills and their revocation is not just a lawyer's attempt at making it difficult to carry out the intent of the testator. The rules are designed to and do avoid fraud and undue influence. If these sections are enacted, we will see more deathbed "Wills" favoring the nurse, companion and others placed in a position of control over the minds and bodies of the mentally and physically weak. These situations where fraud and undue influence are possible are not isolated incidents. With a growing aged population, separated from close family by distance, the opportunity for abuse and fraud will increase. It is in the public interest to encourage the solemnity of the occasions when a person provides for disposition of property to take effect at death, rather than to minimize the precautions which guard against abuses.
>
> We believe erosion of the disinterested witness rules will overburden the courts of California with prolonged trials of contests of Wills or their revocation that now would not survive cursory examination by the courts. Perhaps of greater importance, undue influence over the minds of the weak will be encouraged by the conniving person in circumstances where today it would not be attempted because it would be known to be fruitless.

Valerie J. Merritt (Exhibit 2) also questions the decision to permit gifts to interested witnesses:

> While I understand the problem posed of thwarting a testator's intent when invalidating gifts to an interested witness, I firmly believe there should be at least one disinterested witness. I would alter §6112(b) to more closely parallel current §51, but with the gift valid if there is one disinterested witness, but void if none.

With respect to the two-disinterested witnesses requirement, the Commission's recommendation states:

> **Interested Witness**
>
> Under existing law, a witness is disqualified from taking under the will unless there are two other disinterested witnesses.[18] The intent of this rule is to prevent fraud or

[18] 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).

undue influence. However, in most cases of fraud or undue influence the malefactor is careful not to sign as a witness.[19] The disqualification 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 witness is not automatically disqualified from taking under the will.[20] Instead, the person who challenges the gift to the interested witness can bring all the salient facts to the court's attention, and the court can draw an inference of undue influence if justified from those facts.[21] In addition, the proposed law permits a person to challenge the gift without the risk of losing benefits under the will: The proposed law makes a no-contest clause in the will ineffective to disinherit the person who challenges a gift to an interested witness.

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).

[19] Comment to Uniform Probate Code § 2-505.

[20] This provision is taken from Section 2-505 of the Uniform Probate Code.

[21] See Comment to Uniform Probate Code § 2-505.

With respect to the use of a notary public as an alternative to the two-witness requirement, the Commission's recommendation states:

As an alternative to the two-witness requirement, the proposed law permits the testator to acknowledge the will before a notary public in California. This alternative is new to California law. It provides a simple and reliable method to prove that the person who signed the will was the testator and to prove the date the will was acknowledged.[17]

[17] The notary's certificate of acknowledgment indicates the date of the acknowledgment. See, *e.g.*, Civil Code § 1189. A will executed in the traditional manner need not be dated. McCarroll & Smith, *Formal and Technical Aspects of Wills*, in California Will Drafting § 4.16, at 132 (Cal. Cont. Ed. Bar 1965).

With respect to the elimination of the requirement of two witnesses to prove revocation by act of someone other than the testator, the Commission's recommendation states:

## 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.[25] 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.[26]

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 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.[27]

[25] Prob. Code § 74.

[26] 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).

[27] 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.

Valerie J. Merritt (Exhibit 2) also indicates serious concern with the provision that permits the testator to acknowledge the signature or the will after the testator has signed the will:

> I believe there are serious problems to allowing witnesses to sign a will after the testator. They may be unable to testify as to the testator's capacity at the time of his signing if they sign days, weeks or months later. I would alter §6110(c)(1)(i) by deleting "either... or the testator's acknowledgement of the signature or of the will". If we are to keep subsection (2), I would alter it to read, "(2) Be subscribed and sworn before a notary public of this state". This would mean the notary public would be present at the time the testator signed.

Existing law permits the testator to sign the will and then later acknowledge the will in the presence of the witnesses. Section 50 of the Probate Code provides in part:

> (2) The subscription must be made, or the testator must acknowledge it to have been made by him or by his authority, in the presence of both of the attesting witnesses, present at the same time.
>
> (3) The testator, at the time of subscribing or acknowledging the instrument, must declare to the attesting witnesses that it is his will.

The changes made in existing law by Section 6110 of AB 25 is that the acknowledgment need not be in the presence of both witnesses present at the same time. The testator can acknowledge the will to one witness who signs as a witness and then later to another witness who signs as a witness. The Commission adopted this rule after considerable discussion and consideration of a persuasive statement in support of the rule adopted prepared by Professor Dukeminier.

§ 6113. Choice of law as to validity of execution of will

Valerie J. Merritt (Exhibit 2) comments:

> I would alter §6113(c) to delete "has a place of abode or is a national" as I believe it is overly broad as it reads currently. This still comports with the purpose described in (7) on page 3 of the bill.

There is some merit to this comment. However, the section is the same in substance as Section 2-506 of the Uniform Probate Code. On balance, the staff would retain the section without change.

Valerie J. Merritt (Exhibit 2) comments:

> I don't believe the provisions regarding interpretation of wills (§§6160-6162) say enough. I believe we should keep the language of current Section 101 saying the testator's intent is paramount. I'm also concerned that §6160 only talks about total intestacy. I believe the law is now and should be a preference to avoid any intestacy, whether total or partial. Finally, while it is arguable that the omitted Probate §§105, 141, 142 and 143 are unnecessary, I believe they do provide useful guidance and should be re-enacted.

She suggests we keep the language of Section 101 saying that the testator's intent is paramount. Section 101 is superseded by Sections 6140 and 6141 which read:

> 6140. The intention of a testator as expressed in his or her will controls the legal effect of the dispositions in the will.
> 6141. The rules of construction in this chapter apply unless a contrary intention is indicated by the will.

These sections are the same in substance of Section 2-603 of the Uniform Probate Code.

Section 101 of the California Probate Code provides:

> 101. Several testamentary instruments executed by the same testator are to be taken and construed together as one instrument. A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible.

Merritt is concerned that we have lost something in the last two sentences of Section 101. The staff is concerned that Sections 6140 and 6141 include language that can be construed to require that the testator's intent be expressed in the will (excluding evidence apart from the will). We will prepare a separate memorandum on this problem.

Merritt is also concerned that Section 6160 only talks about total intestacy. The phrase "total intestacy" is taken from existing Section 102, but the suggestion to delete "total" appears to be a good one. We recommend that the phrase "an intestacy" be substituted for "a total intestacy" in two places in Section 6160.

Merritt suggests that four existing sections should be retained. One of these is Probate Section 105, which provides:

> 105. When there is an imperfect description, or no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the

will or from extrinsic evidence, excluding the oral declarations of the testator as to his intentions; and when an uncertainty arises upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, excluding such oral declarations.

The reason why this section was not continued is stated in the Commission's Comment to the repealed section:

> Comment. Former Section 105 is not continued. The section purported to codify the much-criticized distinction between patent and latent ambiguities in a will. See Comment, Extrinsic Evidence and the Construction of Wills, 50 Calif. L. Rev. 283, 285 (1962). Also, although the section purported to exclude oral declarations of the testator, the courts have created exceptions to that rule. See, e.g., In re Estate of Dominici, 151 Cal. 181, 185-86, 90 P. 448 (1907) (attorney's testimony of testator's oral instructions held admissible).

Merritt also suggests retaining existing Sections 141, 142, and 143, relating to conditions precedent and subsequent. You will recall that our consultants demonstrated that these provisions were inadequate, incorrect, and not a modern statement of the law. It was concluded that the subject matter of the sections should be left to case law development.

As to the general matter of rules on interpretation of wills, you will also recall that the Commission has a consultant (Professor Edward C. Halbach, Jr.) who is preparing a study for the March meeting.

§§ 6300-6303. Uniform Testamentary Additions to Trusts Act

Section 6300 provides in substance that a will may make a disposition to a trustee of a trust established or to be established by the testator or by the testator and some other person or by some other person. A revocation or termination of the trust before the death of the testator causes the devise to lapse.

Valerie J. Merritt (Exhibit 2) makes the following suggestion:

> While it's unusual to tamper with Uniform Acts, I'd like to suggest the law would be improved by a new Section 6304 to read as follows:
>
> > 6304. Notwithstanding Section 6300 above, if the Court finds that the lapse of a gift to a trust due to its revocation or termination was contrary to the intent of the testator, the Court may order distribution of the estate as if the terms of said trust at the time of execution of the Will were incorporated by reference in the Will.

The will can, of course, include some provision dealing with the situation where the trust is revoked or terminated before the death of the testator. In the absence of such a provision should the devise lapse (as provided in Section 6300) or should a provision like suggested Section 6304 apply? The staff would be inclined not to change the Uniform Act but we do not feel strongly about this matter.

§§ 6401-6402. Intestate succession

The officers (Exhibit 1) comment:

> 1. Generally. Intestate succession rules should be designed to carry out the probable intentions of most people. The provisions of proposed Section 6401(c)(1) and 6401(c)(2) may be more accurate reflections of the probable intentions of the public than existing law. The rest of the major proposed changes in intestate succession we believe clearly do not carry out such intentions. We do not believe that the average person would equate more remote relatives with the closest relative, yet Section 6402(d) does just that. The proposal would divide an estate into one part for the maternal grandparents or their issue and one part for the paternal grandparents or their issue regardless of the nearness of the degree of relationship on one side or the other. We believe the present law is more in keeping with probable intent as it favors the closest relative. As an example, we think that a maternal aunt should be favored over, and not have to share with, paternal first cousins three times removed. In any event, there appears to us to be no great need for a change in this area. The proposed change also would increase the problems of identifying and locating heirs by increasing the chances that the heirs will be remote.

The officers approve Section 6401 which gives the surviving spouse all of the intestate estate unless the decedent has issue of a different marriage. However, the officers object to Section 6402(d) which divides the estate between maternal and paternal kin where there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents. Valerie J. Merritt (Exhibit 2) makes the same point: "Second, I don't belive that there is any reason to differentiate between maternal and paternal kin." The staff believes that the point made is a good one. We are primarily impressed by the fact that the change made by AB 25 will increase the problems of identifying and locating heirs by increasing the change that the heirs will be remote. Accordingly, we recommend that the following be substituted for subdivision (d) of Section 6402:

> (d) If there is no surviving issue, parent or issue of parent, to the grandparent or grandparents equally.

(e) If there is no surviving issue, parent or issue of parent, or grandparent, to the issue of any of the grandparents, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation.

Valerie J. Merritt (Exhibit 2) would add a new subsection after subdivision (d) of existing Section 6402 to include issue of great-grandparents. "My children know some of their second cousins; I know some of mine. I don't believe that this degree of relationship is so far removed as to create 'laughing heirs'." Assuming for the moment that it would be desirable to expand the list of persons who can inherit, the staff questions whether the issue of great-grandparents should be given a preference over children of a predeceased spouse of the decedent. It is far more likely that the decedent will have known children of a predeceased spouse of the decedent than issue of great-grandparents. Accordingly, if we were to add the issue of great-grandparents, we would add it following children of a predeceased spouse of the decedent. This leaves the policy question whether the list of those who may inherit should be expanded to include issue of great-grandparents. The officers (Exhibit 1) also object to the cutting off of the right to inherit at issue of grandparents:

3. Escheat. The Bill's provisions for escheat are the least responsive to the public's probable intent. We venture to guess that only a very small percent of the public would prefer to have their property pass to the State of California in preference to a great aunt or uncle, a second cousin, or other more remote relatives. We believe proposed Section 6404 and Part 4 will be viewed by the public as an attempt by the State to confiscate.

What are the considerations relevant to deciding whether to expand the list of those who may inherit? First, the decedent can always make a will disposing of the property he or she has to whomever he or she desires. Here the decedent made no will or the disposition in the will failed for one reason or another. (You will recall also that the proposal to permit the issue of a devisee take a lapsed gift given the devisee was revised to restore the existing requirement that the devisee be "kindred" of the testator, thus creating a greater possibility that part of an estate will go by intestate succession to very remote relatives in preference to the issue of someone who the testator specifically provided for in the will.) Second, where there is no will, it is quite likely that the issue of great-grandparents will actually be "laughing heirs."

The advantages of the proposed law over existing law are listed in the Commission's recommendation:

> 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 expense of attempting to find remote missing heirs and by minimizing problems of service of notice.[84]
>
> (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.[85]
>
> (3) It removes a significant source of uncertainty in land titles.[86]
>
> (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.[87] 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.

[84] Niles, *Probate Reform in California*, 31 Hastings L.J. 185, 200 n.98 (1979).

[85] 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).

[86] Cavers, *supra* note 82, at 211, 214.

[87] See discussion under "Right of Heirs of Predeceased Spouse" *infra*.

The staff believes that it is sound public policy not to expand the list of those who inherit to include issue of great-grandparents or more remote heirs.

The proposed legislation allows certain relatives of a predeceased spouse of the decedent to claim escheated property of the decedent's estate. See Section 6820. Valerie J. Merritt (Exhibit 2) objects to this scheme and suggests:

> My third suggested change would be to add a new subsection after subsection (e) which would list all those listed in §6820(a) of the bill. To me, this makes much more sense than providing for escheat and then allowing these people to file a claim with the state. It is much more efficient to distribute the estate's assets directly from the estate to these heirs.
>
> If one takes my suggestion abut changing §6402, then the balance of §6820 is completely unnecessary. The usual claim procedures regarding property escheated to the State are set forth in detail in the Code of Civil Procedure and there is no need for a Probate Code overlay.

The officers (Exhibit 1) in the extract from their letter also object to the escheat provisions. The staff believes that the escheat scheme is sound for the reasons given in the extract from the Commission's recommendation quoted above and for the reasons given in the Commission's recommendation quoted below:

> **Right of Heirs of Predeceased Spouse**
>
> California law gives certain relatives[98] of a predeceased spouse a right to inherit any portion of the decedent's estate that would otherwise escheat.[99] 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.[100]
>
> 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.[101] 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 problem of locating and giving notice to them. The proposed law provides a simple procedure for determining claims by other relatives of a predeceased spouse to escheated property.[102]
>
> [98] 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).
>
> [99] Prob. Code § 229(d). This supplements the ancestral property provisions of existing law. See Prob. Code § 229. See also Prob. Code § 296.4.
>
> [100] See Prob. Code § 328.
>
> [101] 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.
>
> [102] The general escheat procedure found in existing law is adopted for use. See Code Civ. Proc. § 1352.

§ 6408. Adoption by stepparent

The officers (Exhibit 1) comment:

> 2. Adoption by stepparent. We believe Section 6408 is unclear. We believe that the section is not appropriate if the meaning is, as the legislative counsel suggests, that a child who is adopted by a stepparent inherits from both natural parents and the adoptive parent. If the meaning is that the child will not inherit from the stepparent who adopts, we believe the provision is contrary to the expectation and desires of the adopted family.

In Memorandum 83-22 (prepared for the March meeting), the staff presents suggestions for the improvement of Section 6408. Professor Halbach has made additional suggestions in the material attached to Memorandum 83-15. We believe that the adoption of the staff recommended revision of Section 6408 set out as Exhibit 3 of Memorandum 83-22 (modified in light of Professor Halbach's suggestions) will provide the needed clarification and improvement of that section.

§ 6521. Persons for whom probate homestead may be set apart

Valerie J. Merritt (Exhibit 2) points out that the right to a probate homestead is narrower than the right to a family allowance:

> I'm not sure I understand why an actually dependent adult disabled child should get a family allowance (which terminates when probate ends), but no right to a probate homestead. I would at least include such a person in §6500 if the child was living with decedent at the time of death.

This suggestion has considerable merit. However, the family allowance is of limited duration and would probably not affect the rights of a person who is a devisee of property which might be a probate homestead. The probate homestead gives the person granted it a right to occupy the homestead for as long as life (if the spouse of the decedent). In effect, the probate homestead takes the property that would otherwise go to an heir or devisee and gives it to the person granted the probate homestead for the duration of the time the probate homestead exists. The staff suggests the following additional subdivision to be added to Section 6521:

> (c) Adult children of the decedent who are physically or mentally incapacitated from earning a living and who were actually dependent in whole or in part upon the decedent for support and were living with the decedent at the time of death.

A conforming revision will be needed in Section 6524 (duration of probate homestead) to give the children described above the probate homestead for a term as long as life.

The Commission should also be aware of the possibility that there may be a need to review the family allowance and probate homestead provisions to provide some protection to a former spouse whom the decedent was obligated to support under a support order in effect at the time of the decedent's death. There is considerable opposition to the proposal to make the obligation of support under an order or agreement

for support of a former spouse survive the death of the support obligor. However, including the former spouse in those entitled to a family allowance and probate homestead might be more acceptable since it does not involve introducing a radical new concept into the law.

§ 6573. Manner of satisfying share of omitted child

Valerie J. Merritt (Exhibit 2) notes an inconsistency in the proposed legislation:

> While §6562 provides for abatement in the usual order, §6573 provides a special order of abatement. While it is true the latter section is essentially the same as current §91, I'm not sure I can come up with a policy reason dictating different treatment.

Section 6562 adopts Chapter 13 (commencing with Section 750) of Division 3. Chapter 13 has more comprehensive rules than proposed Section 6573. We are unable to justify different rules as to how the share of an omitted spouse is to be satisfied and how the share of omitted children are to be satisfied. Accordingly, we recommend replacing Section 6573 with a section reading the same as Section 6562.

Effect on existing trusts and wills

The officers (Exhibit 1) comment:

> 4. Effect on existing trusts and wills. Many carefully prepared estate plans provide that if certain preferred beneficiaries cannot take, the property will be distributed to heirs of the testator. Those clauses typically make reference to the laws of intestate succession in effect at the time of the failure of other distribution possibilities. Section 6148 would cause reference to be made to the new intestate succession rules even if the draftsman had not so provided. Often these clauses are intended as a shorthand phrasing of specific choices of the testator based on the professional explanation of existing laws of intestate succession. If the sweeping changes that are proposed in AB 25 become law, attorneys will feel obligated to try to contact those persons who have used such clauses and explain the need for reconsideration. It will be an unhappy group of constituents who realize that to avoid the possibility of an escheat they will have to go to the trouble and expense of a codicil. More importantly, the expectations of testators who have died and the beliefs of trustors of irrevocable trusts will be frustrated. The estate planning documents of many persons will have been rewritten for them by the legislature and there will be no recourse. The fiat of escheat is the type of legislation that promotes disrespect and distrust of the law and of the courts.

The basic objection is that a trust may provide for a distribution to those who would take under the laws of intestate succession at the time of the failure of other distribution possibilities. Here we have a

case where the draftsperson of the trust elected not to use the intestate succession law in effect at the time the trust was drafted but instead elected to pick up changes made in intestate succession law after the trust instrument was drafted. The real substance of the objection is that the proposed law eliminates inheritance by "laughing heirs" and the persons who are thus eliminated could inherit under the law at the time the trust was drafted. The staff sees no problem with giving effect to the intent of the trust instrument to pick up changes in intestate succession law after the trust instrument was drafted. However, we have previously recommended in this supplement that the provision of AB 25 which differentiates between maternal and paternal kin be eliminated. That eliminates one change that would have been made in existing law and leaves only the change which eliminates the "laughing heirs."

The staff believes that the provision of a trust that picks up future changes in the law should be given effect and the existence of such a provision is not a substantial reason for retaining existing law.

Technical matters

Valerie J. Merritt (Exhibit 2) raises various technical matters in the following comments, but the staff has checked these matters and no action need be taken to deal with them:

> First, Section 4 of the Bill on page 7 should be deleted. A.B. 24 both deletes Division 2b., and enacts replacement provisions, which is the way it should be handled, as there is no guarantee both bills will pass with the same effective dates. Similarly, A.B. 28 deletes existing Probate §§190 et seq., and enacts replacement provisions. Those sections should not be affected by this bill.
>
> Second, the bill enacts provisions on a probate homestead or family allowance, but does not repeal Chapter 11 of Division 3 (§§660-684). That should be done to avoid confusion.
>
> The bill deletes existing Probate §§160-163 regarding income from and interest on legacies. I believe they should be re-enacted and suggest they be added as new §§6153-6156.

Respectfully submitted,

John H. DeMoully
Executive Secretary

**Exhibit 1**

TWENTY-SIXTH FLOOR
555 SOUTH FLOWER STREET
LOS ANGELES, CALIFORNIA 90071

February 10, 1983

Assembly Judiciary Committee
State Capitol
Sacramento, California 95814

Attention: Ms. Lettie Young
Consultant

Re: Assembly Bill 25

The undersigned are the officers of the Probate and Trust Law Section of the Los Angeles County Bar Association. We have not polled the membership of the Section because the membership exceeds nine hundred persons. The members are interested in and regularly practice in the fields of estate planning and administration of estates and trusts. Due to the inability to poll the Section's membership, we cannot speak for the Section, but we believe the vast majority of the Section's members would agree with the positions expressed by us.

To the extent Assembly Bill 25 states existing California statutory and case law, we welcome and support the clear, concise statement of the law provided by Assemblyman McAlister and the Law Revision Commission.

In certain other areas where Assembly Bill 25 would change existing California law, we approve of the proposed changes. For example, we support the changes involved in Section 6146(b) relating to failed residuary gifts and the provisions of Sections 6170 through 6177 relating to exoneration, ademption and advancements. We believe these changes will be significant improvements in the law and will result in the law more closely matching the intent of testators.

However, there are many provisions that we oppose on the following grounds:

1. There are provisions which would create more problems than they are designed to solve.

2. There are provisions which are not necessary.

3. There are provisions which are contrary to the public's desires.

4. There are provisions which would create major problems for the courts.

5. There are provisions which would foster disrespect for the law and the courts.

Technical Requirements

Several sections of Assembly Bill 25 are obviously intended to eliminate technical traps in Wills and other attempts to pass property to intended recipients. The following provisions although so intended create other severe problems.

1. Payable on death provisions. The expansion of the permitted payable on death provisions in Section 160 would permit beneficiaries designated informally and without advice to prevail over other beneficiaries of Wills that were carefully considered. Many testator's estate plans have been frustrated in the past because of beneficiary designations and forms of title that were created by persons who did not understand the ramifications of what they were doing. Section 160 would expand the chances of such errors. Section 160 also permits conniving and fraudulent persons to obtain informal designations as beneficiaries since the protection now afforded by the technical requirements of Wills would be lacking.

2. Witness provisions. The permitted substitution of a notarial acknowledgment for the traditional witnesses (Section 6110(c)(2), the permission for an interested person to take under a Will witnessed by him or her (Section 6112(b) and the elimination of a requirement of witnesses to a revocation by destruction by someone other than the testator (Sections 6120 and 6121) we believe will create more problems than they solve. The requirement of two disinterested witnesses

for such important acts as execution of Wills and their revocation is not just a lawyer's attempt at making it difficult to carry out the intent of the testator. The rules are designed to and do avoid fraud and undue influence. If these sections are enacted, we will see more deathbed "Wills" favoring the nurse, companion and others placed in a position of control over the minds and bodies of the mentally and physically weak. These situations where fraud and undue influence are possible are not isolated incidents. With a growing aged population, separated from close family by distance, the opportunity for abuse and fraud will increase. It is in the public interest to encourage the solemnity of the occasions when a person provides for disposition of property to take effect at death, rather than to minimize the precautions which guard against abuses.

We believe erosion of the disinterested witness rules will overburden the courts of California with prolonged trials of contests of Wills or their revocation that now would not survive cursory examination by the courts. Perhaps of greater importance, undue influence over the minds of the weak will be encouraged by the conniving person in circumstances where today it would not be attempted because it would be known to be fruitless.

## Intestate Succession

1. Generally. Intestate succession rules should be designed to carry out the probable intentions of most people. The provisions of proposed Section 6401(c)(1) and 6401(c)(2) may be more accurate reflections of the probable intentions of the public than existing law. The rest of the major proposed changes in intestate succession we believe clearly do not carry out such intentions. We do not believe that the average person would equate more remote relatives with the closest relative, yet Section 6402(d) does just that. The proposal would divide an estate into one part for the maternal grandparents or their issue and one part for the paternal grandparents or their issue regardless of the nearness of the degree of relationship on one side or the other.

We believe the present law is more in keeping with probable intent as it favors the closest relative. As an example, we think that a maternal aunt should be favored over, and not have to share with, paternal first cousins three times removed. In any event, there appears to us to be no great need for a change in this area. The proposed change also would increase the problems of identifying and locating heirs by increasing the chances that the heirs will be remote.

2. Adoption by stepparent. We believe Section 6408 is unclear. We believe that the section is not appropriate if the meaning is, as the legislative counsel suggests, that a child who is adopted by a stepparent inherits from both natural parents and the adoptive parent. If the meaning is that the child will not inherit from the stepparent who adopts, we believe the provision is contrary to the expectation and desires of the adopted family.

3. Escheat. The Bill's provisions for escheat are the least responsive to the public's probable intent. We venture to guess that only a very small percent of the public would prefer to have their property pass to the State of California in preference to a great aunt or uncle, a second cousin, or other more remote relatives. We believe proposed Section 6404 and Part 4 will be viewed by the public as an attempt by the State to confiscate.

4. Effect on existing trusts and wills. Many carefully prepared estate plans provide that if certain preferred beneficiaries cannot take, the property will be distributed to heirs of the testator. Those clauses typically make reference to the laws of intestate succession in effect at the time of the failure of other distribution possibilities. Section 6148 would cause reference to be made to the new intestate succession rules even if the draftsman had not so provided. Often these clauses are intended as a shorthand phrasing of specific choices of the testator based on the professional explanation of existing laws of intestate succession. If the sweeping changes that are proposed in

AB 25 become law, attorneys will feel obligated to try to contact those persons who have used such clauses and explain the need for reconsideration. It will be an unhappy group of constituents who realize that to avoid the possibility of an escheat they will have to go to the trouble and expense of a codicil. More importantly, the expectations of testators who have died and the beliefs of trustors of irrevocable trusts will be frustrated. The estate planning documents of many persons will have been rewritten for them by the legislature and there will be no recourse. The fiat of escheat is the type of legislation that promotes disrespect and distrust of the law and of the courts.

## Homicide

Perhaps one of the greatest practical problems of AB 25 is its provisions regarding homicide. Section 204 presents the possibility of murder trials in the probate courts with different standards of proof than in the criminal courts. A person acquitted or a person who was not prosecuted criminally because of the prosecutor's belief that a guilty verdict was not probable could be tried for murder in the probate court. The courts do not want this type of case. The public and the popular press will not understand how a person barred from inheritance by the probate court escaped criminal conviction or prosecution. We believe the forfeitures provided in Section 200, et seq., should be conditioned upon a final judgment of conviction in the criminal courts.

## Summary

We urge that AB 25 be carefully reviewed in committee and that it be amended to eliminate the objectionable features we have pointed out. We believe that AB 25 can become very beneficial legislation if each provision is examined with a view to the problems created as well as those addressed and with a view to whether the proposed changes are really needed.

Long-standing, well tested rules should not be changed just for the sake of making changes nor for the correction of perceived problems if the solutions create even greater problems.

Very truly yours,

Keith A. Pursel
Chair
Probate and Trust Law Section

Leslie D. Rasmussen
Vice Chair
Probate and Trust Law Section

Robert D. Bannon
Secretary-Treasurer
Probate and Trust Law Section

cc: Roy H. Aaron, Esq.
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February 9, 1983

Assembly Judiciary Committee
State Capitol
Sacramento, California 95814

Attn: Ms. Lettie Young, Consultant

Re: A.B. 25

Dear Ms. Young:

I have a number of comments to make about A.B. 25, the bill to re-enact a large portion of the Probate Code. My comments are based upon my experience as an estate planning and probate attorney. While, I believe most of the bill's provisions are sound, some should be deleted or modified.

First, Section 4 of the Bill on page 7 should be deleted. A.B. 24 both deletes Division 2b., and enacts replacement provisions, which is the way it should be handled, as there is no guarantee both bills will pass with the same effective dates. Similarly, A.B. 28 deletes existing Probate §§190 et seq., and enacts replacement provisions. Those sections should not be affected by this bill.

Second, the bill enacts provisions on a probate homestead or family allowance, but does not repeal Chapter 11 of Division 3 (§§660-684). That should be done to avoid confusion.

The definition of "devisees" (§34) omits beneficiaries of testamentary trusts. They are not necessarily included under the definition of "beneficiary" (§24) during the period of estate administration because there is not yet a trust in existence. I assume they are "interested persons" under §48(a)(1) as an "any other person". This may have adverse effects regarding notice, although this bill doesn't really affect many of the administrative proceedings. But note that §233(b) requires notice to heirs and devisees and would not require notice to the beneficiaries of a testamentary trust. That is also true in §6541(c).

I have serious reservations about §143 and §146(b), regarding the enforceability of premarital agreements. We have many clients who enter premarital agreements without a full and complete disclosure of property. Often, if both individuals are wealthy, even if their wealth is disparate, they have no interest in knowing the details of each other's affairs. I would add to §143(a) and the corresponding language in §146(b), "unless the surviving spouse waived such a full and complete disclosure after advice by independent legal counsel".

"Feloniously and intentionally," is not defined in §204 or the related sections. Because of the high "beyond a reasonable doubt" standard, the conclusive presumption of §204 is sound. I would add that a judgment of acquittal creates a presumption that the killing was not felonious and intentional. I would not make this presumption conclusive (because of the differing standards of proof), but I believe it would discourage litigation somewhat. The current Probate §258 makes an acquittal conclusive. The courts would still be involved in trying criminal cases if there were a hung jury, failure to prosecute or murder-suicide. But they do it now.

I suggest changing §224(c) to insurance policy beneficiary designations prior to 1/1/85, rather than policies issued prior to that date. Alternatively, I'd omit the subsection altogether as I'm not sure what policy it promotes.

There is a typographical error in the first line of §6102. It should read, "A will may make..."

I believe there are serious problems to allowing witnesses to sign a will after the testator. They may be unable to testify as to the testator's capacity at the time of his signing if they sign days, weeks or months later. I would alter §6110(c)(1)(i) by deleting "either... or the testator's acknowledgement of the signature or of the will". If we are to keep subsection (2), I would alter it to read, "(2) Be subscribed and sworn before a notary public of this state". This would mean the notary public would be present at the time the testator signed.

While I understand the problem posed of thwarting a testator's intent when invalidating gifts to an interested witness, I firmly believe there should be at least one disinterested witness. I would alter §6112(b) to more closely parallel current §51, but with the gift valid if there is one disinterested witness, but void if none.

I would alter §6113(c) to delete "has a place of abode or is a national" as I believe it is overly broad as it reads currently. This still comports with the purpose described in (7) on page 3 of the bill.

The bill deletes existing Probate §§160-163 regarding income from and interest on legacies. I believe they should be re-enacted and suggest they be added as new §§6153-6156.

I don't believe the provisions regarding interpretation of wills (§§6160-6162) say enough. I believe we should keep the language of current Section 101 saying the testator's intent is paramount. I'm also concerned that §6160 only talks about total intestacy. I believe the law is now and should be a preference to avoid any intestacy, whether total or partial. Finally, while it is arguable that the omitted Probate §§105, 141, 142 and 143 are unnecessary, I believe they do provide useful guidance and should be re-enacted.

While it's unusual to tamper with Uniform Acts, I'd like to suggest the law would be improved by a new Section 6304 to read as follows:

> 6304. Notwithstanding Section 6300 above, if the Court finds that the lapse of a gift to a trust due to its revocation or termination was contrary to the intent of the testator, the Court may order distribution of the estate as if the terms of said trust at the time of execution of the Will were incorporated by reference in the Will.

I'd make three changes to §6402. The first would be to add a new subsection after subsection (d) which would include issue of great-grandparents. My children know some of their second cousins; I know some of mine. I don't believe this degree of relationship is so far removed as to create "laughing heirs". Second, I don't believe there is any reason to differentiate between maternal and paternal kin. I'd remove the division into halves language of (d) and not use any such language in the new subsectionI propose above. My third suggested change would be to add a new subsection after subsection (e) which would list all those listed in §6820(a) of the bill. To me, this makes much more sense than providing for escheat and then allowing these people to file a claim with the state. It is much more efficient to distribute the estate's assets directly from the estate to these heirs.

I'm not sure I understand why an actually dependent adult disabled child should get a family allowance (which terminates when probate ends), but no right to a probate homestead. I would at least include such a person in §6500 if the child was living with decedent at the time of death.

While §6562 provides for abatement in the usual order, §6573 provides a special order of abatement. While it is true the latter section is essentially the same as current §91, I'm not sure I can come up with a policy reason dictating different treatment.

If one takes my suggestion about changing §6402, then the balance of §6820 is completely unnecessary. The usual claim procedures regarding property escheated to the State are set forth in detail in the Code of Civil Procedure and there is no need for a Probate Code overlay.

While this is a lengthy list of comments, I believe each is directed to improving the bill. If we are to re-enact the Probate Code, we should improve it as much as we can.

Very truly yours,

Valerie J. Merritt

VJM:par

cc: Mr. Matthew S. Rae, Jr.
Ms. Leesa Speer