#L-656 01/13/84

First Supplement to Memorandum 84-2

Subject: Study L-656 - Probate Law and Procedure (Representation)

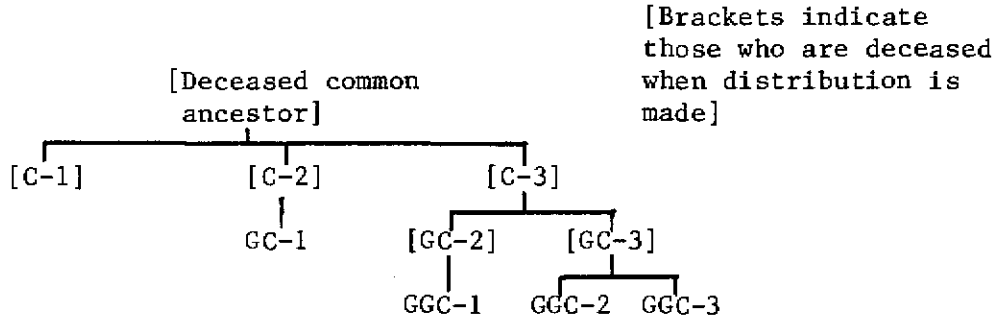
We have received three letters suggesting revisions to the new Commission-recommended rule of representation in Probate Code Section 240. These letters are attached as Exhibits 1-3 to this Supplement. The staff recommendation for amendments to Section 240 are set forth in Exhibit 4. Conforming revisions are set forth in Exhibit 5. The policy issues are discussed below.

Background

The new California representation provision (Section 240) shifts the old rule slightly in the direction of per capita (equal) distribution. The old rule was per stirpes, except where all descendants were of the same generation.

Under the old rule, the primary division of the estate was made at the first (children's) generation, whether or not that generation had any living members. The new rule, drawn from the Uniform Probate Code, skips any generation where all members are deceased and divides the estate per capita (equally) at the next generation having any living members. The benefit of the new rule is that it sometimes reduces the disparity among members of second and more remote generations, consistent with the popular preference for having all members of the same generation share equally.

The difference between the old and new rules may be illustrated by the following example:



Under all representation systems, the number of primary shares is determined by the number of living members of the generation at which division is to be made, plus the number of deceased members of that generation having living issue. Thus under the old rule there were two primary shares, one for C-2 and one for C-3. C-2's half of the estate descended to GC-1. C-3's half was divided again at the grandchildren's generation. GC-2's quarter of the estate descended to GGC-1. GC-3's quarter was divided one-eighth each to GGC-2 and GGC-3. The result under the old rule was that GC-1 took half, GGC-1 took one-quarter, and GGC-2 and GGC-3 took one-eighth each.

Under the new rule, the primary division of the estate is made at the grandchildren's generation. Thus there are three primary shares instead of the two under the old rule. GC-1 and GGC-1 each take one-third. GGC-2 and GGC-3 take one-sixth each. The new rule reduces the disparity between the three grandchildren, and thus conforms more closely to popular preference than did the old rule.

Per Capita at Each Generation Representation

Exhibit 1 is from Professor Lawrence Waggoner, a long-time advocate of the system called "per capita at each generation" representation. Professor Waggoner thinks California's new rule does not go far enough toward per capita distribution, and could be improved by adopting per capita at each generation representation.

Under per capita at each generation representation, the primary division of the estate is made at the first generation having any living members, like California's new rule and the UPC. However, after the shares are allocated to the living members of that generation, the shares of deceased members which descend to the next generation are aggregated and redivided per capita (equally) among all the living children of those deceased members. If there are deceased children having living offspring, the same procedure is followed at the next generation. Thus in the example on page 1, GC-1 takes one-third as under the new California rule, but the remaining two-thirds is divided equally among the three grandchildren, with two-ninths each going to GGC-1, GGC-2, and GGC-3. This result is the most consistent with the popular preference for equality among members of the same generation.

The Commission considered adopting per capita at each generation representation. Although the Commission found that scheme appealing, the Commission chose the UPC rule in the interest of national uniformity

of law. At the November 1983 meeting, the Commission adopted a limited measure to include a statutory definition of "per capita at each generation" so that one drafting a will could use that scheme by a simple reference to the statutory term; this proposal is now part of our 1984 legislative program.

The staff recommends that we adopt the rule of per capita at each generation as the general rule of representation. Two states (North Carolina and Maine) use per capita at each generation representation, weakening the national uniformity argument in favor of the UPC rule which we have adopted in California. In 1975, the Joint Editorial Board considered revising the UPC rule to substitute per capita at each generation representation. Although the Board decided to keep the present UPC scheme since several states had already enacted it in that form, a majority of the Board thought per capita at each generation was the better scheme. The Uniform Statutory Will Act now being worked on by the Uniform Law Commissioners contains per capita at each generation representation in the most recent draft. Thus there appears to be a developing trend in favor of per capita at each generation representation, and perhaps the UPC will be similarly revised at some future time.

We have heard from a number of practitioners who challenge the empirical studies which show a popular preference for having members of the same generation share equally. These practitioners draw on their personal experience to say that most testators prefer a per stirpes system of distribution. This is the view taken in Exhibits 2 and 3. The Probate and Trust Law Section of the Los Angeles County Bar Association has written us to the same effect:

> We do not agree that Probate Code § 240 needs revision. Many of our members were somewhat surprised to find that the Law Revision Commission believes that the change to per capita distribution more closely corresponds to "popular preference." We have seen no evidence of such popular preference. To the contrary, virtually all the wills prepared by members of our section or reviewed by us have used per stirpes distribution. Most clients prefer per stirpes or are even possibly indifferent on this question, since frequently it is applied to remote generations. Since virtually all estate planning documents currently use per stirpes distribution, it would be confusing to shift the rule for intestate succession to a per capita format.

Despite these views of practitioners, the published empirical studies do show an overwhelming popular preference for having all descendants in the same generation take equally. See Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. B. Foundation Research J. 319; Note, 63 Iowa L. Rev. 1041 (1978). Our consultant, Professor Russel Niles, is of the same view. See Niles, Probate Reform in California, 31 Hastings L.J. 185, 202 n.111 (1979) ("strong popular preference for having all issue in the same generation share equally").

Based on these studies, the staff recommends revising Section 240 to adopt per capita at each generation representation as set forth in Exhibit 4. If the Commission approves this recommendation, we would abandon as unnecessary the section approved at the November 1983 meeting defining "per capita at each generation" for use by one drafting a will.

What is the Commission's view?

Representation Under a Will

Like the UPC, the new California representation rule applies in cases of intestate succession. However, unlike the UPC, the new rule also applies as a rule of construction for wills. The new rule applies both where the will is silent on the manner of distribution, and also where the will calls for distribution "per stirpes" or "by representation."

Exhibits 2 and 3 say we made a serious error by applying the new rule to a will which calls for distribution "per stirpes" or "by representation." They argue that the new rule ascribes a meaning to the terms "per stirpes" and "by representation" that the testator did not intend. This may either produce unfair results or require the wholesale redrafting of wills.

The staff thinks this view is well taken. Accordingly, the staff would limit application of the new rule to wills executed after the operative date of the law (January 1, 1985). This revision is included in the amendments to Section 240 proposed in Exhibit 4.

Respectfully submitted,

Rober J. Murphy III
Staff Counsel

EXHIBIT 1

THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
HUTCHINS HALL
ANN ARBOR, MICHIGAN 48109

November 16, 1983

Mr. John De Moully
Executive Director,
California Law Revision Commission
Room D-2
4000 Middlefield Road
Palo Alto, CA 94306

Dear Mr. De Moully:

Copies of Memorandum 83-64 on Study L-626 (proposing the per capita at each generation system), and Professor Halbach's comments thereon, have been sent to me by Dick Wellman. I hope you will permit me to add a few thoughts on the question. I am taking the liberty of enclosing a copy of pp. 26-33 of the most recent edition of our casebook. Of particular interest is the Iowa Law Review Note (cited on p.30) describing the results of an empirical study conducted by the student editors that revealed a strong preference among laypersons for the per capita at each generation system. Also of interest is the excerpted paragraph from the Maine Probate Law Revision Commission Report, also supporting per capita at each generation.

Professor Halbach's comments are a bit hard to react to, because I am not sure exactly what he is getting at. The only system of representation that is uninfluenced by the order of particular deaths is the pure per stirpes system. Pure per stirpes, however, is greatly influenced by the number of children each descendant has, and it is this feature that leads to the possibility of survivors in the same generation taking unequal shares and survivors in more remote generations taking larger shares than survivors in nearer generations. Per capita at each generation assures that survivors in the same generation take equal shares and prevents survivors in more remote generations from taking larger shares than those in a nearer generation.

Per capita at each generation is, indeed, very much influenced by the order of particular deaths. There is no way for a system that opts for "horizontal equality" (see p.31) not to be influenced by the order of particular deaths. Horizontal equality

can only be effected with respect to those who survive the decedent. To say that this makes the system non-neutral leaves me wondering what is expected in order for a system to be regarded as "neutral."

Perhaps I am missing the point of the elderly-mother-with-two-middle-aged-children example. Per capita at each generation works no differently than pure per stirpes or the UPC system, were one child but not the other to be "unplugged" before mother; and it would make no difference which one was "unplugged": One-half of mother's estate would go to the surviving child and the other half would be divided equally among the children of the predeceased ("unplugged") child. If, on the other hand, both were to be "unplugged" before mother, per capita at each generation and the UPC system work out the same. The difference between the two is that the UPC system gives up per capita treatment below the first generation having living members; whereas the per capita at each generation system grants per capita treatment for every generation that has living members. If it is true that many people believe that per capita treatment should not go beyond the first generation having living members, I have never heard of an underlying rationale or theory that supports drawing the line there; and, in fact, I would hope that the Iowa Law Review study would be taken as evidence that most people believe that per capita treatment should continue throughout all generations having living members.

Sincerely,

Lawrence W. Waggoner

Lawrence W. Waggoner
Professor of Law

LWW/rda
Enclosure

EXHIBIT 2

A. K. ROBINSON (1887-1935)
K. D. ROBINSON (1913-1968)
D. R. ROBINSON

ROBINSON AND ROBINSON
ATTORNEYS AT LAW
ONE CALIFORNIA STREET
P. O. BOX 511
AUBURN, CALIFORNIA 95603

TELEPHONE
885-4508
AREA CODE 916

December 23, 1983

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94306

Gentlemen:

If I am reading proposed §240 of the Probate Code correctly, this letter is my strongest expression of opposition to its enactment. I have practiced probate law in Placer County since March, 1947. A guess would be that I've averaged about 10 to 15 wills a month for those 37 years. I think we must assume that any attorney in using language unfamiliar to laymen explains that when the words "by right of representation" are used, it means the estate's share of any deceased child will be that person's fractional share of the estate and that it will go to his children regardless of whether there are one or ten of them.

With this explanation, I have found, I am sure, that a very substantial majority of testators prefer that their grandchildren take by right of representation. I think there is a strong feeling that if a person divides his estate equally among his children then, whether a deceased child has one surviving child or ten, his estate should be divided among his surviving children. I do not find it true that there is any preference among testators that all grandchildren be treated equally. I don't approve of lawyers and legislators substituting their views for what I know have been the views of a majority of my clients. I am perturbed by the proposed section.

This letter is brief only because of the time element in getting it to you in time to be considered.

Sincerely,

D. R. Robinson

DRR/bp

P.S. How can we prepare wills if the present meaning is going to be wiped out by revision a few years later?

DRR

EXHIBIT 3

STEPHAN B. ROBINSON, JR.
LAWYER
643 SOUTH OLIVE STREET, NINTH FLOOR
LOS ANGELES, CALIFORNIA 90014
(213) 627-2131

December 20, 1983

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

Gentlemen:

I write in opposition to Section 240 of the new Probate Code as it applies to wills and trusts. It is based upon a misconception of the nature and purpose of a will. (I include trusts within that term); it is based upon a perception of a problem that is dubious; and the solution to that problem, if any, is misdirected.

According to the Legislative Counsel's Digest the bill of which Section 240 is a part becomes operative on January 1, 1985 and will apply to the estate of any decedent who dies after that date. Section 240 provides as follows:

> 240. If representation is called for by this code, or if a will that expresses no contrary intention calls for distribution per stirpes or by representation or provides for issue or descendants to take without specifying the manner, the property shall be divided into as many equal shares as there are living members of the nearest generation of issue then living and deceased members of that generation who leave issue then living, each living member of the nearest generation of issue then living receiving one share and the share of each deceased member of that generation who leaves issue then living being divided in the same manner among his or her then living issue.

In your November 1982 Tentative Recommendation relating to Wills and Intestate Succession at pp 2338-2340 you have referred to various articles in the legal literature whose writers have perceived a strong popular preference, shared by the writers of the articles, for having all issue in the same generation share equally in an estate. The Commission has accepted this perception. I believe that perception faulty as it applies

to wills for reasons which I shall explain later. I should like to speak first of what I believe to be the misconception of the nature and purpose of a will inherent in Section 240.

Existing California law and policy allow a testator (and I include trustors in that term) to dispose of his or her property at death as he or she intends. I understand the Commission agrees with that policy and has not sought to change it. Wills are designed to express the intention of a particular testator. The words of the testator are the symbols by which he or she expresses his or her thought; it is the thought of the testator which should control not the meaning the legislature may have assigned to the symbol. Popular preferences and the notions of legal scholars about fairness are not relevant. A particular testator may or may not share those notions and preferences; if the testator does not, under existing law and policy it is the testator's intention that should prevail If for some reason a will does not express the actual intention of the testator a judicial proceeding is necessary to determine it and to order distribution of the testator's property according to that actual intention. In such a proceeding the court is not limited to a consideration only of the language of the will. If the testator has used the terms "per stirpes" or "by right of representation" in his or her will the manner of disposition set forth in Section 240 should not be conclusive.

Section 240 does not purport to address the actual intention of the testator; the statute merely directs a manner of distribution, aberrant to existing California law, under two of the most common terms-of-art used in wills. The statute does not change the actual intention of the testator in using those terms-of-art, it merely garbles the meaning of the testator's language. When Section 240 becomes effective there will be two technical meanings of those terms-of-art: one the technical meaning effective before January 1, 1985, the other effective afterwards. If the testator has executed a will before the effective date but dies afterwards which technical meaning shall prevail? If the will expresses no contrary intention but the testator's actual intent can be clearly shown to be different from the Section 240 meaning is the will to be construed according to the testator's actual intent or according to the Section 240 meaning? Does the Commission have

in mind that in addition to providing an aberrant meaning to the terms-of-art, Section 240 provides that the aberrant meaning shall be conclusive on the legatees and devisees in the absence of an expression of contrary intention in the will? Does the Commission have in mind that the mere fact that testator survived January 1, 1985 changes his or her actual intent? Does the Commission have in mind that requiring a will construction proceeding in each decedent's estate where those terms are used in order to determine whether distribution of the testator's property should be made according to the testator's actual intent or according to Section 240 will further the administration of justice?

The problem perceived by the Commission and the writers in the articles to which the Commission has referred is that notwithstanding what the Commission and those writers perceive as fairness and strong popular preference for having all issue in the same generation share equally, most testators provide in their wills for an equal division among families per stirpes. Those writers attribute that form of stirpital distribution to a desire on the part of testators for a distribution pattern that their lawyers suggest is normal, and contend that what lawyers believe to be normal is the distribution pattern they know. California lawyers are familiar with at least two "normal" distribution patterns: one per capita in which each recipient takes in his own right; the other per stirpes or "by right of representation" in which the recipient takes the share of a deceased person as a substitute. Knowing both the "per stirpes" and "per capita" patterns, it is not obvious why California lawyers should suggest to a testator disposing of his own property that one pattern rather than the other is "normal".

In my experience most testators are entirely capable of determining the objects of their bounty and what shares of their estate those objects are to receive. This has been particularly true of those testators disposing of estates large enough to provide for a stirpital distribution. In that connection I should mention that I have practiced law in California as a sole practitioner for over thirty years. During that time I have drafted more than 150 wills and have acted as attorney for numerous executors in

in decedent's estate proceedings. Most of those estates were of moderate size, that is, they were of a value between $100,000 and $1,000,000.

Many of the wills I have drafted called for distribution "by right of representation". As that is a term-of-art with a technical meaning my practice has been to explain its meaning and operation to the testator before execution. That explanation would customarily involve the particular situation of the testator and his or her plan of distribution. Distribution commonly was to the children equally and by right of representation to the issue of the children. My explanation pointed out that in such a distribution the grandchildren would take their deceased parent's share as substitutes, that the grandchildren would share equally with their brothers and sisters but not with their cousins, and that the shares of the several grandchildren would not all be equal. My testators never seemed to have had any difficulty with my explanation, or in grasping the concept that an equal distribution among families was different from an equal distribution among degrees of relationship. Most of my testators seemed familiar with the concept of a stirpital distribution before my explanation. Most of them expressed a preference for an equal division among families per stirpes even though they were informed that their grandchildren would not each receive a share equal to that of each of the other grandchildren. In expressing that preference many told me they wanted a manner of distribution that determined the share of a grandchild by reference to the share of that grandchild's immediate family, that is, his deceased parent and his brothers and sisters, rather than a manner of distribution that determined the grandchild's share by reference to the family situation of his aunts, uncles and cousins. Stability seemed important to my testators; each of his or her children and the family of that child would be able to plan their own affairs with reference only to the situation of their own immediate family. I do not imagine that my practice of making an explanation before execution of the will of the meaning and effect of a stirpital distribution has been materially different from that of most other experienced California will draftsmen. I have no reason to believe that their experience with their testators has been much different from my own.

I believe you underestimate the familiarity of California testators with estates large enough to consider a stirpital distribution with the general meaning of the terms "per stirpes" and "by right of representation." Throughout the history of California the family stocks in a stirpital distribution have been found among the ancestors of those who were to take. In Kidwell v. Ketler (1905) 146 C. 12 the will was executed in 1863 and the decedent died in 1865. The testamentary trust distributed the income to a niece and nephew for life with the remainder to their issue. The nephew died in 1901 with five surviving children; the niece died in 1871 with one surviving child. The court found that the testator intended a stirpital distribution of the remainder with the niece and nephew as the family stocks as opposed to a per capita distribution among the grandnephews, and ordered distribution one-half to the surviving child of the niece and one-fifth of one-half to each of the five surviving children of the nephew. Maud v. Catherwood (1943) 67 CA 2 636 involved the 1874 inter vivos trust of Judge Hastings, former Chief Justice of California. The trust reserved the income to the trustor and his wife then to their children for their lives with the remainder to be distributed to the heirs of the trustor. The trust terminated about 1942. The question was whether the stirpital distribution should begin at the level of the trustor's children or at the level of his grandchildren. The court held that the stirpital distribution should begin at the level of the trustor's children and ordered distribution accordingly even though there were different numbers of grandchildren by the several children and the shares of the grandchildren would not all be equal. Lombardi v. Blois (1964) 230 CA 2 191 involved distribution according to the 1913 inter vivos trust of one of the great California fortunes, that of Henry Miller of Miller & Lux, Inc. Income went to the trustor for life, then to his daughter and son-in-law for their lives, then to his grandchildren for their lives (within the Rule). The remainder went to the issue of the grandchildren per stirpes. The trustor died in 1916. The trust terminated in 1962. Again the question was whether the stirpes was at the level of the grandchildren who were all deceased, or at the level of the great-grandchildren most of whom were living. The court held that the stirpes was determined at the level of the grandchildren not the great-grandchildren, and that such was the intention of the trustor.

The significance of these cases apart from their explication of rules of law is that what is meant by a stirpital distribution in California has become more or less common knowledge to laymen as well as to lawyers. Generations of California testators, at least those with estates large enough to provide for stirpital distribution, and their families have become familiar with the general concept that a stirpital distribution is one by families and that remote degrees of relationship, e. g. grandchildren, do not each share equally. Certainly most of my testators have displayed a general familiarity with that concept before my explanation, and I believe most experienced California will draftsmen have had that experience too.

The idea that a testator is materially influenced by his or her will draftsman to choose the per stirpes pattern is most unrealistic. Most testators of estates of the size we are concerned with have firm opinions of their own on the subject of the objects of their bounty and the dispositive provisions they wish their wills to contain. The wills of most such testators are commonly considered over a period of days or weeks and are mulled over by the testators afterwards. The dispositive provisions of those wills are generally the will provisions of greatest interest to testators. They are not usually concerned about "normal" distribution patterns other than what the objects of their bounty may expect. Whether the testator chooses a stirpital or per capita distribution is a decision he or she makes. Any preference the will draftsman might have for a per stirpes pattern of distribution would not ordinarily be persuasive to a California testator with the background and with as strong opinions as he or she may be expected to have.

The Commission has convinced itself that the existing manner of determining per stirpital distribution is unfair, and that most California testators would recognize that it was unfair, and but for their lawyers, would provide for a different manner of distribution. Apart from the personal preferences of the members of the Commission, there is no convincing basis for it to believe that most California testators would provide for an equal distribution of their property by degrees of relationship were they not influenced against it by their lawyers. The belief that there is a strong popular

preference for having all issue in the same generation share equally is based upon the survey reported in 1978 American Bar Foundation Research Journal 321. I should like to comment about that survey:

1. It was made to determine the distributive preferences of intestate decedents;

2. The survey was conducted by telephone with each interview lasting about 20 minutes;

3. 150 telephone interviews were conducted in each of five states, including California;

4. The survey was presented to the persons interviewed as a survey of public opinion on possible improvement in state laws regarding succession, particularly those laws that determine property distribution when an individual dies without a will;

5. The persons interviewed were asked about how they would like their property distributed if they died without wills and were survived by certain relatives.

The survey was purportedly national, at least its results have been extrapolated to mean that there is a strong popular preference among the general public for having all issue in the same generation share equally. A 20 minute interview over the telephone consisting of abstract questions about the inheritance of property cannot be convincingly equated with the interview and questions of a lawyer drafting the will of a particular testator with an estate large enough to provide for a stirpital distribution. The survey purportedly was inquiring about popular preferences with respect to intestate succession. Testators draw wills because they do not wish their property to pass according to the laws of intestate succession; testators wish to provide for the manner of distribution of their property themselves. Those surveyed may well have given answers they believed those taking the poll wished to hear, and may well have given answers about their intestate succession preferences that would not conform to their own testamentary preferences. Testators are individuals disposing of their own property generally among the members of their own families,

and what they do in that situation has little relevance to their notions about the general public good or their preferences about intestate succession.

I myself have drafted more wills than the Californians polled in the survey and so have many experienced California will draftsmen. My experience leads me to believe that California testators with estates large enough to provide for a stirpital distribution prefer an equal distribution by families per stirpes as provided in existing California law to an equal distribution by degrees of relationship. I believe most experienced California will draftsmen would be of the same opinion. An inquiry among such an informed body of opinion might lead to a conclusion different from that of the Commission. Such an inquiry apparently is one that the Commission does not care to make, presumably because it fears its result. The notion that such an inquiry would merely reflect the conservative preferences of the bar for the familiar is merely an excuse to justify not making the inquiry. The Commission may have convinced itself that its view is correct and an accurate reflection of the modern views that our society now has about testamentary distributions, but if so, it is at least conceivable that those convictions are mistaken. The Commission should allow itself to inquire further into these matters and without prejudgment.

The Commission's solution to the problem, if any, created by the present law of testamentary distribution "per stirpes" or "by right of representation" appears misdirected. The commission apparently believes that that present law prescribing divisions of the decedent's estate among the family stocks at the generation nearest the decedent even though there are no living members of that generation is frequently unfair in operation. This is thought to be unfair because it frequently results in unequal shares among persons of the same generation, and frequently results in a person in a remote generation taking a larger share than a person in a closer generation. If the Commission wishes to limit a testator's power of testamentary disposition it should do so directly. Merely changing the meaning of the terms-of-art without changing the power leaves open the questions of what the testator actually intended, and whether or not the will should be construed according to that actual intention.

Only a fraction of California lawyers and even fewer testators may be expected to learn of Section 240 before it becomes effective and perhaps they will not learn of it for a long time afterwards. By changing the settled meaning of such common testamentary terms-of-art you are creating a trap for the ignorant and unwary. Much litigation will be required to determine the meaning and operation of the statute. Neither the public nor the bar has perceived any flaw in the existing law of stirpital distribution. That perception has been limited to legal scholars, and is based upon their understanding of the views of the public at large rather than the views of those Californians actually disposing of their property and upon their notions of fairness. Neither California testators nor the bar will anticipate so aberrant a change in existing law for such reasons.

The Commission considered other solutions to the problem of fairness, but chose the Uniform Probate Code rule in the interest of national uniformity in intestate succession law. Whatever interest there may be in having a uniform national intestate succession law, diversity appears more advantageous than uniformity when it comes to testamenatry distributions. Each state has its own customs and practices; the testators and lawyers of each state are familiar with them, and draft wills accordingly. Wills are drafted to accomplish the intentions of the testator, and the lawyers and testators in each state should be permitted to use terms-of-art with the meanings familiar to them to accomplish that objective. It is advantageous not to attempt to change the settled meanings of commonly used terms-of-art because not everyone becomes aware of the changes at the same time. Some may be expected not to become aware of such changes until long after they become effective; is there some reason to lay a trap for them? It is an illusion to imagine that all states are going to adopt the same meanings of these terms-of-art; it is not advantageous to attempt to do so because such an attempt will cause more confusion than benefit. Testamentary distribution is essentially local and individual in character, and California testators should be allowed to dispose of their property as they wish using terms-of-art with the meanings familiar to them.

Immigrants to California who draw wills here do not commonly expect to bring their law with them, but usually expect to accept

the law of California. Newcomers to California who execute California wills may be expected to tell their draftsmen their testamentary intentions, and may expect those draftsmen to draft those wills accordingly. I doubt that immigrants to California will be particularly concerned whether the meaning given to the terms "per stirpes" or "by right of representation" in California is the same as or different from the meaning given to those terms in the State from which they have come. Non-residents of California drawing wills affecting California property may expect to have their wills construed according to the law of their domicile.

The Commission purportedly is attempting to clarify and simplify probate law, to carry out more effectively the testator's intent, and to promote national uniformity of law. It made recommendations relating to both wills and intestate succession. Section 240 substitutes the Commission's notions of fairness in testamentary distributions for those of the testator, and may be expected to create new fields for litigation as legatees and devisees seek to obtain distribution of the testator's estate according to the testator's notions of fairness or the Commission's. This may produce legal business for the profession, but it would not generally be considered in the public interest or an improvement in the administration of justice. It is not sufficient to provide, as Section 204 does, for a change in the meanings of the terms-of-art unless a contrary intention is expressed in the will. The issues in the construction proceeding will be to determine whether or not a contrary intention is expressed in the will as well as to determine the testator's actual intent and whether decedent's property should be distributed in the manner actually intended by the testator or in the manner assigned by the legislature.

Intestate succession according to the notions of fairness of the Commission and to promote national uniformity of law can be provided for without changing the settled meaning of testamentary terms-of-art.

Section 204 is ill conceived. It should not become effective.

Cordially,

Stephan B. Robinson, Jr.

SBR:mgw

EXHIBIT 4

Probate Code § 240 (amended). Per capita at each generation representation

SEC. _____. Section 240 of the Probate Code is amended to read:

240. (a) If per capita at each generation representation is called for by this code, or if a will or trust that expresses no contrary intention calls for distribution per stirpes or by representation or provides for issue or descendants to take without specifying the manner, the property shall be divided into as many equal shares as there are living members of the nearest generation of issue ~~then living~~ which contains any living member and deceased members of that generation who leave issue then living~~, each~~. Each living member of the nearest generation of issue ~~then living receiving~~ which contains any living member is allocated one share and the ~~share of each deceased member of that generation who leaves issue then living being divided in the same manner among his or her then living issue~~ remainder of the property is divided in the same manner as if those already allocated a share and their issue had predeceased the decedent.

(b) Unless the will or trust expresses a contrary intention, subdivision (a) does not apply to a will or trust executed prior to January 1, 1985, that calls for distribution per stirpes or by representation, and such will or trust shall be construed under the law in effect prior to January 1, 1985.

Comment. Section 240 is amended to do the following:

(1) To enact the substance of the provision for per capita at each generation representation recommended by Professor Lawrence Waggoner. See Comment to Uniform Probate Code § 2-103; Waggoner, A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants, 66 Nw. U.L. Rev. 626 (1971).

(2) To apply to inter vivos and testamentary trusts where no contrary intention is expressed in the trust instrument.

(3) To add subdivision (b) which limits the effect of subdivision (a) when applied to a will or trust executed prior to January 1, 1985.

EXHIBIT 5

CONFORMING REVISIONS

Civil Code § 1389.4 (amended). Power of appointment

SEC. _____. Section 1389.4 of the Civil Code is amended to read:

1389.4. (a) Except as provided in subdivision (b), if an appointment by will or by instrument effective only at the death of the donee is ineffective because of the death of an appointee before the appointment becomes effective and the appointee leaves issue surviving the donee, the surviving issue of such appointee shall take the appointed property in the same manner as the appointee would have taken had the appointee survived the donee except that the property shall pass only to persons who are permissible appointees, including those permitted under Section 1389.5. If the surviving issue are all of the same degree of kinship to the deceased appointee they take equally, but if of unequal degree then those of more remote degree take by per capita at each generation representation as provided in Section 240 of the Probate Code.

(b) This section does not apply if either the donor or donee manifests an intent that some other disposition of the appointive property shall be made.

Comment. Section 1389.4 is amended to reflect the new provision for per capita at each generation representation in Probate Code Section 240.

968/991

Probate Code § 282 (amended). Effect of disclaimer

SEC. _____. Section 282 of the Probate Code is amended to read:

282. (a) Unless the creator of the interest provides for a specific disposition of the interest in the event of a disclaimer, the interest disclaimed shall descend, go, be distributed, or continue to be held (1) as to a present interest, as if the disclaimant had predeceased the creator of the interest or (2) as to a future interest, as if the disclaimant had died before the event determining that the taker of the interest had become finally ascertained and the taker's interest indefeasibly vested. A disclaimer relates back for all purposes to the date of

the death of the creator of the disclaimed interest or the determinative event, as the case may be.

(b) Notwithstanding subdivision (a):

(1) If an interest created by intestate succession is disclaimed, the beneficiary is not treated as having predeceased the decedent for the purpose of ~~determining the generation at which the division of the estate is to be made under~~ Section 240.

(2) The beneficiary of a disclaimed interest is not treated as having predeceased the decedent for the purpose of applying subdivision (d) of Section 6409 or subdivision (b) of Section 6410.

Comment. Section 282 is amended to reflect the revision to Section 240.

045/118

Probate Code § 6147 (amended). Antilapse

SEC. _____. Section 6147 of the Probate Code is amended to read:

6147. (a) As used in this section, "devisee" means a devisee who is kindred of the testator or kindred of a surviving, deceased, or former spouse of the testator.

(b) Subject to subdivision (c), if a devisee is dead when the will is executed, or is treated as if he or she predeceased the testator, or fails to survive the testator or until a future time required by the will, the issue of the deceased devisee take in his or her place by per capita at each generation representation. A devisee under a class gift is a devisee for the purpose of this subdivision unless his or her death occurred before the execution of the will and that fact was known to the testator when the will was executed.

(c) The issue of a deceased devisee do not take in his or her place if the will expresses a contrary intention or a substitute disposition. With respect to multiple devisees or a class of devisees, a contrary intention or substitute disposition is not expressed by a devise to the "surviving" devisees or to "the survivor or survivors" of them, or words of similar import, unless one or more of the devisees had issue living at the time of the execution of the will and that fact was known to the testator when the will was executed.

Comment. Section 6147 is amended to pick up the new provision for per capita at each generation representation in Section 240.

Probate Code § 6402 (amended). Intestate share of heirs other than surviving spouse

SEC. _____. Section 6402 of the Probate Code is amended to read:

6402. Except as provided in Section 6402.5, the part of the intestate estate not passing to the surviving spouse under Section 6401, or the entire intestate estate if there is no surviving spouse, passes as follows:

(a) To the issue of the decedent; if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree, then those of more remote degree take by per capita at each generation representation.

(b) If there is no surviving issue, to the decedent's parent or parents equally.

(c) If there is no surviving issue or parent, to the issue of the parents or either of them, 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 per capita at each generation representation.

(d) If 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, to the grandparent or grandparents equally, or to the issue of such grandparents if there is no surviving grandparent, 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 ~~degrees~~ degree take by per capita at each generation representation.

(e) If there is no surviving issue, parent or issue of a parent, grandparent or issue of a grandparent, but the decedent is survived by the issue of a predeceased spouse, to such issue, the issue taking equally if they are all of the same degree of kinship to the predeceased spouse, but if of unequal degree, those of more remote degree take by per capita at each generation representation.

(f) If there is no surviving issue, parent or issue of a parent, grandparent or issue of a grandparent, or issue of a predeceased spouse, but the decedent is survived by ~~next of kin, to the next of kin in equal degree, but when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who~~

~~claim through the nearest ancestor shall be preferred to those claiming through an ancestor more remote~~ one or more great-grandparents or issue of great-grandparents, to the great-grandparent or great-grandparents equally, or to the issue of such great-grandparents if there is no surviving great-grandparent, 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 per capita at each generation representation.

(g) If there is no surviving ~~next of kin of the decedent and no surviving~~ issue, parent or issue of a parent, grandparent or issue of a grandparent, great-grandparent or issue of a great- grandparent, or issue of a predeceased spouse ~~of the decedent~~, but the decedent is survived by the parents of a predeceased spouse or the issue of such parents, to the parent or parents equally, or to the issue of such parents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the predeceased spouse, but if of unequal degree those of more remote degree take by per capita at each generation representation.

Comment. Section 6402 is amended (1) to reflect the new provision for per capita at each generation representation in Section 240, and (2) to repeal California's rule of unlimited succession formerly contained in subdivision (f), pursuant to which the decedent's next of kin could inherit from the decedent no matter how remote the relationship. As revised, subdivision (f) is limited to great-grandparents and issue of great-grandparents of the decedent.

968999

Probate Code § 6402.5 (amended). Special rule for portion of decedent's estate attributable to the decedent's predeceased spouse

SEC. _____. Section 6402.5 of the Probate Code is amended to read:

6402.5. (a) If the decedent had a predeceased spouse who died not more than 15 years before the decedent and there is no surviving spouse or issue of the decedent, the portion of the decedent's estate attributable to the decedent's predeceased spouse passes as follows:

(1) If the decedent is survived by issue of the predeceased spouse, to the surviving issue of the predeceased spouse; if they are all of the same degree of kinship to the predeceased spouse they take equally, but if of unequal degree those of more remote degree take by per capita at each generation representation.

(2) If there is no surviving issue of the predeceased spouse but the decedent is survived by a parent or parents of the predeceased spouse, to the predeceased spouse's surviving parent or parents equally.

(3) If there is no surviving issue or parent of the predeceased spouse but the decedent is survived by issue of a parent of the predeceased spouse, to the surviving issue of the parents of the predeceased spouse or either of them, the issue taking equally if they are all of the same degree of kinship to the predeceased spouse, but if of unequal degree those of more remote degree take by per capita at each generation representation.

(4) If the decedent is not survived by issue, parent, or issue of a parent of the predeceased spouse, to the next of kin of the decedent in the manner provided in Section 6402.

(5) If the portion of the decedent's estate attributable to the decedent's predeceased spouse would otherwise escheat to the state because there is no kin of the decedent to take under Section 6402, the portion of the decedent's estate attributable to the predeceased spouse passes to the next of kin of the predeceased spouse who shall take in the same manner as the next of kin of the decedent take under Section 6402.

(b) For the purposes of this section, the "portion of the decedent's estate attributable to the decedent's predeceased spouse" means all of the following property in the decedent's estate:

(1) One-half of the community real property in existence at the time of the death of the predeceased spouse.

(2) One-half of any community real property, in existence at the time of death of the predeceased spouse, which was given to the decedent by the predeceased spouse by way of gift, descent, or devise.

(3) That portion of any community real property in which the predeceased spouse had any incident of ownership and which vested in the decedent upon the death of the predeceased spouse by right of survivorship.

(4) Any separate real property of the predeceased spouse which came to the decedent by gift, descent, or devise of the predeceased spouse or which vested in the decedent upon the death of the predeceased spouse by right of survivorship.

(c) For the purposes of this section, quasi-community real property shall be treated the same as community real property.

(d) For the purposes of this section:

(1) Relatives of the predeceased spouse conceived before the decedent's death but born thereafter inherit as if they had been born in the lifetime of the decedent.

(2) A person who is related to the predeceased spouse through two lines of relationship is entitled to only a single share based on the relationship which would entitle the person to the larger share.

Comment. Section 6402.5 is amended to reflect the new provision for per capita at each generation representation in Section 240.