#L-626 1/11/84

Fifth Supplement to Memorandum 84-2

Subject: Study L-626 - Probate Law and Procedure (Share of Spouse Omitted From Will)

The statutory shares of the testator's separate property provided for a spouse and children omitted from a will executed before marriage and before the birth of the children adds up to more than 100% of the property. This is because the spouse is entitled to half of the separate property (Section 6560), and the children are entitled to an intestate share (Section 6570) which is two-thirds of the property if there are two or more children. Presumably the court would abate these shares pro rata, adding unnecessary complexity to the scheme.

The Commission adopted this scheme when the intestate succession recommendation proposed to give the spouse all the separate property (except where the decedent was survived by issue some of whom were not also issue of the spouse). The Commission thought that an intestate share, and thus all of the property, would be overly generous to the omitted spouse and was concerned that such a scheme would obliterate any other gift in the testator's will. When the bill was in the Legislature, the Commission restored the intestate succession scheme of existing law in order to obtain passage of the bill, but the provisions for a spouse and children omitted from the testator's will were not correspondingly adjusted. It may be desirable to make such an adjustment now.

One solution would be to provide that the omitted spouse shall take an intestate share of separate property, but in any event no more than half. This would give the omitted spouse one-third of the separate property if the testator is survived by two or more children, one child and the issue of one or more deceased children, or the issue of two or more deceased children, whether or not the testator's will omits to provide for children. See Section 6401. Keeping a ceiling of one-half on the omitted spouse's share of separate property would prevent complete obliteration of other testamentary gifts, unless the testator's will both omits a spouse whom the testator married after making the will and omits a child born or adopted after the making of the will. This is probably an infrequent case.

This proposal may be effectuated by revising Section 6560 as follows:

6560. Except as provided in Section 6561, if a testator fails to provide by will for his or her surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive a share in the estate consisting of the following property in the estate:

(a) The one-half of the community property that belongs to the testator under Section 100.

(b) The one-half of the quasi-community property that belongs to the testator under Section 101.

(c) ~~One-half~~ A share of the separate property of the testator equal in value to that which the spouse would have received if the testator had died intestate, but in no event is the share to be more than one-half of the value of the separate property of the testator.

Comment. Section 6560 is amended to provide that, with respect to the testator's separate property, the omitted spouse shall receive the lesser of an intestate share or one-half. This eliminates the possibility that the statutory shares may add up to more than one hundred per cent if the testator's will omits to provide for a spouse and two or more children.

If the Commission is not enthusiastic about the one-half ceiling, that could be deleted by striking the "but" clause from subdivision (c).

Respectfully submitted,

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