

Sixth Supplement to Memorandum 84-2

Subject: Study L-626 - Probate Law and Procedure (Revisions Suggested by State Bar)

Exhibit 1 to this Supplement is a letter from Charles Collier on behalf of the Executive Committee of the State Bar Estate Planning, Probate and Trust and Law Section with 21 points concerning the new wills and intestate succession law. These are discussed below.

Points Covered in Other Memorandums

Points 1, 20, and 21 deal with transitional problems which are covered in the Second Supplement to Memo 84-2. The staff thinks the Second Supplement satisfactorily addresses these points.

Point 4 (representation) is covered in the First Supplement to Memo 84-2. The First Supplement presents some significant policy issues.

Desirable Drafting Improvements

Points 6, 11, 12, and 17 suggest desirable drafting improvements. These may be accomplished by approving the revisions set forth in Exhibits 2 and 3. Points 8 and 9 contain drafting improvements that the staff will eventually incorporate into the recommendation concerning Division 3 (administration of estates).

Emancipation of Minors Act

Point 16 suggests that we amend the Emancipation of Minors Act to make clear that an emancipated minor may execute directives to physicians and powers of attorney including durable powers. The staff thinks this is already adequately covered by the provision in the Emancipated Minors Act giving an emancipated minor the power "to enter into a binding contract" (Civil Code § 63), and by Civil Code Section 2296 which provides that "[a]ny person having the capacity to contract may appoint an agent." These provisions are noted in the Commission's 1982 Recommendation Relating to Emancipated Minors. See 16 Cal. L. Revision Comm'n Reports, at 190 n.16 (1982).

Revocation of Will by Divorce

Point 18 asks whether the provision that divorce revokes a will's dispositive provisions in favor of the former spouse applies to an

interlocutory or a final decree. Legislation passed in 1983 abolishes the two separate decrees in dissolution proceedings. As of July 1, 1984, there will be only one decree. See 1983 Cal. Stats. ch. 1159.

Surviving Spouse's Waiver of Rights

Point 2 suggests that one of the Comments to Sections 140-147 (surviving spouse's waiver of rights) make clear that these new regulatory provisions do not apply to a will which requires the surviving spouse to elect against the will in order to claim his or her half share of community or quasi-community property. However, the new regulatory provisions do apply to a will which contains the written consent of the surviving spouse to the will's requirement of an election. See Section 141(a)(7). Therefore such a Comment would be inaccurate.

The new regulatory provisions are expressly applicable only to a waiver made after the operative date of the act, so a will now in existence would not be affected by the new provisions. Also, the Commission's cleanup bill to the wills and intestate succession law (Assembly Bill 2290) adds language to Section 146 to make clear that a waiver may provide for the manner of its own amendment or revocation. Thus, for example, an appropriately drawn waiver could provide that it may be revoked unilaterally by the spouse who made it.

Point 5 asks whether Section 146 and 147 should perhaps be in the Civil Code rather than the Probate Code. Sections 146 and 147 are part of an integrated statutory scheme along with Sections 140-145. These sections deal with rights at death. The Probate Code therefore seems the appropriate place for them.

Double Jeopardy

Point 3 suggests additional research concerning whether double jeopardy prevents imposing civil penalties on the murdering heir. See Sections 200-206. The staff sees no problem here, but will review any authorities provided by the State Bar Section that might indicate otherwise.

Wrongful Death

The general wrongful death provision (Code Civ. Proc. § 377) permits an action for wrongful death to be brought by a minor who resided for the previous 180 days in the decedent's household and was dependent on the decedent for one-half or more of the minor's support, while the

comparable provision for wrongful death of a prisoner (Penal Code § 3524) does not contain that language. Point 19 suggests that we put the language in Penal Code Section 3524. The staff is reluctant to do this, since it seems that a prisoner would not be in a position to support a minor, and that therefore the difference in the two sections is based on considered policy.

Other Matters

Point 17 concerns the possible need for a statutory cross-reference in Civil Code Section 730.05 to Probate Code Section 1035(e) (QTIP trusts). The staff does not see the need for this revision, but would welcome more explanatory material from the State Bar.

The staff recommends against making the technical drafting changes suggested in points 7, 13, 14, and 15.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

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January 6, 1984

John H. DeMouilly
California Law Revision Commission
4000 Middlefield Road
Palo Alto, California 94306

Re: AB 25 - Technical Corrections

Dear John:

Members of the Executive Committee of the Estate Planning, Trust and Probate Law Section, State Bar of California, were requested to review AB 25 for technical corrections. We hope they will be of assistance to you and the Commission.

Our comments are as follows:

1. Division 1, Part 1, Preliminary Provisions, Section 3, refers to certain parts which will apply only where the decedent died on or after January 1, 1985. Part 6, dealing with division by representation, (Section 240) is not mentioned in Section 3. Therefore, it is unclear whether the new definition of division by representation would be applicable to decedents dying before January 1, 1985. Any such result would seem inappropriate. Although Section 58 of the Bill states that the Bill becomes operative January 1, 1985, Section 3 perhaps should be amended to include a reference to Part 6.

2. Section 140 and subsequent deal with contractual arrangements relating to rights at death. A common practice is to prepare a will in which the surviving spouse is put to an election to have his or her share of the community property or quasi-community property administered under the will of the first spouse to die. The other spouse often signs an election at that time to submit his or her half of

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the community or quasi-community property to administration under the will of the first spouse to die. It is not intended to be a final election, and is not really a written agreement. Perhaps the comment should state that these sections do not apply to such an election.

3. Sections 200, et seq., dealing with effects of homicide, presumably raise no questions of double jeopardy in that the criminal proceeding deals with the person's rights or freedom, not with property rights. However, perhaps some research should be done on this if it has not been done in the past.

4. Section 240 redefining division by representation is a source of great concern. The existing Probate Code does not define right of representation with reference to a will. Most of us who draft Wills have for many years included language providing for division of property by right of representation. We have understood that to mean division at the first generation, not at the first living generation. A number of members of the Executive Committee were very troubled by this provision relating to wills as it fundamentally changes language which has been drafted into wills for many years. It may necessitate contacting clients and asking if Codicils should be prepared to redefine right of representation in accordance with the common law meaning rather than this new statutory definition. It is also a problem if property is left under an inter vivos trust which refers to right of representation. Is that under the old definition or the new definition? The Commission is requested to reexamine this area and perhaps delete the reference to a will in Section 240.

5. One of our members questioned whether Sections 146 and 147 should be in the Probate Code or in the Civil Code.

6. In connection with those sections dealing with contractual arrangements relating to rights at death, one of our members suggested that the phrase "execution of the waiver" be modified to refer to "signing of the waiver" for clarification. This would affect Sections 143(a), 144(a)(1), 146(c)(1), 146(c)(2) and 146(d).

7. In Section 300, second line, the word "person" should perhaps be "persons".

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8. In Section 323, the phrase near the end should, we believe, read "whether or not the will is in the petitioner's possess[i]on."

9. We would suggest that the first sentence of Section 641 be modified to read as follows: "A petition alleging that this article is applicable and praying that the estate be set aside may be presented without filing a petition for probate of the will or for letters of administration, by the person named in the will as Executor or the surviving spouse or the guardian of the minor child or children of the decedent."

10. Former Sections 202-205 have been renumbered as Section 649.1 through 649.5. We hope that this numbering will remain when Division III is revised or reviewed. These sections are often referred to in printed affidavits relating to community property. To renumber them again in a year or two would cause considerable confusion.

11. We believe the introductory language in Section 736 could be clarified by wording that introductory language as follows: "When a testator devises real property subject to a mortgage, deed of trust or other lien and the will provides that such mortgage, deed of trust or other lien shall be exonerated . . ."

12. Section 103, subparagraphs (a) and (b), both talk about property being "administered upon". The word "upon" could be deleted for clarification.

13. Section 120 might be clarified after the word "interest", by adding the words "whether absolute or qualified" to make it clear that a legal life estate might be encompassed.

14. Section 141(a)(4) should be cross-referenced to Section 6510 if appropriate.

15. In Section 6110(c) the phrase "the signature or of the will" should be modified by deleting the word "or".

16. Section 63 of the Civil Code as amended might be further amended to make specific reference to execution of powers of attorney, including durable powers of attorney, and living wills, that is, directives to physicians.

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17. Section 730.5 of the Civil Code should perhaps be cross-referenced to Probate Code 1035(e) which provides that income at date of death of a spouse in a QTIP trust must pass to his or her estate and not to the next beneficiary.

18. Section 4352 relating to dissolution of marriage no longer refers to a final judgment. Is an interlocutory decree sufficient therefore to eliminate the provisions for the spouse? In many cases the final decree is never picked up and the parties reconcile. Further, we believe that the provisions of Section 6122 should only apply to dissolutions which become final on or after January 1, 1985. A further concern is the possible difference between the use of a will and the use of an inter vivos trust. Section 4352 would revoke provisions for a former spouse only by will. It would not affect such provisions in an inter vivos trust. Section 6122 also only refers to a will revoking provisions for a spouse. Some consideration should be given to all types of testamentary transfers to a spouse, not just limited to a will.

19. The amendment to Penal Code Section 3524 should perhaps refer in paragraph C to foster children as heirs to be consistent with CCP Section 377. Perhaps a test of support should also be inserted as in CCP Section 377(b)(3).

20. A section should be inserted stating that references in existing documents to Probate Code sections shall be deemed to refer to the new, renumbered sections of AB 25.

21. Are any of the provisions of AB 25 procedural in nature, so as to apply to existing estates as of January 1, 1985, rather than only to estates of persons dying on or after February 1, 1985? Clarification may be needed.

The above are the extent of our technical comments to date. We may have some additional ones on the latter portions of AB 25. Those are not available to me at this time as yet.

Sincerely,



Charles A. Collier, Jr.

CAC:vjd
cc: H. Neal Wells
Ken Klug
Ted Cranston

EXHIBIT 2

Sections to Go in Assembly Bill 2290

10912

Probate Code § 140 (technical amendment). "Waiver" defined

SEC. _____. Section 140 of the Probate Code is amended to read:

140. As used in this chapter, "waiver" means a waiver by the surviving spouse of any of the rights listed in subdivision (a) of Section 141, whether ~~executed~~ signed before or during marriage.

Comment. Section 140 is amended to change the word "executed" to "signed" for clarity. This change is nonsubstantive.

10916

Probate Code § 143 (technical amendment). Waiver enforceable as of right

SEC. _____. Section 143 of the Probate Code is amended to read:

143. A waiver that complies with Section 142 is enforceable unless the court determines either of the following:

(a) A fair and reasonable disclosure of the property of the decedent was not provided to the surviving spouse prior to the ~~execution~~ signing of the waiver unless the surviving spouse waived such a fair and reasonable disclosure after advice by independent legal counsel.

(b) The surviving spouse was not represented by independent legal counsel at the time of ~~execution~~ signing of the waiver.

Comment. Section 143 is amended to change the words "execution" to "signing" for clarity. This change is nonsubstantive.

27932

Probate Code § 144 (technical amendment). Waiver enforceable in discretion of court

SEC. _____. Section 144 of the Probate Code is amended to read:

144. (a) Except as provided in subdivision (b), a waiver that complies with Section 142 but is not enforceable under Section 143 is enforceable if the court determines either of the following:

(1) The waiver at the time of ~~execution~~ signing made a fair and reasonable disposition of the rights of the surviving spouse and the surviving spouse understood the effect of and voluntarily ~~executed~~ signed the waiver.

(2) The surviving spouse had, or reasonably should have had, an adequate knowledge of the property of the decedent and understood the effect of and voluntarily ~~executed~~ signed the waiver.

(b) If, after considering all relevant facts and circumstances, the court finds that enforcement of the waiver pursuant to subdivision (a) would be unconscionable under the existing facts and circumstances, the court may refuse to enforce the waiver, enforce the remainder of the waiver without the unconscionable provisions, or limit the application of the unconscionable provisions to avoid an unconscionable result.

Comment. Section 144 is amended to change the words "execution" and "executed" to "signing" and "signed" for clarity. This change is nonsubstantive.

28025

Probate Code Section 146 (technical amendment). Alteration or revocation of waiver

SEC. _____. Section 146 of the Probate Code is amended to read:

146. (a) As used in this section, "agreement" means a written agreement signed by each spouse or prospective spouse altering, amending, or revoking a waiver under this chapter.

(b) Unless the waiver specifically otherwise provides, a waiver under this chapter may not be altered, amended, or revoked except by a subsequent written agreement signed by each spouse or prospective spouse.

(c) An agreement is enforceable against a party to the agreement unless the court determines either of the following:

(1) A fair and reasonable disclosure of the property of the other spouse was not provided to the spouse against whom enforcement is sought prior to the ~~execution~~ signing of the agreement unless the spouse against whom enforcement is sought waived such a fair and reasonable 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~~ signing of the agreement.

(d) Except as provided in subdivision (e), an agreement that is not enforceable under subdivision (c) is enforceable if the court determines that the agreement at the time of ~~execution~~ signing made a fair and reasonable disposition of the rights of the spouses and the spouse against whom the agreement is sought to be enforced understood the effect of and voluntarily ~~executed~~ signed the agreement.

(e) If, after considering all relevant facts and circumstances, the court finds that enforcement of the agreement pursuant to subdivision (d) would be unconscionable under the existing facts and circumstances, the court may refuse to enforce the agreement, enforce the remainder of the agreement without the unconscionable provisions, or limit the application of the unconscionable provisions to avoid an unconscionable result.

Comment. Section 146 is amended to change the words "execution" and "executed" to "signing" and "signed" for clarity. This change is nonsubstantive.

28456

Probate Code § 736 (technical amendment). No sale of specifically devised property to exonerate other encumbered property

SEC. ____ . Section 736 of the Probate Code is amended to read:

736. When a testator devises real property subject to a mortgage, deed of trust or other lien, and ~~notwithstanding Section 6170 the real property passes with a right of exoneration in accord with an intention indicated by the will, the will provides that such mortgage, deed of trust or other lien shall be exonerated,~~ other property specifically devised or bequeathed shall not be sold for the purpose of exonerating the encumbered property, unless a contrary intention that the other property be sold is indicated by the will.

Comment. Section 736 is amended to make nonsubstantive drafting improvements.

EXHIBIT 3

Amendments to Section Contained in Assembly Bill 2288

28734

Probate Code § 103 (technical amendment). Effect on community and quasi-community property where married persons die simultaneously

SEC. _____. Section 103 of the Probate Code is amended to read:

103. Except as provided by Section 224, if a husband and wife die leaving community or quasi-community property and it cannot be established by clear and convincing evidence that one spouse survived the other by 120 hours:

(a) One-half of the community property and one-half of the quasi-community property shall be administered ~~upon~~ or distributed, or otherwise dealt with, as if one spouse had survived and as if that half belonged to that spouse.

(b) The other half of the community property and the other half of the quasi-community property shall be administered ~~upon~~ or distributed, or otherwise dealt with, as if the other spouse had survived and as if that half belonged to that spouse.