#L-626 04/17/84

Memorandum 84-39

Subject: Study L-626 - Wills and Intestate Succession

Assembly Bill 2290 has been introduced as a cleanup bill to make any technical or substantive revisions in Chapter 842 of the Statutes of 1983 (AB 25) (comprehensive revision of wills and intestate succession law). Assembly Bill 2290 will become operative on January 1, 1985, at the same time when AB 25 becomes operative. A copy of the latest amended version of Assembly Bill 2290 is attached. Also attached is a copy of Assembly Bill 25.

This memorandum reviews comments contained in two letters from the Estate Planning, Trust and Probate Law Section concerning Assembly Bill 2290. The Board of Governors of the Lawyers' Club of San Francisco adopted a resolution urging the deferal of the operative date of Assembly Bill 25; the reasons given for the adoption of this resolution are reviewed in this memorandum. Finally, the staff recommended provisions to improve the statutory provisions governing the waiver of a surviving spouse of rights upon death of the other spouse are attached as Exhibit 4.

Assembly Bill 2290 is scheduled for hearing by the Assembly Judiciary Committee on April 30. There will not be time to prepare amendments to the bill before the hearing and we cannot defer the hearing because May 11 is the last day for policy committees to report Assembly bills. Any amendments that need to be made to the bill can be made before it is set for hearing in the Senate. Most of the provisions of Assembly Bill 2290 make highly technical revisions in Assembly Bill 25. Attached as Exhibit 5 is an outline of the more significant revisions and an explanation of each section of the bill. You may want to read this for background, but that is not essential because this memorandum points up the matters that require consideration by the Commission.

REVISION OF THE WAIVER PROVISIONS OF ASSEMBLY BILL 25

Attached as Exhibit 4 are revisions of Probate Code Sections 140-147 (surviving spouse's waiver of rights). These provisions govern the waiver of a surviving spouse to any of the following:

(1) Property that would pass from the decedent by intestate succession.

(2) Property that would pass from the decedent by testamentary disposition in a will executed before the waiver.

(3) A probate homestead.

(4) The right to have exempt property set aside.

(5) Family allowance.

(6) The right to have an estate set aside under Article 2 (commencing with Section 640) of Chapter 10 of Division 3.

(7) The right to elect to take community or quasi-community property against the decedent's will.

(8) The right to take the statutory share of an omitted spouse.

(9) The right to be appointed as executor or administrator of the decedent's estate.

The revision of the waiver provisions is designed to make clear that normal defenses to enforcement of a contract apply (except for lack of consideration and lack of capacity of minor who later marries). The revision also makes clear the effect of the confidential relationship between the spouses on the enforcement of the waiver. Finally, the revision adds a new provision that the rights may be waived by a valid premarital agreement and that the validity of such an agreement is governed by the law otherwise applicable. This latter provision is included because the Commission asked the staff to distribute the Uniform Premarital Agreement Act (in the form of a statute drafted for California with conforming revisions) to interested persons for review and comment. We will be reviewing the comments received on the Uniform Premarital Agreement Act at a subsequent meeting, but we need to make the necessary technical and clarifying revisions in the AB 25 waiver provisions before those provisions become operative on January 1, 1985. If the revisions attached as Exhibit 4 are approved as proposed by the staff or with revisions, we will incorporate them into AB 2290 before the bill is heard in the Senate.

COMMENTS OF STATE BAR ESATE PLANNING, TRUST AND PROBATE LAW SECTION

We have received two letters from the Estate Planning, Trust and Probate Law Section concerning Assembly Bill 2290. One letter, dated March 16, 1984, forwards the comments of various members of the Executive Committee of the Section (letter attached as Exhibit 1 and hereinafter referred to as "State Bar letter"). A second letter, dated March 29, 1984, forwards comments of the Executive Committee of the Section (letter attached as Exhibit 2 and hereinafter referred to as "Supplemental State

Bar letter"). For the most part, the letters approve the provisions of Assembly 2290 in its latest amended form. The staff notes below only the questions raised by these letters concerning Assembly Bill 2290 and the objections made in the letters to provisions of Assembly Bill 2290. With the exception of these questions and objections, the letters approve the provisions of Assembly Bill 2290 in its latest amended form.

Civil Code § 226.12 (amended)

The State Bar letter comments:

> 1. Section 1, which amends Section 226.12 of the Civil Code, refers to the natural parent and the child having "lived together at any time". This would appear to place the burden on the child to show that the natural parent and child lived together as parent and child at any time. This may result in some litigation. Perhaps some further clarification is appropriate.

The statement in Section 226.12 is a notice to a natural parent who relinquishes a child for adoption. The notice is an accurate statement of the applicable law. See Prob. Code § 6408(a)(3), which provides:

> 6408. (a) If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person:
>
> (1) Except as provided in paragraph (3), the relationship of parent and child exists between a person and his or her natural parents, regardless of the marital statutes of the natural parents.
>
> (2) The relationship of parent and child exists between an adopted person and his or her adopting parent or parents. The relationship between a person and his or her foster parent, and between a person and his or her stepparent, has the same effect as if it were an adoptive relationship if (i) the relationship began during the person's minority and continued throughout the parties' joint lifetimes and (ii) it is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier.
>
> (3) The relationship of parent and child does not exist between an adopted person and his or her natural parent unless (i) the natural parent and adopted person lived together at any time as parent and child and (ii) the adoption was by the spouse of either of the natural parents of the adopted person or after the death of either of the natural parents.
>
> (b) For the purposes of intestate succession:
>
> (1) A parent and child relationship is established where that relationship is presumed and not rebutted pursuant to the Uniform Parentage Act, Part 7 (commencing with Section 7000) of Division 4 of the Civil Code.
>
> (2) A parent and child relationship may be established pursuant to any other provisions of the Uniform Parentage Act, except that the relationship may not be established for the purposes of intestate succession by an action under subdivision (c) of Section 7006 of the Civil Code unless either (i) a court order was entered during the father's lifetime declaring paternity or (ii) paternity is established by clear and convincing evidence that the father has openly and notoriously held out the child as his own.

Assembly Bill 25 changed prior law under former Probate Code Section 257 which provided in part that "An adopted child does not succeed to the estate of a natural parent when the relationship between them has been severed by adoption" and "nor does such adopted child succeed to the estate of a relative of the natural parent." The rule under former Probate Code Section 257 produced unjust results in several types of cases where there is a stepparent adoption:

> Fact Situation. A married couple have several children, one of whom is a minor. The marriage is dissolved and the wife is awarded custody of the children. The wife remarries and the new husband agrees to adopt the minor child. The former husband consents.
>
> Case 1. The former husband dies intestate. Result under former law: Minor adopted child takes nothing; unadopted adult children take as children. Result under AB 25: Adopted minor child takes same share as unadopted adult children.
>
> Case 2. The former husband dies and then the former husband's mother dies (the former husband's father having previously died). There is no will and the grandmother has no closer relatives than the grandchildren. Result under former law: Minor adopted child takes nothing; adult unadopted children take as grandchildren. Result under AB 25: All children, including adopted child, take as grandchildren.

At the same time it was not considered desirable to provide that the adopted child takes as an heir of the natural father in a case where the child is born out of wedlock and the natural father, who never lived with the woman and child, consents to the adoption of the child by the husband of the mother by a subsequent marriage.

The language of Section 6408 was written so as to distinguish between the two types of situations. In the great majority of stepparent adoptions, there will be no issue whether the "natural parent and adopted person lived together at any time as parent and child." In the rare case where it is unclear, the court will have to make its determination on the basis of the facts shown in the particular case.

The staff believes that the policy expressed in subdivision (a)(3) of Section 6408 is sound public policy. We do not think that there will be many cases where the language of the section will present a problem. And we are unable to suggest any better language to accomplish the purpose of the provision.

Prob. Code § 3 (amended)

The State Bar letter comments:

> 2. Section 1.5 appears to clarify the law so as to make it clear that AB 25 (Chapter 842) is in all respects prospective in application. We have been concerned that if, for example, the definition of right of representation applied to existing Wills

where the person died after January 1, 1985, a review and possible revisions of Wills would be necessary. We have also been concerned as to the effect of the vesting provisions, anti-lapse statute, etc., as they might apply to existing documents. Is it the intent that Chapter 842 would only apply to persons dying on or after January 1, 1985, and only to documents executed or amended after that date?

Section 3 is amended to make clear that AB 25 (Chapter 842) does not apply to any case where the decedent died before January 1, 1985. The State Bar misconstrues the amendment to make the new law apply only to documents executed or amended after January 1, 1985. The general provision added by amendment to Section 3 does not have this effect. If a will is made before January 1, 1985, but the decedent dies on or after January 1, 1985, the new law applies. This does not mean, however, that a particular provision will apply because some provisions by their terms are limited in their application. For example, the provision relating to the effect of a marriage dissolution on a devise applies without regard to when the will was executed but applies only if the marriage dissolution becomes final on or after January 1, 1985. Thus, even where the will was executed before January 1, 1985, a marriage dissolution that becomes final after January 1, 1985, will revoke the disposition to the former spouse unless the will otherwise provides. AB 2290 amends Probate Code Section 150 to make the new restrictions on contracts to make a will apply only to contracts made after December 31, 1984. On the other hand, if the decedent dies on or after January 1, 1985, it will not be necessary to prove that a lost will was in the testator's possession at the time of a death, even though the will was made before January 1, 1985. Also the broader anti-lapse provision will apply if a decedent dies on or after January 1, 1985, even though the will was executed before that date.

We have made a number of revisions in AB 25 by amendments proposed in AB 2290 that are designed to avoid the need to review existing wills and other instruments when AB 25 becomes operative. With these revisions, we do not believe that there are any provisions of Assembly Bill 25 that should not apply to documents executed before January 1, 1985. If there are any provisions of AB 25 that the State Bar Section believes should not apply where the decedent dies on or after January 1, 1985, those provisions should be identified and suggestions made as to how the situations should be treated. It is important to note that as a general rule the provisions do not apply where the will has a contrary provision. For example, if the will deals with the anti-lapse situation, the provision

of the will will govern. The anti-lapse provision applies only where the will is silent on the matter, the testator having failed to express his or her intent. Likewise, where a decedent dies on or after January 1, 1985, the failure to mention a grandchild in his or her will does not give the grandchild any right as an omitted child, without regard to when the will was executed. Likewise, a parent of the decedent who was actually dependent in whole or in part upon the decedent for support will be eligible for family support (in the discretion of the court) without regard to when the decedent's will was executed.

The State Bar letter refers to several instances of provisions that should not apply to existing documents: (1) definition of representation (this has been amended so that it does not apply to existing wills that provide for distribution per stirpes or by representation), vesting provisions (these have been deleted by amendments made by AB 2290), and the anti-lapse statute (discussed above--the new provision applying only where the will does not deal with the matter).

Adoption of the suggestion that AB 25 not apply in any case where a document was executed before January 1, 1985, would require that two bodies of law continue in existence for many years until all existing documents were no longer of any effect. One body would apply to documents executed before January 1, 1985, and another body of law would apply to documents executed on or after January 1, 1985. There would be a difficult construction problem which provisions (like expanded family allowance) apply even though the decedent's will was executed before January 1, 1985. If a defect is discovered in preexisting law, it would be necessary to find a way to amend repealed sections. Lawyers would have to determine when a document was executed and then find and apply the law applicable. For many years it would be necessary to publish both the repealed law and the new law, and lawyers would face the task of determining which law applied to a particular situation where a document was executed before January 1, 1985. It seems clear to the staff that the best solution to this problem is not to create this impossible situation, but instead we should make clear those provisions, if any, that we do not desire to apply where a will was made before January 1, 1985.

Prob. Code § 240 (amended)

The State Bar letter comments:

> 3. Section 4, dealing with Section 240, still causes concern. We think the addition of the reference to trusts is appropriate. We assume that, if a Will or trust, for example, provides that property is left to descendants by right of representation or per

stirpes, the existing law would apply and that Section 240, as amended, would not be applicable. Our members had some concern that the language at the end of Section 240, namely "being divided in the same manner among his or her then living issue", is ambiguous. Is it possible that certain grandchildren or great-grandchildren would be omitted from the testator's plan by application of this section?

The State Bar letter is correct in its assumption that, prior law (not Section 240) would apply if a will leaves property to descendants by right of representation or per stirpes.

The State Bar letter suggests that there is some ambiguity concerning the meaning of the language at the end of Section 240. This suggestion may be directed to the section prior to its amendment which deleted the language that made the section applicable when the will provided for distribution per stirpes or by right of representation. Otherwise, we see no ambiguity in the section. In any case, the language used follows closely the language used in the comparable provision applicable to a California statutory will under subdivision (i) of former Section 56, which reads:

> (i) Whenever a distribution under a California statutory will is to be made to a person's descendants, the property is to be divided into as many equal shares as there are then living descendants of the nearest degree of living descendants and deceased descendants of that same degree who leave descendants then living; and each living descendant of the nearest degree shall receive one share and the share of each deceased descendant of that same degree shall be divided among his or her descendants in the same manner.

In addition, this portion of the language of Section 240 is drawn from Section 2-106 of the Uniform Probate Code, a provision that has been the subject of a number of law review articles that explain the system under Section 240 in great detail. The articles do not question the meaning of Section 240, but instead suggest that the section might go further in adopting a per capita approach.

The Supplemental State Bar letter suggests a clarification in Section 240:

> 1. Reference is made to Section 240 at Page 9 of the Bill. While we believe the language is reasonably clear that representation as defined therein would not apply to a Will or trust if that document left property to issue or descendants by right of representation, perhaps this could be clarified by further language to the effect that a reference in a Will or trust to division by right of representation or per stirpes shall not be affected by the definition of representation as set forth in this section.
>
> The Executive Committee was concerned that the introductory clause "if representation is called for by this Code" creates some ambiguity since documents are read in the context of the Probate Code. Therefore, this additional language would clarify that point.

To make the clarification suggested by the Supplemental State Bar letter, the staff plans to suggest that Assembly Member McAlister amend Assembly Bill 2290 before the April 30 hearing to insert, on page 9, line 23, after the period, the following: "This section does not apply where a will or trust provides for division per stirpes or by representation."

Prob. Code § 282 (amended)

The State Bar letter refers to a defect which exists in Section 282, a defect that has already been corrected in AB 2290. For a letter that explains the defect in more detail, see Exhibit 3 (attached).

The Supplemental State Bar letter notes that the reference to Section 241 in line 17 on page 10 is no longer appropriate since that section will not be added by Assembly Bill 2290. This is correct. However, the staff suggests that an appropriate substitution should be made for the references in line 17 on page 10. First, it should be recognized that the Commission plans to draft and recommend various alternative distribution schemes that can be adopted by reference by a person drafting a will or trust (See Memorandum 84-46). We will compile these optional distribution schemes in Part 6 (commencing with Section 240). In addition, the provision set out on lines 13 to 17 on page 10 should, the staff believes, apply where a provision of a will or trust provides for a distribution scheme so that the rights of other beneficiaries under the will or trust cannot be decreased by a disclaimer. Accordingly, we plan to recommend that Assembly Member McAlister amend Assembly Bill 2290 before the April 30 hearing to substitute the following for "Section 240 or 241" on page 10, line 17, of the bill: "Part 6 (commencing with Section 240) or other provision of a will or trust."

Prob. Code § 665 (added)

The State Bar letter comments:

> Section 7.5, which adds Section 665 to the Probate Code, appears appropriate. Query: Should there not be a general statement rather than this rather narrow statement to the effect that any references in a written instrument, including a Will or trust, to provisions of the Probate Code which have been renumbered as the result of AB 25 shall refer to the corresponding sections?

The Supplemental State Bar letter makes the same point:

> 4. Sections 649.6 and 665 (Page 11) are specific references to the comparable provisions of the former Code. We feel that 649.6 is appropriate because of the reference to a specific section. However, is it not more appropriate to have some more general

language in place of Section 665 that a reference in a written instrument, including a Will or trust to provisions of former Divisions I through IIb, shall be deemed to refer to the corresponding provisions of Chapter 842?

Any reference in an existing document to a specific statutory section or sections will continue after January 1, 1985, to be a reference to that section. If there are other specific references commonly used in wills or other documents in addition to those listed in new Sections 649.6 and 665 (both added to the Probate Code by AB 2290), we can add an additional provision to provide that a reference to the repealed provision is deemed to be a reference to the new provision if that is considered to be appropriate. The problem the State Bar letter identifies here would be much more severe if a provision were included in AB 2290 that made none of the provisions of AB 25 applicable to documents executed before January 1, 1985. We could include a provision that would provide in substance that, unless the existing document indicated a contrary intent, a reference to the provisions repealed by AB 25 shall be deemed to be a reference to the corresponding new provision.

Prob. Code § 736 (amended)

The State Bar letter comments:

> 7. Section 7.7, as amended, adds language that "the mortgage, deed of trust or other lien is to be exonerated in accordance with the testator's intent". We believe this should perhaps be made more specific to reduce the possibility of litigation over intent. Perhaps it should be modified to refer to the "testator's express" or to the "testator's stated" intent. The purpose would be to provide that there would be no exoneration unless there was a specific provision in the Will or trust providing for exoneration.

The language referred to is consistent with the substantive provisions that govern exoneration. See Probate Code Sections 6165 and 6170, which read:

> 6165. The rules of construction in this article apply in the absence of a contrary intention of the testator.
>
> 6170. A specific devise passes the property devised subject to any mortgage, deed of trust, or other lien existing at the date of death, without right of exoneration, regardless of a general directive in the will to pay debts.

By way of contrast, the Uniform Probate Code provides in Section 2-603:

> 2-603. The intention of a testator as expressed in his will controls the legal effect of his dispositions. The rules of construction expressed in the succeeding sections of this part apply unless a contrary intention is indicated by the will.

The non-exoneration provision of the UPC is one of the succeeding rules of construction.

At one time, the Commission's draft included the UPC provision. However, as enacted, various provisions of AB 25 do not restrict the "contrary intention" to one indicated by the will. The provisions of AB 25 are drawn from former Probate Code Sections 100 and 101. Section 100 provided:

> 100. The interpretation of wills, wherever made, is governed, when relating to property within this state, by the law of this state, and the rules prescribed by this code are to be observed, unless an intention to the contrary clearly appears.

Section 101 provided in part:

> A will is to be construed according to the intention of the testator.

Former Probate Code Sections 100 and 101 did not specifically restrict the contrary intention to one disclosed by the will. However, the court decisions interpreting the meaning of these sections have applied the rule that the intention to be determined is that which is expressed in the language of the will. 7 Witkin, Summary of California Law Wills and Probate § 159 at page 5675 (8th ed. 1974). "When a study of the language of the will, in light of the surrounding circumstances (see infra, § 160), and aided by any other extrinsic evidence which may be admissible, fails to disclose a sufficiently clear intention, the process of interpretation of the instrument comes to an end, and certain legal presumptions or rules of construction are employed. These are based upon experience or policy, and are controlling only in the absence of intention appearing from the will." Witkin supra. In addition there are a number of situations where oral declarations of the testator are admissible. See Witkin supra § 161 (instructions to attorney, aid to interpretation of uncertain or imperfect description, where indicate testamentary or nontestamentary character of the instrument).

AB 25 retains in Section 6140 and in Sections 6142, 6143, 6144, and 6165 language somewhat comparable to that found in former Sections 100 and 101.

The staff recommends the following:

(1) The following should be substituted for Section 6140:

> 6140. (a) The intention of the testator as expressed in the will controls the legal effect of the dispositions made in the will.
>
> (b) The rules of construction expressed in this article apply unless a contrary intention is indicated by the will.

(2) The phrase "unless a contrary intention is indicated by the will" should be substituted for the comparable phrases in Sections 6142, 6143, 6144, and 6165 that do not include "in the will."

(3) The official comment should indicate that the language used in Section 6140 and comparable language used in other sections does not affect the rules of existing law that permit the use of extrinsic evidence to determine the intention that is expressed in the language of the will.

The revision suggested above would be consistent with the suggestion made in the State Bar letter, would more accurately state prior law, and would be consistent with the Uniform Probate Code.

Prob. Code § 6112 (amended)

The State Bar letter points out possible significant defect in this section. If the interested witness fails to rebut the presumption created by the section, should the witness be entitled to an intestate share? This would retain existing law under former Probate Code Section 51. The staff suggests that the Commission consider adding the following additional subdivision to Section 6112 of Probate Code:

> (c) If a devise to an interested witness fails because the presumption established by subdivision (b) applies to the devise and the witness fails to rebut the presumption, if the interested witness would be entitled to any share of the estate of the testator under the law relating to intestate succession if there were no will, the interested witness shall take such proportion of the devise made to the witness in the will as does not exceed the share of the estate which would be distributed to the witness under the law relating to intestate succession if there were no will. Nothing in this subdivision affects the law that applies where it is established that the witness procured a devise by duress, menace, fraud, or undue influence.

Prob. Code § 6152 (amended)

The Supplemental State Bar letter comments:

> 7. Section 6152 at Page 13, which includes stepchildren and foster children in terms of a class gift, is opposed by the Executive Committee as we had previously advised. We feel this broadened definition will necessitate reviews of existing estate plans and redefinition of descendants or issue. We are also concerned that there will be litigation over what constitutes a foster child or stepchild who could have been adopted except for legal impediments, etc. It is our understanding that no other states have included stepchildren and foster children in the definition of a class gift. We hope that the Commission will reconsider its decision on this particular point.

The amendment to Section 6152 to add stepchildren and foster children to class gifts is a technical amendment to conform to the rules set out in subdivision (a) of Section 6408 which provides in very limited circumstances that a foster child or stepchild is to be treated the same as an adopted child. See Section 6408(a)(2) (set out supra under discussion of Civil Code § 226.12) (child treated as adopted child only "if (1) the relationship began during the person's minority and continued throughout the parties' joint lifetimes and (2) it is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier." So long as Section 6408 remains unchanged, the technical amendment to Section 6152 is necessary.

The Supplemental State Bar letter raises the policy issue whether the rule of 6408(a)(2) is a sound rule. This rule is one that was given specific attention by the legislation committees that considered Assembly Bill 25 and was approved by the committees. The Supplemental State Bar letter raises a policy issue that the staff considers already has been resolved by the Legislature in Assembly Bill 25, and we do not see that a case is made by in the letter for a change in the rule which requires "clear and convincing evidence."

Prob. Code § 6152(b)

The State Bar letter finds subdivision (b) of Section 6152 to be rather difficult to understand as worded and suggests that it might be reworded for clarification.

Subdivision (b) consists of two sentences. The first sentence reads:

> In construing a devise by a testator who is not the natural parent, a person born to the natural parent shall not be considered a child of that parent unless the person lived while a minor as a regular member of the household of the natural parent or of that parent's parent, brother, sister, or surviving spouse.

The introductory clause makes clear that this rule does not apply where the devisee is a child of the testator. One effect of the first sentence is to limit application of the anti-lapse rule. Where a devise is to a person who is kindred of the testator or kindred of a surviving, deceased, or former spouse of the testator, if the devisee predeceases the testator, a child of the devisee will take only if the child "lived while a minor as a regular member of the household of the natural parent or of that parent's parent, brother, sister, or surviving spouse." The effect of the provision is to cut out (1) the child who was given out for adoption

upon birth and (2) the child of a natural father where the child was never a member of the father's household or the household of a close relative of the father. In these cases, the anti-lapse statute would not apply to give the child the devise to the predeceased natural parent. This would appear to reflect the intent of the average testator who makes a specific devise and fails to cover the possibility of the death of the devisee before the testator.

The rule also applies to a class gift to the children of another person. The children to be members of the class must satisfy the requirement of the rule. (The rule does not apply where the class gift is to children of the testator because of the introductory clause of the rule.)

The staff believes the rule stated is sound and we have no revisions to suggest in the rule even though the rule is not a simple one to understand as stated in the statute.

The second sentence of subdivision (b) is a comparable provision relating to a person adopted by a person other than the testator. The effect of the provision is the preclude an adult adoption to qualify a person as a child of the adopting person for the purpose of taking a devise. The sentence provides that "a person adopted by the adoptive parent shall not be considered the child of that parent unless the person lived while a minor (either before or after the adoption) as a regular member of the household of the adopting parent or of that parent's parent, brother, sister, or surviving spouse." The staff is unable to suggest any simplification of the language of the provision.

Prob. Code § 6147 (amended)

The State Bar letter states:

> 21. One of our members has raised concern about the anti-lapse statute, Section 6147, applying to a "former spouse". This is a question of policy. Clearly the anti-lapse statute should provide for the kindred of a surviving or deceased spouse, but where there is a divorce or dissolution it seems questionable whether the anti-lapse statute should apply.

Section 6147 would allow the issue of a stepchild to take if a devise is made to a stepchild and the stepchild predeceased the testator leaving issue. This rule would appear to be one that is consistent with the intent of the testator who makes a devise to a stepchild. Often a testator will be very close to the issue of a stepchild and a dissolution of marriage will not destroy that closeness, especially where the testator has made a devise to the stepchild in the testator's will. The staff

believes that Section 6147 reflects sound policy. The section does NOT apply to a "former spouse," it applies only to a predeceased devisee who is "kindred of a ... former spouse" which would include, for example, a brother-in-law or sister-in-law or a step-child.

Section 59 added to Chapter 842 of the Statutes of 1983

Section 21 of Assembly Bill 2290 (page 20 of bill) adds a provision to the 1983 wills and intestate succession statute that makes clear that a lawyer has no duty to contact a client to have a will or trust reviewed in light of the 1983 statute and is not liable if the lawyer does not inform the client of the enactment of the 1983 statute and suggest that the will or trust be reviewed. This provision was added because it was concluded that it would be undesirable as a matter of public policy to require clients to pay a fee to have their wills or trusts reviewed in light of the enactment of the 1983 statute because a lawyer, out of an abudance of caution, suggested that the will or trust be reviewed.

Concerning this new provision, the Supplemental State Bar letter comments:

> 12. We oppose new Section 59, added by the amendment of March 12. We believe that no exception can be made for Chapter 842 in terms of the duty of a lawyer to advise his clients of changes in the law. Obviously, there are a great many changes every year in the law, and the lawyer must consider which changes, if any, should be reviewed with clients. This immunity for a particular statute seems inappropriate, contrary to the best interests of the public and, we believe, contrary to the best interests of the Bar. The Executive Committee unanimously supported the view that this section should be deleted from the Bill.

The staff plans to recommend to Assembly Member McAlister that Section 21 of Assembly Bill 2290 be deleted by amendment made before the April 30 hearing.

Application to trusts of rules of interpretation of wills

The Supplemental State Bar letter raises the general question of whether the various rules for interpretation of wills should apply as well to trusts. This is a problem that is the subject of a study being made by Professor French for the Law Revision Commission. In addition, the Commission is now engaged in a study of the law relating to trusts, and this study is the next phrase of the probate law study that is scheduled for completion and a recommendation to the Legislature. The staff recommends that this question be deferred for the time being until we have received Professor French's study.

Numbering system for new Probate Code provisions

The Supplemental State Bar letter makes the following comments concerning the numbering of sections under Assembly Bill 25 and the Commission's division of the major portions of the Probate Code into separate projects:

> 14. The Executive Committee is strongly opposed to the general renumbering of sections that has occurred pursuant to AB 25. We are not aware of what the Commission's view is as to the ultimate numbering system for probate administration. However, unless there are significant changes in the number of sections, it would appear that existing Sections 300 through 1313 could essentially be retained for numbering purposes as the Commission works on probate administration. Numbering of the requirements as to intestate succession, for example, in the 6000 series seems unnecessary. Based upon a count of sections proposed by the Law Revision Commission when AB 25 was first introduced, there were approximately 240 sections in the material covered by AB 25, and there were obviously up to 300 sections, based upon the old numbering system, available to cover these new provisions. The confusion that has resulted from the new numbering system is unjustified. For example, the new edition of Parker's Probate Code of California is extremely difficult to follow because of all of the renumbering and inclusion of provisions which are operative now and those which will be operative on January 1, 1985. If there is further piecemeal amendment of the Probate Code in the next several years, this issue will be compounded. The Executive Committee urges the Commission to seek to revise the Probate Code within the existing framework of the numbering system.
>
> 15. A number of practitioners, as well as members of the Executive Committee, have expressed great concern about the amendment to the Probate Code over a series of years, as evidenced by AB 25, amending the first portions of the Code. It is difficult for practitioners to deal with a code which is being amended piecemeal. For example, in connection with the conservatorship and guardianship laws, the entire revised law was submitted as a single package and became operative at one time. A similar comprehensive package with a single effective date would be much easier for practitioners to deal with and understand. It would also be much easier for those companies which print the Probate Code, the agency which prints Judicial Council forms, etc., all of which would require revision and renumbering. The Commission is urged to consider approaching the Probate Code as a single package, so that Divisions I, II and III would all be revised with a single effective date, for example, January 1, 1987.

The enactment of Assembly Bill 25 with a deferred operative date has created a serious problem because of the way in which the law publishers have published the codes. The publishers have published the existing sections that fall within the Probate Code sections numbered from 1 to 296.8 in a confusing manner: The codes set out the repealed Probate Code sections with the new Probate Code sections interspersed, so that the user of the statute must carefully determine which sections

are operative until January 1, 1985, and which sections become operative on January 1, 1985. This problem will not exist on and after January 1, 1985, because then the published codes will contain only the section that is in effect.

The Commission has proceeded with the comprehensive probate law study on a systematic basis. The first phase of the study was a revision of the Probate Code relating to guardianship-conservatorship. A comprehensive revision of this portion of the Probate Code was recommended in 1978. The revision was enacted in 1979 with a deferred operative date, and became operative on January 1, 1981. A cleanup bill was enacted in 1980 and became operative on January 1, 1981, when the comprehensive revision became operative. At each following session, bills have been recommended and enacted to make technical or substantive changes in or additions to the comprehensive revision. The second phase of the probate law study relates to wills and intestate succession. A comprehensive revision of this portion of the Probate Code was enacted in 1983 and will become operative on January 1, 1985. Here again, a cleanup bill will be enacted to become operative at the same time as the comprehensive revision. We have planned to follow the same procedure on the remaining major portions of the Probate Code.

As each phase of the Probate Code study is completed, the numbers assigned to the comprehensive statute covering that phase will be numbers that will remain unchanged in the new Probate Code. For example, the numbers assigned to the guardianship-conservatorship law will remain unchanged.

This outlines the general approach the Commission has been following on the Probate Code revisions. At the same time, the Commission has submitted separate recommendations to deal with problems that need more immediate attention, such as Assembly Bill 2270, relating to independent administration and other administration matters.

The organizational scheme and numbering system for the new Probate Code is set out below.

NEW PROBATE CODE

(Tentative Outline)

DIVISION 1. PRELIMINARY PROVISIONS AND DEFINITIONS

Part 1. Preliminary Provisions (§§ 1-12) (ENACTED, OPERATIVE 1/1/85)

Part 2. Words and Phrases Defined (§§ 20-88) (ENACTED, OPERATIVE 1/1/85)

DIVISION 2. GENERAL PROVISIONS

Parts 1-3. (§§ 100-160) (ENACTED, OPERATIVE 1/1/85)

Part 4. Establishing Fact of Death (§§ 200-212) (AB 2255, OPERATIVE 1/1/85)

Parts 5-6. (§§ 220-240) (ENACTED, OPERATIVE 1/1/85)

Part 7. Effect of Homicide (§§ 250-256) (AB 2255, OPERATIVE 1/1/85)

Part 8. Disclaimer of Testamentary and Other Interests (§§ 260-295) (ENACTED, OPERATIVE 1/1/84, CURRENTLY A DIVISION RATHER THAN A PART)

DIVISION 3. (RESERVED) [EXISTING DIVISION 3 WILL BE REPEALED WHEN NEW DIVISIONS 7 AND 8 BECOME OPERATIVE]

DIVISION 4. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE PROCEEDINGS

Parts 1-8. (§§ 1400-3803) (EXISTING LAW)

Part 9. California Uniform Transfers to Minors Act (§§ 3900-3925) (AB 2492, OPERATIVE 1/1/85)

DIVISION 5. NONPROBATE TRANSFERS (§§ 5100-5407) (ENACTED, OPERATIVE JULY 1, 1984) (NEEDS ADDITIONAL STUDY TO EXPAND PROVISIONS TO COVER ALL TYPES OF FINANCIAL INSTITUTIONS)

DIVISION 6. WILLS AND INTESTATE SUCCESSION (§§ 6100-6806) (ENACTED, OPERATIVE 1/1/85)

DIVISION 7. ADMINISTRATION OF ESTATES OF DECEDENTS (§§ 7000-_____) [WORK IN PROGRESS--SCHEDULED FOR SUBMISSION TO 1987-88 LEGISLATIVE SESSION] (OPERATIVE JANUARY 1, 1988)

DIVISION 8. DISPOSITION OF ESTATES WITHOUT ADMINISTRATION (§§ 8000-_____) [WORK IN PROGRESS--SCHEDULED FOR SUBMISSION TO 1987-88 LEGISLATIVE SESSION] (OPERATIVE JANUARY 1, 1988)

DIVISION 9. TRUSTS (§§ 9000-_____) [WORK IN PROGRESS--SCHEDULED FOR SUBMISSION TO 1985-86 LEGISLATIVE SESSION] (OPERATIVE JANUARY 1, 1987)

Divisions 1, 2, 4, 5, and 6 are already enacted and the numbers of those divisions will not change in preparation of a new Probate Code. The next Commission project will be to prepare Division 9 (relating to trusts) and the sections in this division will be given the same numbers they will have in the new Probate Code. The provisions of the Civil Code and Probate Code relating to trusts will be repealed at the time Division 9 is enacted, but we do not expect any confusion because there will not be new sections interspersed with the old trust sections. Finally, Division 3 will be superseded by new Divisions 7 and 8 (relating to administration) but the deferred date of the new divisions will not cause confusion because the new provisions will not be interspersed with the provisions of existing Division 3.

The staff believes that it is a sound approach to enact legislation dealing with each major portion of the Probate Code and have it become operative after lawyers have time to study it and any bugs in it can be eliminated. We have already enacted and have in operation the division on guardianship-conservatorship law and the division on nonprobate transfers. On January 1, 1985, we will have Divisions 1, 2 and 6 become operative (wills and intestate succession). By January 1, 1987, we hope to have enacted and become operative the division on trusts. And by January 1, 1988 or January 1, 1989, we hope to have enacted and become operative Divisions 7 and 8 relating to administration.

The scheme outlined above gives lawyers a chance to become familiar with portions of probate law as revisions of those portions are completed, rather than lawyers having to become familiar with an entire new Probate Code at the same time. It provides an opportunity for careful study of each part as it is enacted and permits correction of any defects in that part before it becomes operative.

Ancestral property doctrine

The Supplemental State Bar letter comments:

> 16. AB 25 basically eliminates the ancestral property doctrine except for real property obtained from a predeceased spouse within 15 years. One or more of our members have been concerned about that limitation and whether the 15-year rule, if retained, should not apply to all property from the spouse that can be identified within the 15-year period.

The Commission, with strong support from its consultants, legal writers, and others, originally recommended that the ancestral property doctrine be abolished in California. As the Commission's report points out, the majority of states have never adopted any form of ancestral property inheritance, and those that have generally confined it to real property as under the English common law. The provision of Assembly Bill 25 that continues the ancestral property doctrine in a limited form was included in Assembly Bill 25 as a compromise position. The Commission reviewed this particular matter after the 1983 session and decided that the provision was a compromise and that it would not reopen this issue by recommending repeal of the provision or by attempting to perfect the provision. The staff believes that this is a sound decision; and that it would be undesirable to reopen this issue at this time.

RESOLUTION OF BOARD OF GOVERNORS OF LAWYERS' CLUB OF SAN FRANCISCO

The Board of Governors of the Lawyers' Club of San Francisco adopted a resolution urging the Board of Governors of the State Bar to sponsor emergency legislation to defer the effective date of Assembly Bill 25 for a minimum of two years "in order to permit adequate review and proposal of clean-up legislation before members of the public are harmed by the unintended effects of the legislation.

The first "WHEREAS clause" to the resolution states that "in 1983 the Legislature passed Assembly Bill 25, notwithstanding the opposition of the State Bar Estate Planning, Trust and Probate Law Section." This is not correct. The Section did not oppose the bill as passed by the Legislature. In fact, the Section was listed by the staff of the Senate Committee on Judiciary as being in support of the bill.

The statement of reasons given for adoption of the resolution states that former Probate Code Sections 1 to 296.8 are repealed and replaced with new provisions "Many of which are radical changes in substantive law" and that the bill "will apply to the estate of any person dying after January 1, 1985, regardless of when the will was executed." The statement cites seven examples, which are set out below with some staff analysis.

Statutory share for omitted child

The Statement of Reasons gives the following as a reason for deferral of Assembly Bill 25:

> 1. The present pretermission statute provides an intestate share when the testator omits to provide for any child or issue of any deceased child. Under Assembly Bill 25, pretermission will also include issue of a predeceased spouse.

Assembly Bill 25 does not extend pretermission to include issue of a predeceased spouse. See Prob. Code §§ 6570-6573. In fact, Assembly Bill 25 limits the protection to an omitted child of the testator born after the making of the will. The new law no longer protects an omitted child living when the will was made and the protection no longer extends to omitted grandchildren or more remote issue of the testator. Accordingly, the statement concerning omitted children given in support of the resolution is completely inaccurate. The provisions of Assembly Bill 25 will support rather than defeat the likely intention of the testator who fails to mention a living child or issue of a deceased child in the will.

Division of estate by right of representation

The Statement of Reasons gives the following as a reason for deferral of Assembly Bill 25:

> 2. Under Assembly Bill 25, division of an estate by right of representation among the grandchildren of the decedent will be per capita if no children of the decedent survive, instead of the current definition of right of representation.

This reason no longer applies since Assembly Bill 2290 will delete the provision of Probate Code Section 240 which would have made the rule stated in that section apply when a will which expresses no contrary intent calls for distribution per stirpes or by right of representation. Thus, there will be no need to review existing wills by reason of the statutory rule concerning division by representation. In addition, it should be noted that the rule under existing law may be uncertain. See Exhibit 6. The Commission plans to give this matter further study.

Revocation of spousal election

The Statement of Reasons gives the following as a reason for deferral of Assembly Bill 25:

> 3. Now, a spousal election will consented to by the other spouse does not bind the consenting spouse until the testator dies and may be revoked unilaterally until then. Assembly Bill 25 will require the subsequent written agreement of both spouses to alter or revoke the election.

The rules stated in Assembly Bill 25 do not apply to an agreement made prior to January 1, 1985. Prob. Code § 147(b) ("Nothing in this chapter affects the validity or effect of any waiver, agreement, or property settlement made prior to January 1, 1985, and the validity and effect of such waiver, agreement, or property settlement shall continue to be determined by the law applicable to the waiver, agreement, or settlement prior to January 1, 1985"). As to agreements made on or after January 1, 1985, Assembly Bill 2290 would amend Section 146 of the Probate Code to permit the parties to a spousal election will consented to by the other spouse to provide whatever rule they wish concerning the right of the consenting spouse to revoke the consent. Subdivision (b) of Section 146 would be amended to provide:

> (b) ~~A~~ 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.

Accordingly, the reason given does not apply to consents given before January 1, 1985, and Assembly Bill 2290 would permit the party consenting (waiving right of election) to provide in the waiver the manner in which it may be revoked.

Exoneration

The Statement of Reasons gives the following as a reason for deferral of Assembly Bill 25:

> 4. Assembly Bill 25 revokes the rule of exoneration and provides that a devise passes property subject to all encumbrances.

The rule of Assembly Bill 25 that a specific devise passes the property devised subject to any encumbrance applies only absent a contrary intent of the testator. See Prob. Code §§ 6165, 6170. Accordingly, if the testator has indicated his or her intent, that intent will be given effect. However, if no intent is expressed, the rule stated in Assembly Bill 25 will apply. There appears to be general agreement among probate lawyers that the rule of Assembly Bill 25 conforms more closely to the intent of the average testator than existing California law. It should be noted that under prior law, where the testator's intent was unknown, exoneration was required only if the debt was one for which the testator was personally liable. The impact of the prior rule was diminished in California because of anti-deficiency legislation which provides that on a purchase money mortgage or deed of trust for real property, no personal liability may be imposed on the debtor and, hence, in such a case, no exoneration is required. Moreover, under prior law exoneration did not apply to one who took as a surviving joint tenant unless the will so provided, and a direction in the will to "pay all debts" was not a sufficient statement of the testator's intent that the surviving joint tenant should take the property free and clear of the encumbrance. It is difficult to understand why this highly desirable change in prior law (to apply absent a contrary intent of the testator) is a reason to defer the operative date of Assembly Bill 25.

Intestate inheritance by issue of predeceased spouse

The Statement of Reasons gives the following as a reason for deferral of Assembly Bill 25:

> 5. Assembly Bill 25 changes the rules of intestacy to permit issue of a predeceased spouse to inherit before kindred more remote than grandparents and their issue.

Assembly Bill 25 does permit the issue (stepchild or issue of stepchild) of a predeceased spouse (defined in Probate Code § 59 added to Probate Code by AB 2290) to inherit before a great-grandparent or issue of a great-grandparent. It is far more likely that a decedent will want his predeceased spouse's child or grandchild to take in preference to the so-called "laughing heir." The trend in other states is to eliminate any right of intestate inheritance for heirs more remote than a grandparent or issue of a grandparent. This modest change is hardly reason to review a will or other instrument made prior to January 1, 1985.

Omitted spouse

The Statement of Reasons gives the following as a reason for deferral of Assembly Bill 25:

> 6. Under Assembly Bill 25, an omitted spouse will no longer receive an intestate share but will take the decedent's half of the community and quasi-community property plus one half of the separate property.

Under former law, the omitted spouse received the decedent's half of the community and quasi-community property. Assembly Bill 25 continues this rule. Under former law, the amount of the decedent's separate property that went to the omitted spouse was all, one-half, or one-third, depending on whether the decedent left relatives and on the relationship of the relatives. Even though the relatives of the omitted spouse took nothing under the will, the amount received by the spouse under former law varied with the existence of the relatives. In addition, the omitted spouse may take all the separate property under former law in preference to a close friend or favorite charity to which the decedent made a specific and reasonable devise. Assembly Bill 25 remedies these anomalies by giving the omitted spouse an intestate share in the separate property but not more than one-half of the separate property. This does not deprive the other close relatives of the decedent but prevents devisees of the decedent from losing all benefits under the will. This desirable change is hardly a reason to delay the operative date of Assembly Bill 25.

Pay-on death provisions in contracts and other instruments

The Statement of Reasons gives the following as a reason for deferral of Assembly Bill 25:

> 7. Under some circumstances, present law invalidates requirements in notes and other instruments that the obligation be paid on the death of the obligor. Assembly Bill 25 will validate all such clauses, even if not executed with the formalities of a testamentary disposition.

The statutory provision of Assembly Bill 25 referred to is taken from the Uniform Probate Code. The sole purpose of the provision is to eliminate the testamentary characterization of arrangements falling within its terms. The statute does not validate any provision that is not otherwise valid apart from the Statute of Wills. No California case has been found holding such a provision invalid under the Statute of Wills (contrary to the statement in the reason that present law invalidates such provisions). The provision merely makes clear that such a provision is not invalid because it is not executed in compliance with the requirements for a will and avoids the need to have the instrument probated. The effect of the provision is to give effect to a provision that otherwise might result in litigation based on a claim that the provision was not executed in compliance with the requirements for a will. It is difficult to understand why this desirable clarification in prior law is a reason to defer the operative date of Assembly Bill 25.

Statutory will

The statement in support of the resolution gives another reason for deferral of Assembly Bill 25:

> Even the statutory will sold by the State Bar before 1985 may trap unsuspecting consumers who buy and execute them but die after 1984.

Assembly Bill 2290 would make clear that forms prepared for use under the prior version of the California statutory will statute may continue to be used after the operative date of Assembly Bill 25. Three changes would be made applicable to a California statutory will, whether executed before or after the operative date of Assembly Bill 25:

(1) A marriage dissolution that becomes final after the operative date of Assembly Bill 25 will revoke the disposition made to the former spouse, whether the will is executed before or after the date Assembly Bill 25 becomes operative. Under prior law, the spouse married to the testator at the time the testator executed the statutory will took under the will even where the testator and that spouse were divorced after the will was executed. This change clearly reflects what is the likely intent of the testator; and a judgment of marriage dissolution that becomes final after January 1, 1985, will inform the testator that the dissolution may revoke the devise to the former spouse and that the testator should review other will in light of this fact. It is difficult to say that this provision will "trap unsuspecting consumers" who execute statutory wills.

(2) The general provisions that determine when a parent-child relationship exists will apply to a California statutory will, without regard to when the will is executed. These carefully drafted provisions are designed to make the law reflect what is most likely to be a testator's intent. It is difficult to say that these provisions will "trap unsuspecting consumers."

(3) A reference in a California statutory will to the "Uniform Gifts to Minors Act of any state" is deemed to include a reference to the "Uniform Transfers to Minors Act of any state." The Uniform Gifts to Minors Act is superseded by the Uniform Transfers to Minors Act. The addition of the reference to include the new Uniform Act will effectuate the testator's intent that the gift made by the will be transferred to a custodian to be governed by the version of the Uniform Act in force in the particular state. It is difficult to say that this provision will "trap unsuspecting consumers."

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 84-39 **Exhibit 1** Study L-626

ESTATE PLANNING, TRUST AND PROBATE LAW SECTION

THE STATE BAR OF CALIFORNIA

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March 16, 1984

John DeMoully, Esq.
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Re: AB 2290

Dear John:

We have asked various members of our Executive Committee to review AB 2290 and have a number of comments relating to the Bill, both as originally introduced and as amended on February 7, 1984. We understand that this Bill is tentatively set for hearing on April 30 before the Assembly Judiciary Committee. We will be glad to discuss any of our comments with you in advance of that date. We have not at this point sent a letter to Assemblyman McAlister, setting forth our position on the bill. We will be meeting on March 24 and 25 and in all likelihood will have further discussion of this Bill. If there are additional comments after that meeting, I will pass them on to you.

Our comments and questions are with reference to the Bill, as amended on February 7. These are as follows:

1. Section 1, which amends Section 226.12 of the Civil Code, refers to the natural parent and the child having "lived together at any time". This would appear to place the burden on the child to show that the natural parent and child lived together as parent and child at any time. This may result in some litigation. Perhaps some further clarification is appropriate.

2. Section 1.5 appears to clarify the law so as to make it clear that AB 25 (Chapter 842) is in all respects prospective in application. We have been concerned that if, for example, the definition of right of representation applied to existing Wills where the person died after January 1, 1985, a review and possible revisions of Wills would be necessary. We have also been concerned as to the effect of the vesting provisions, anti-lapse statute, etc., as they might apply to existing documents. Is it the intent that Chapter 842 would only apply to persons dying on or after January 1, 1985, and only to documents executed or amended after that date?

3. Section 4, dealing with Section 240, still causes concern. We think the addition of the reference to trusts is appropriate. We assume that, if a Will or trust, for example, provides that property is left to descendants by right of representation or per stirpes, the existing law would apply and that Section 240, as amended, would not be applicable. Our members had some concern that the language at the end of Section 240, namely "being divided in the same manner among his or her then living issue", is ambiguous. Is it possible that certain grandchildren or great-grandchildren would be omitted from the testator's plan by application of this section?

4. Section 5, dealing with Section 241 and per capita at each generation, seems to be satisfactory. We assume that it would be applicable to a Will or trust only if there is specific reference to distribution "per capita at each generation".

We do note, however, the reference again to the language "in the same manner" which we commented on with reference to Section 240.

5. Section 6, dealing with Section 242 and disclaimers, has a limitation in subsection (b)(1) that in the case of intestate succession, a disclaimer does not affect the determination of the generation at which division of the estate is to be made pursuant to Section 240 or 241. If an interest under a Will or trust is disclaimed, is the result the same or can a party who is

a beneficiary under a trust or Will in fact increase the share which his or her issue would take by executing a disclaimer? Presumably, if the division was at the first living generation (without reference to the disclaimer), there would be no change. However, if right of representation in fact refers to division at the first generation taking property, then there might be some ability to adjust shares by a disclaimer. We would appreciate the staff's thinking on this point.

6. Section 7.5, which adds Section 665 to the Probate Code, appears appropriate. Query: Should there not be a general statement rather than this rather narrow statement to the effect that any references in a written instrument, including a Will or trust, to provisions of the Probate Code which have been renumbered as the result of AB 25 shall refer to the corresponding sections?

7. Section 7.7, as amended, adds language that "the mortgage, deed of trust or other lien is to be exonerated in accordance with the testator's intent". We believe this should perhaps be made more specific to reduce the possibility of litigation over intent. Perhaps it should be modified to refer to the "testator's express" or to the "testator's stated" intent. The purpose would be to provide that there would be no exoneration unless there was a specific provision in the Will or trust providing for exoneration.

8. Section 8, dealing with Section 6112 of the Probate Code, raises an interesting question of what happens if the interested witness cannot overcome the presumption of duress, menace, fraud or undue influence. Does the bequest in that case fail and the property pass under the residuary clause or, if it is a residuary bequest, does it pass to the other residuary beneficiaries, or does the interested person take at least a statutory share as if there was intestacy?

Under existing law, we believe that an interested witness is entitled to a statutory share.

9. The changes indicated by Section 8.5, dealing with Section 6122, are desirable. Clearly this provision

should apply only to a dissolution applying after January 1, 1985.

10. Section 9, dealing with Section 6152 of the Probate Code, would add stepchildren and foster children to class gifts. Our Executive Committee has been troubled by that concept and has opposed it.

11. Section 6152(b) is rather difficult to understand as worded. Perhaps that can be reworded for clarification.

12. Section 10 deals with the California statutory Will. You have advised that the proposal to add the word "form" throughout is being withdrawn. We believe that the document should remain as the California statutory Will. A change in name would add confusion. There are many thousands of these printed forms which are now in circulation.

13. Section 18 of the Bill, dealing with Section 6209, refers to Section 240. Section 240 would indicate that if there is no other provision, property would be divided at the first living generation. Is this appropriate under Section 6209?

14. Section 29 of the Bill, dealing with Section 6243, amplifies the distribution to children and descendants of any deceased child and refers simply to the property going to testator's descendants who survive the testator. Query: Would this result in division by right of representation under the traditional meaning of the term or under the modified concept of Section 240?

15. Section 35 of the Bill, dealing with Section 6300 of the Probate Code, would provide for a pour-over from a probate estate into a trust. Assets poured over would be subject to the amendments to the trust before or after the death of the testator. We have discussed this at the Executive Committee, and it is my recollection that we found this change satisfactory.

16. Section 36.3 of the Bill, dealing with Section 6402, you have advised would be further amended to delete the reference to great-grandparents. My notes

were not clear as to whether no limitation is imposed or whether it is limited to grandparents or their issue. Generally, our Executive Committee didn't see any reason for changing the law in this area, and we would like to see the present law continued.

17. The amendment to Section 6560, as shown in Section 37.5 of the Bill, is a good clarification and eliminates some inconsistency between the intestate share and the share where a party was omitted from a Will.

18. Section 38 of the Bill, dealing with Section 6562, raises the question of what is the obvious intention of the testator with reference to a specific devise so as to defeat the apportionment provisions. Is a gift of jewelry, a gift of furniture, furnishings and automobiles, or other tangible items to be omitted from the apportionment statute? Is a club membership, for example, to be omitted from the apportionment provisions? Perhaps this has to be handled simply on a case-by-case basis, but it will undoubtedly lead to some ambiguity and litigation.

19. You have advised me that AB 2290 will be further amended to take out the language in Section 6146 to the effect that "unless a contrary intention is indicated by the Will, a devisee of a future interest (including one in class gift form) is required by the Will to survive to the time the devise is to take effect in enjoyment". We have not considered the implications of this amendment. Our Executive Committee has had considerable concern about the delayed vesting of gifts and the possible tax problems relating thereto. We have expressed this concern in other correspondence with you.

20. You have indicated in a telephone conversation, also, that the second sentence of Section 6147(c) would be deleted. That sentence, we believe, now reads as follows: "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."

21. One of our members has raised concern about the anti-lapse statute, Section 6147, applying to a "former spouse". This is a question of policy. Clearly the anti-lapse statute should provide for the kindred of a surviving or deceased spouse, but where there is a divorce or dissolution it seems questionable whether the anti-lapse statute should apply.

The above represent our current comments on AB 2290. If there are other comments which result from our Executive Committee meeting, they will be passed on to you.

After dictating this letter a copy of the bill, as amended February 21, was received. This letter does not address any further amendments of February 21.

Sincerely,

Charles A. Collier, Jr.

CAC:ccr

cc: H. Neal Wells III, Esq.
Theodore J. Cranston, Esq.
Kenneth M. Klug, Esq.
James A. Willett, Esq.
Ms. Clare Springs
Matthew S. Rae, Jr., Esq.

ESTATE PLANNING, TRUST AND PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA

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March 29, 1984

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California Law Revision Commission
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Palo Alto, California 94306

Re: AB 2290

Dear John:

The Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar met over the weekend of March 24 and 25. We reviewed the current status of AB 2290 and the amendments which had been made thereto, including the amendments on March 12 and the further typed amendments, undated, consisting of three pages. For purposes of reference, this letter refers to the Bill, as amended in the Assembly March 12, 1984. We have the following comments:

1. Reference is made to Section 240 at Page 9 of the Bill. While we believe the language is reasonably clear that representation as defined therein would not apply to a Will or trust if that document left property to issue or descendants by right of representation, perhaps this could be clarified by further language to the effect that a reference in a Will or trust to division by right of representation or per stirpes shall not be affected by the definition of representation as set forth in this section.

The Executive Committee was concerned that the introductory clause "if representation is called for

by this Code" creates some ambiguity since documents are read in the context of the Probate Code. Therefore, this additional language would clarify that point.

2. We support the deletion of Section 241 at Page 9, that is, the definition of per capita at each generation.

3. On Page 10, Line 26, the reference to Section "or 241" we believe should be deleted.

4. Sections 649.6 and 665 (Page 11) are specific references to the comparable provisions of the former Code. We feel that 649.6 is appropriate because of the reference to a specific section. However, is it not more appropriate to have some more general language in place of Section 665 that a reference in a written instrument, including a Will or trust to provisions of former Divisions I through IIb, shall be deemed to refer to the corresponding provisions of Chapter 842?

5. As indicated, we believe, in a prior letter, the provisions in Section 6122(f) (Page 12, Lines 26 through 30) are appropriate, and we support those changes.

6. The deletion of the language on Page 13, Lines 20 through 27, with respect to multiple devisees or a class of devisees, is an improvement. That language was very difficult to follow and appears unnecessary.

7. Section 6152 at Page 13, which includes stepchildren and foster children in terms of a class gift, is opposed by the Executive Committee as we had previously advised. We feel this broadened definition will necessitate reviews of existing estate plans and redefinition of descendants or issue. We are also concerned that there will be litigation over what constitutes a foster child or stepchild who could have been adopted except for legal impediments, etc. It is our understanding that no other states have included stepchildren and foster children in the definition of a class gift. We hope that the Commission will reconsider its decision on this particular point.

8. Dropping the word "form" from the California Statutory Will is supported by our Executive Committee. We

have been concerned about the revisions in the Statutory Will brought about by AB 25 and would like to minimize changes in that statutory document whenever possible.

9. We strongly support the amendment set forth in the three-page typewritten amendments dealing with the execution of a Statutory Will after January 1, 1985, on a form which was printed based upon the law prior to January 1, 1985. We believe this is a major area of concern with any statutory form, and the Commission's solution in this area seems satisfactory. Obviously, there is great concern about the law changing from time to time and old printed forms being signed at a later date after changes in the Statutory Will.

10. We support the changes in Section 6402, as amended at Pages 42 and 43 of the March 12 amended version of AB 2290, that is, removing the reference to grandparents and referring to next of kin.

11. We support the amendments to Sections 6562 and 6573 at Page 44 of the March 12 amended version of the Bill, satisfying the share for a spouse or child proportionately from other devises under the Will.

12. We oppose new Section 59, added by the amendment of March 12. We believe that no exception can be made for Chapter 842 in terms of the duty of a lawyer to advise his clients of changes in the law. Obviously, there are a great many changes every year in the law, and the lawyer must consider which changes, if any, should be reviewed with clients. This immunity for a particular statute seems inappropriate, contrary to the best interests of the public and, we believe, contrary to the best interests of the Bar. The Executive Committee unanimously supported the view that this section should be deleted from the Bill.

13. With reference to Section 736 of the Probate Code found at Page 11, our letter of March 16 made reference to the testator's express or written intent. Query whether the provision as to exoneration should also apply to an inter vivos trust. This raises a general question of the applicability of various rules to trusts as well as to Wills.

14. The Executive Committee is strongly opposed to the general renumbering of sections that has occurred pursuant to AB 25. We are not aware of what the Commission's view is as to the ultimate numbering system for probate administration. However, unless there are significant changes in the number of sections, it would appear that existing Sections 300 through 1313 could essentially be retained for numbering purposes as the Commission works on probate administration. Numbering of the requirements as to intestate succession, for example, in the 6000 series seems unnecessary. Based upon a count of sections proposed by the Law Revision Commission when AB 25 was first introduced, there were approximately 240 sections in the material covered by AB 25, and there were obviously up to 300 sections, based upon the old numbering system, available to cover these new provisions. The confusion that has resulted from the new numbering system is unjustified. For example, the new edition of Parker's Probate Code of California is extremely difficult to follow because of all of the renumbering and inclusion of provisions which are operative now and those which will be operative on January 1, 1985. If there is further piecemeal amendment of the Probate Code in the next several years, this issue will be compounded. The Executive Committee urges the Commission to seek to revise the Probate Code within the existing framework of the numbering system.

15. A number of practitioners, as well as members of the Executive Committee, have expressed great concern about the amendment to the Probate Code over a series of years, as evidenced by AB 25, amending the first portions of the Code. It is difficult for practitioners to deal with a code which is being amended piecemeal. For example, in connection with the conservatorship and guardianship laws, the entire revised law was submitted as a single package and became operative at one time. A similar comprehensive package with a single effective date would be much easier for practitioners to deal with and understand. It would also be much easier for those companies which print the Probate Code, the agency which prints Judicial Council forms, etc., all of which would require revision and renumbering. The Commission is urged to consider approaching the Probate Code as a single package, so that Divisions I, II and III would all be revised with a single effective date, for example, January 1, 1987.

16. AB 25 basically eliminates the ancestral property doctrine except for real property obtained from a predeceased spouse within 15 years. One or more of our members have been concerned about that limitation and whether the 15-year rule, if retained, should not apply to all property from the spouse that can be identified within the 15-year period.

We understand that the hearing before the Assembly Judicial Committee on AB 2290 will be held on April 10. Jim Willett will appear on behalf of our Executive Committee at that hearing. We obviously are supportive of cleanup of AB 25 but, as you know, still have a number of concerns about it which have been expressed in prior letters and in this letter.

Sincerely,

Charles A. Collier, Jr.
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CAC:ccr

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TELEPHONE
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February 13, 1984

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

RE: NEW SECTIONS 240 AND 282
CALIFORNIA PROBATE CODE
(OPERATIVE 1/1/85)

Dear Sirs:

I am an attorney who, for the past fifteen years, has practiced primarily in the field of estate planning and probate--and for the past several years have been teaching various CEB courses on the matter.

I recently took (as a student) a CEB course on the IMPACT OF CALIFORNIA'S PROBATE CODE REFORM, which course explored the recent changes in California's Probate Code.

Although I believe most of the changes to be beneficial (and am generally supportive of the changes), I am greatly disturbed by one change in particular--which may have unintended and inadvertent consequences.

Although I find it shocking that the Legislature would--after 900 years--attempt to change the definition of the phrase "by right of representation" (§240 of the Probate Code), I have made my peace with that change and on balance think the change is probably beneficial. I am, however, greatly disturbed by the potential for abuses under the new definition of the concept of "representation" that exist in the event of a disclaimer by the sole surviving member of one generation under circumstances where a decedent's property passes testate "by right of representation." The disclaiming survivor could substantially increase the share of the estate going to his/her issue (at the expense of a predeceased sibling's issue) by such a disclaimer.

New §282(b)(1) of the Probate Code effectively prevents that kind of abuse where the decedent dies intestate. It would seem to me that it would be wise to make a technical correction in that section to apply the same to interest created by testate succession as well as intestate succession.

As disclaimers have become a vitally important post-mortem estate planning tool (the use of which is frequently discussed with, and contemplated by, a testator at the time he/she makes his/her Will), it seems to me that this issue is one of vital importance. Absence the change along the lines suggested, I'm afraid that a great deal of mischief (both intentional and unintentional) may result.

Based on discussions with other probate practitioners, I find that my concern is not unique.

If I can be of any further assistance, or you wish to discuss the matter further, please don't hesitate to call.

In the meantime, I thank you for your attention to this matter.

Cordially,

FERGUSON & BERLAND

Michael C. Ferguson

MCF/jac

EXHIBIT 4

WAIVER BY SURVIVING SPOUSE

311 66

Civil Code § 5103 (technical amendment). Transactions between husband and wife

5103. (a) ~~Either~~ Subject to subdivision (b), either husband or wife may enter into any ~~engagement or~~ transaction with the other, or with any other person, respecting property, which either might if unmarried~~;~~.

(b) ~~subject~~ Except as provided in Sections 143, 144, and 146 of the Probate Code, in transactions between themselves, a husband and wife are subject to the general rules which control the actions of persons occupying confidential relations with each other, as defined by Title 8 (commencing with Section 2215) of Part 4 of Division 3.

Comment. Section 5103 is amended to divide the section into two subdivisions and to add references to the Probate Code provisions that constitutes exceptions to the rule stated in subdivision (b). The division of Section 5103 into two subdivisions facilitates reference in other sections to the rule stated in subdivision (b). See, e.g., Prob. Code §§ 143, 144, 146. The omission of the word "engagement" in subdivision (a) is not a substantive change.

311 65

Probate Code § 142 (amended). Formal requirements of waiver; general rule on enforceability

142. (a) A waiver under this chapter shall be in writing and shall be signed by the surviving spouse.

(b) Subject to subdivision (c), a waiver under this chapter is enforceable only if it satisfies the requirements of subdivision (a) and is enforceable under either Section 143 or Section 144.

(c) Enforcement of the waiver against the surviving spouse is subject to the same defenses as enforcement of a contract, except that:

(1) Lack of consideration is not a defense to enforcement of the waiver.

(2) A person intending to marry may make a waiver under this chapter as if married, but the waiver becomes effective only upon the marriage.

Comment. Section 142 is amended to add subdivisions (b) and (c). These new subdivisions make clear that enforcement of the waiver is subject to the same defenses as enforcement of a contract, but lack of consideration is not a defense and a minor intending to marry is treated as an emancipated minor (Civil Code § 63). The surviving spouse can raise the defense of lack of capacity to contract. See Civil Code § 1556 (unsound mind or deprived of civil rights). The defense of lack of consent because of duress, menace, fraud, undue influence, or mistake (Civil Code §§ 1565-1579) also is available. But see the Comment to Section 143.

282 78

Probate Code § 143 (amended). Enforcement where independent legal counsel and disclosure or waiver of disclosure

143. (a) ~~A waiver that complies with Section 142~~ Subject to Section 142, a waiver is enforceable under this section unless the ~~court determines~~ surviving spouse proves either of the following:

~~(a)~~ (1) A fair and reasonable disclosure of the property or financial obligations of the decedent was not provided to the surviving spouse prior to the signing of the waiver unless the surviving spouse waived such a fair and reasonable disclosure after advice by independent legal counsel.

~~(b)~~ (2) The surviving spouse was not represented by independent legal counsel at the time of signing of the waiver.

(b) Subdivision (b) of Section 5103 of the Civil Code does not apply if the waiver is enforceable under this section.

Comment. Section 143 is amended to expand the disclosure under subdivision (a)(1) to include a disclosure of the financial obligations of the decedent. Information concerning financial obligations may be important in determining whether the rights described in Section 141 should be waived.

Enforcement of a waiver under Section 143 is subject to the same defenses as enforcement of a contract. See Section 142(c). However, the requirement of representation by independent legal counsel and disclosure or waiver of disclosure on the advice of independent legal counsel should permit enforcement of the waiver against a claim of undue influence or duress or mistake except where the surviving spouse lacked sound mind or there was some type of duress, mistake, or fraud that the independent counsel and disclosure requirements do not protect against. Thus, parties who seriously want an enforceable waiver should obtain independent legal counsel despite the added expense. See Rothschild, Antenuptial and Postnuptial Agreements, in 2 California Marital Dissolution Practice § 29.2, at 1175, § 29.4, at 1176 (Cal. Cont. Ed. Bar 1983). However, even if the requirements of Section 143 are not satisfied, the waiver may be enforceable under Section 144.

Subdivision (b) is added to make clear that the fiduciary standards normally applicable to spouses pursuant to Section 5103 do not apply if the requirements of Section 143 are satisfied.

Probate Code § 144 (amended). Enforcement in discretion of court

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

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

(2) The surviving spouse had, or reasonably should have had, an adequate knowledge of the property and financial obligations of the decedent and ~~understood the effect of and voluntarily signed the waiver~~ the decedent did not violate the duty imposed by subdivision (b) of Section 5103 of the Civil Code.

(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 existing at the time enforcement is sought, 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.

(c) Except as provided in paragraph (2) of subdivision (a), subdivision (b) of Section 5103 of the Civil Code does not apply if the waiver is enforceable under this section.

Comment. Section 144 is amended to delete the requirement of paragraphs (1) and (2) of subdivision (a) that the surviving spouse "understood the effect of and voluntarily signed the waiver." In place of this requirement, Section 142 has been amended to make enforcement of the waiver against the surviving spouse subject to the same defenses as enforcement of a contract. See the Comment to Section 142. See also the Comment to Section 143.

Paragraph (2) of subdivision (a) is amended to require adequate knowledge not only of the property of the decedent but also of the financial obligations of the decedent. Information concerning financial obligations may be important in determining whether the rights described in Section 141 should be waived.

Section 144 also is amended to make clear the extent to which the fiduciary standards normally applicable to spouses pursuant to Section 5103 apply when the waiver is sought to be enforced under Section 144. See subdivision (a)(2) and subdivision (c) of Section 144.

Probate Code § 146 (amended). Agreement altering, amending, or revoking a waiver

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) Subject to subdivision (d), the agreement is enforceable only if it satisfies the requirements of subdivision (b) and is enforceable under either subdivision (e) or subdivision (f).

(d) Enforcement of the agreement against a party to the agreement is subject to the same defenses as enforcement of any other contract, except that:

(1) Lack of consideration is not a defense to enforcement of the agreement.

(2) Persons intending to marry may enter into the agreement as if married, but the agreement becomes effective only upon their marriage.

~~(c)~~ (e) ~~An~~ Subject to subdivision (d), an agreement is enforceable under this subdivision ~~against a~~ unless the party to the agreement against whom enforcement is sought ~~unless the court determines~~ proves either of the following:

(1) A fair and reasonable disclosure of the property or financial obligations of the other spouse was not provided to the spouse against whom enforcement is sought prior to the singing 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 signing of the agreement.

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

~~(e)~~ (g) If, after considering all relevant facts and circumstances, the court finds that enforcement of the agreement pursuant to subdivision ~~(d)~~ (f) would be unconscionable under the ~~existing facts and~~ circumstances existing at the time enforcement is sought, 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.

(h) Subdivision (b) of Section 5103 of the Civil Code does not apply if the agreement is enforceable under this section.

Comment. Section 146 is amended to conform to Sections 142-144.

310 064

Probate Code § 147 (amended). Preexisting agreements and premarital property agreements not affected

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

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

(c) Nothing in this chapter affects the validity or effect of any premarital property agreement, whether made prior to, on, or after January 1, 1985, insofar as the premarital property agreement affects the rights listed in subdivision (a) of Section 141, and the validity and effect of such premarital property agreement shall be determined by the law otherwise applicable to the premarital property agreement.

Comment. Section 147 is amended to make clear that the rights listed in subdivision (a) of Section 141 can be waived in a valid premarital property agreement, even though the requirements of this chapter are not satisfied.

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

CALIFORNIA LAW REVISION COMMISSION
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April 11, 1984

To: Committee Consultant, Assembly Judiciary Committee

Subject: Assembly Bill 2290, set for hearing April 30, 1984

Assembly Bill 2290 makes technical and substantive revisions to the new wills and intestate succession law recommended by the Law Revision Commission and enacted at the 1983 legislative session. The bill is explained in the Commission's printed Recommendation Relating to Revision of Wills and Intestate Succession Law. The bill has been amended four times since its introduction. The important changes are discussed below.

Deletion of Rules of Construction That Might Change Meaning of Old Wills

The bill deletes the following provisions of the new law that lawyers have objected to as possibly changing the meaning of old wills and other instruments:

(1) The provision of Section 240 that the new rule of representation applies despite language in the will or trust calling for distribution "per stirpes" or "by representation."

(2) The rule of construction of Section 6146(a) favoring contingent remainders over vested remainders by requiring survivorship to take a future interest unless a contrary intention is indicated by the will.

(3) The rule of construction of Section 6147(c) that applies the antilapse statute to a class gift despite language in the will making the devise to the "surviving" members of the class.

Effect of Divorce on Disposition to Former Spouse

The bill changes the rule that divorce revokes a disposition made by a will to the former spouse if the testator dies after December 31, 1984. The new rule is that divorce revokes the disposition made by will to the former spouse if the divorce occurs after December 31, 1984. The application of the rule is limited to the cases where the divorce occurs after December 31, 1984, because the notice given at the time of divorce under former law advised the testator that the divorce did not revoke the disposition made by the will to the former spouse.

California Statutory Wills

The provision governing the effect of divorce on a disposition in a California statutory will to the former spouse is revised to conform to the revised general provision outlined immediately above.

A new provision is added to make clear that a California statutory will made on an old form is effective if used after January 1, 1985, if the form was in compliance with the old law.

Transitional Provision

The new wills and intestate succession law contains a transitional provision which applies most of the old substantive law where the decedent dies before the operative date (January 1, 1985). See Probate Code Section 3. AB 2290 revises this provision to apply all of the old law where the decedent dies before the operative date. This is to avoid any confusion which might result from application of partly old law and partly new in such a case.

Inheritance by Natural Relatives From or Through Child Born Out of Wedlock

The new wills and intestate succession law provides that if a child is born out of wedlock, neither a parent nor a relative of a parent inherits from or through the child unless the child has either been acknowledged or supported by that parent. This provision was intended to require that the child have been both acknowledged and supported by the parent. AB 2290 revises this provision to require that the parent both have acknowledged the child and have contributed to the support or the care of the child.

Share of Omitted Spouse

The new wills and intestate succession law provides that if the testator fails to provide by will for a surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive, in addition to the community and quasi-community property, half of the testator's separate property. This may cause a problem in the unusual case where the testator omits to provide for a spouse married after execution of the will and children born after execution of the will. In such a case, the surviving spouse receives half the separate property, and the children receive an intestate share, or two-thirds of the separate property--amounts which total more than one hundred per cent of the separate property.

AB 2290 revises the share of the omitted spouse to be equal to the lesser of half the separate property or the surviving spouse's intestate share (one-third where the decedent leaves two or more children).

BACKGROUND INFORMATION ON ASSEMBLY BILL 2290

Set for hearing on April 30, 1984

Assembly Bill 2290 makes technical and substantive revisions to the wills and intestate succession law (AB 25--Chapter 842) recommended by the Law Revision Commission and enacted at the 1983 session. The bill as introduced is explained in the Commission's printed Recommendation Relating to Revision of Wills and Intestate Succession Law. (Copy attached.) The bill has been extensively amended since its introduction. The following explains each section of the bill as amended March 27, 1984, and as amended by the attached amendments which will be made before the bill is heard if possible; otherwise the amendments will be made at the hearing on the bill.

Civil Code § 226.12

This amendment merely makes the notice provided for in the section conform to the substantive law. See Prob. Code § 6408(a)(3) (AB 25).

Prob. Code § 3

This amendment makes clear that AB 25 does not apply to any case where the decedent died before January 1, 1985. The sections listed in amended Section 3 include conforming revisions made in AB 25 to existing code sections.

Prob. Code § 59

This new definition of "surviving spouse" deals with the problem of a divorce or annulment in another state which is not recognized in Califonria, and applies an estoppel principle. The section is drawn from Section 78 (AB 25). Under Section 59, it is possible that the decedent may have more than one predeceased spouse.

Prob. Code § 82

The amendment merely adds a reference to the Uniform Transfers to Minors Act (which will supersede the Uniform Gifts to Minors Act in those states which enact the new Uniform Act).

Prob. Code §§ 140, 143, 144, and 146

The amendment to subdivision (b) of Section 146 makes clear that a written waiver under the chapter may itself provide for the manner in which it may be amended, altered, or revoked. The other amendments to these sections are clarifying amendments that substitute "signed" the waiver or agreement for "executed" the waiver or agreement.

Prob. Code § 150

This technical amendment adds subdivision (c) to make clear that a contract made before December 31, 1984, is governed by the law applicable to the contract on December 31, 1984.

Prob. Code § 224

This section is amended to add the Uniform Act exception at the end of the amended section so that where a husband and wife die simultaneously the proceeds of the policy will be divided between the estate of the husband and the estate of the wife if no alternative beneficiary has been designated.

Prob. Code § 240

The amendments to this section do two things:

(1) The section is amended to make clear that it applies to both inter vivos and testamentary trusts if no contrary intent is expressed in the governing instrument.

(2) The section is amended so that the rule stated in the section does not apply where a will or trust calls for distribution per stirpes or by representation. Lawyers objected to the application of the section in this type of case because they felt that it would require review of existing wills made before January 1, 1985.

Prob. Code § 282

This section is amended so that the rule stated in subdivision (b)(1) will apply whether the division is made in a case of intestate succession or in a case governed by a will. The effect of the amendment is that a person by disclaiming an interest under a will cannot decrease the share another person would take if there were no disclaimer; only the interest of the person making the disclaimer is affected by the disclaimer. This corrects a technical defect in the section.

Prob. Code § 372.5

This section is amended to delete the phrase that limited the application of the section to a case where the witness is needed to establish the validity of the will. As amended, the section permits a challenge of a gift to a witness without regard to whether the witness is needed to establish the validity of the will.

Prob. Code § 649.6, 665

These sections make references in existing documents to certain provisions of former law references to the comparable provisions of the new law.

Prob. Code § 736

The amendment is a nonsubstantive clarification. The provisions governing exoneration are Sections 6165 and 6170.

Prob. Code § 6112

Subdivision (b) of this section is amended so that the presumption does not apply if there are two other witnesses to the will who are disinterested witnesses. Where there are two disinterested witnesses, the interested witness is superfluous, and there is no reason to apply the adverse presumption. This is consistent with former law which permitted an interested witness to take under a will if there were two disinterested witnesses to the will. See former Prob. Code Section 51 (devise to subscribing witness void unless there are two other and disinterested witnesses to the will).

Prob. Code § 6122

The amendment adds subdivision (f). This subdivision makes the new rule (that divorce revokes a disposition to the former spouse) not applicable where the divorce occurs before January 1, 1985. The new rule applies only where the divorce occurs after December 31, 1984, because the person obtaining a divorce prior to that time was given a notice at the time of the divorce that the divorce did not revoke the will. (The notice given under Harris' bill qualifies that statement but not significantly.)

Prob. Code § 6146

The amendment deletes the second sentence of subdivision (a). This sentence was objected to by lawyers and some lawyers felt that the sentence would require them to review all wills made before January 1, 1985.

Prob. Code § 6147

The amendment deletes the second sentence of subdivision (c). This sentence was objected to by lawyers and some lawyers felt that the sentence would require them to review all wills made before January 1, 1985.

Prob. Code § 6152

This is a technical amendment to add "stepchildren, foster children" to subdivision (a). This is added to make clear that under some circumstances, stepchildren and foster children are included in terms of

class gift or relationship pursuant to the rules for intestate succession. See Section 6408 (when stepchild or foster child treated the same as adopted child).

Prob. Code § 6205

Section 6205 is amended to conform the definition of "descendants" to the definition of "issue" under general law. See Section 50 ("issue" defined). Thus, for example, general law will apply in determining the extent to which the term includes adoptees and children born out of wedlock. See Sections 26, 54, 6408. See also Section 6248 (except as specifically provided, general law applies to California statutory will). The second sentence of Section 6205 continues subdivision (b) of former Section 6206.

Prob. Code § 6206 (repealed)

This section is repealed. Repeal of subdivision (a)--the special rule of construction for a class gift to "descendants" or "children"--makes applicable the general rule of construction in Section 6152. See Section 6248 (except as specifically provided, general law applies to California statutory will). Subdivision (b) is continued in Section 6205.

Prob. Code § 6206 (added)

Sections 6245(b)(2) and 6246(b)(2)(C) refer to the Uniform Gifts to Minors Act of any state. New Section 6206 makes clear that this reference includes the new Uniform Transfers to Minors Act in those states which adopt this new Uniform Act which supersedes the former Uniform Gifts to Minors Act.

Prob. Code § 6226

The amendment to this section in subdivision (d) conforms the section to amended Section 6122. The effect of the amendment is that the rule that a divorce revokes a disposition to the former spouse applies only if the divorce occurs after December 31, 1984, rather than (as under the unamended section) where the new rule applies if the testator dies after December 31, 1984.

Prob. Code § 6247

This section is amended to permit a form prepared in compliance with the law in effect prior to January 1, 1985, to be used after January 1, 1985. The amendment also makes clear that the amendments to

Sections 6205, 6206, and 6226 apply to every California statutory will, including those executed before January 1, 1985.

Prob. Code § 6248

This section is amended to make clear that, except as provided in this chapter, general law applicable to wills applies to a California statutory will.

Prob. Code § 6300

This section is amended to change the former rule that with respect to the testamentary assets the trust may not be amended after the testator's death unless the testator's will so provides. Under the new rule, the trust may be amended after the testator's death unless the testator's will provides that it may not be amended with respect to the testamentary assets. This change is made so that all the assets of the trust will be governed by the same trust provisions unless the testator otherwise specifically provides in the will.

Prob. Code § 6401

This section is amended to make a nonsubstantive technical change.

Prob. Code § 6402

This section is amended to correct typographical errors.

Prob. Code § 6408.5

This section is amended to provide that neither a parent nor a relative of a parent inherits from or through the child unless the parent has both acknowledged the child and has contributed to the support or the care of the child. As enacted, the section inadvertently permits inheritance if the parent had either acknowledged the child or supported the child. Unless the parent does both, inheritance from or through the child by a parent or relative of a parent is not appropriate.

Prob. Code § 6412

This amendment is a technical, nonsubstantive revision.

Prob. Code § 6560

This amendment provides that the share of the omitted spouse is equal to the lesser of one-half of the separate property of the surviving spouse or the surviving spouse's intestate share (one-third where the decedent leaves two or more children or issue of deceased children).

Where the testator fails to provide for a spouse married after execution of the will and children born after exection of the will, the provision prior to this amendment causes this problem: The surviving spouse receives half the separate property, and the children receive an intestate share (two-thirds of the separate property), the total amounting to more than one hundred percent of the separate property.

Prob. Code § 6562

This section is amended to provide a proportional rule of abatement for payment of an omitted spouse's share, drawn from former Section 91. The second sentence of paragraph (2) of subdivision (a) (value determined at date of death) is new.

Prob. Code § 6573

This section is amended to provide a proportional rule of abatement for payment of an omitted child's share, drawn from former Section 91. The second sentence of paragraph (2) of subdivision (a) (value determined at date of death) is new.

ET CETERA

Whither Distribution by Representation?

Edited by Professor Edward C. Halbach, Jr.

Terence S. Nunan of Kadison, Pfaelzer, Woodard, Quinn & Rossi, Los Angeles, has advised the Reporter that our December issue's coverage of new probate legislation failed to emphasize the potential significance of legislation dealing with distribution "by representation." Prob C §240 (Stats 1983, ch 842, §22), effective January 1, 1985. Because the statute raises significant will drafting issues, and further legislation is already pending in this area, further examination of the statute is certainly appropriate.

The issue faced by new Prob C §240 is: At what generation does division of an estate begin when all of a decedent's children predecease the decedent, and the decedent dies intestate or his will provides for distribution by representation? Suppose, for example, that a decedent's two children predecease him, leaving five grandchildren, four the issue of one child, and one the issue of the other child. At what level does representation begin? Analogously, if distribution is "per stirpes" (*i.e.*, by the stocks), what is the stock generation?

The existing law of intestate succession is clear. The five grandchildren will take equally. The children's generation is ignored for division purposes. Prob C §§221 and 222, repealed January 1, 1985. However, if any of the grandchildren were also deceased but left surviving issue, the generation of the two children would not be ignored; under the peculiar wording of the statute, the estate would be divided into halves, with one half allocated to the branch of each deceased child. *Maud v Catherwood* (1945) 67 CA2d 636, 155 P2d 111.

However, what if the same decedent had a will providing for distribution by representation? As noted by Mr. Nunan, the Reporter's summary at 5 CEB Est Plan R 77 (1983) did not distinguish this situation. Under new Prob C §240, the rules for intestate succession distribution and for testate distribution by representation will be the same. In both cases the children's generation will be ignored. (The new statute also eliminates the rule that the children's generation is reinstated for division purposes if one of the grandchildren has died leaving issue.) However, existing law regarding a testamentary disposition by right of representation is unclear. Language in *Lombardi v Blois* (1964) 230 CA2d 191, 40 CR 899, suggests that the division would be made at the children's generation. In our hypothetical, one grandchild would receive half of the estate and the other grandchildren would each receive one eighth. However, *Lombardi* did not involve a situation in which all takers were of the same generation—the only instance in which the existing intestacy statute calls for per capita distribution. Although application of the intestate succession rule was not discussed by the court, the actual result was to follow the intestate succession rule of *Maud v Catherwood, supra*. Analogous authorities in other states are divided on the influence intestate distribution patterns should have on problems of construction.

In short, under current law, the expressions "by representation" and "per stirpes" are ambiguous when applied to situations in which there are no children surviving. Although this situation rarely arises in the case of a simple disposition, it frequently occurs in the context of dispositions of trust remainders where the takers are determined long after the testator's death. In California, the precise wording of the disposition may be crucial to determining the level at which representation begins under existing law. If it is clear from the language that all of the issue (not just those more remote) are to take by representation, the grandchildren, in our example, should represent their respective parents. However, the language of an existing instrument calling for distribution by representation or per stirpes may be interpreted as referring to the intestate pattern, and some forms in common use expressly define the terms to direct that result. See, *e.g.*, Estate Planning (vol. 5), A Proposed Estate Plan for Mr. and Mrs. Harry Black III, p 282 (1983) (defining "per stirpes"); and California Will Drafting Practice §8.36 (Cal CEB 1982) ("whenever property passes under this Will to designated issue by right of representation, the property shall be distributed to the persons and in the proportions that the property of the designated ancestor would be distributed, as if the designated ancestor had died intestate when the issue were to be determined, and was domiciled in California").

When all claimants are grandchildren, new Prob C §240 does not affect the intestate succession rule. In testate situations the new statute removes uncertainty (and some may well believe changes the law) in construction cases by presuming a per capita distribution if the instrument prescribes no pattern of distribution to "descendants" or "issue" or simply calls for distribution per stirpes or by representation without definition. The result, of course, may be contrary to a draftsman's expectations, and CEB has learned that the Law Revision Commission is already considering an amendment to be proposed before the effective date of the new law which would limit its application to instruments executed after 1984. The amendment would leave the meaning of existing instruments to be decided by interpretation based on specific wording, circumstances, and transferor intent in cases involving unamended pre-1985 instruments. Com-

mission sponsored legislation has already been introduced which will make new Prob C §240 applicable to inter vivos trusts. AB 2290 (McAlister). Consideration is also being given to enacting statutory definitions for alternative language that can be used in wills or trusts to invoke, simply and clearly, either of two or three patterns of distribution.

Practitioners may wish to review their current forms and consider revisions in appropriate cases, especially when remainder beneficiaries are likely to be determined long after the death of the testator, and certainly when the death of the last child is the event terminating a trust. Wills and trusts employing precise language will be unaffected by the new law. For a client desiring division at the children's generation regardless of whether any children are living, a form found in California Will Drafting Practice §9.65-2 (Cal CEB 1982) provides that "the Trustee shall divide the trust assets into as many equal shares as there are children of mine then living and children of mine then deceased with descendants then living. Each share set aside for a child of mine then deceased with descendants then living shall be further divided into shares for such descendants by right of representation."