

Memorandum 84-46

Subject: Study L-605 - Probate Law and Procedure (Optional Representation Systems)

The new wills and intestate succession law contains the UPC representation rule. As revised by Assembly Bill 2290, this representation rule applies if a will or trust that expresses no contrary intent provides for issue or descendants to take without specifying the manner. The UPC representation rule will not apply if the will or trust provides for distribution "per stirpes" or "by right of representation." One drafting a will or trust may, of course, choose any representation system by appropriate language.

Professor Halbach has made a persuasive case that many practicing lawyers draft representation provisions with only a hazy understanding of the available alternative systems and how they work, and do not give clients an opportunity to choose among the various possible representation systems. Professor Halbach believes that the Commission would do a service to practicing lawyers by providing shorthand statutory terminology for the commonly used representation provisions that could be picked up by cross-reference in the will or trust instrument. Having various statutory alternatives available would encourage lawyers to think about the possibilities, to query clients as to their specific preferences, and to use precision in drafting so as to carry out the client's intent.

The commonly used representation systems are the following:

(1) Per stirpes with per stirpes representation. This is the so-called "pure" per stirpes system. The primary division of the estate is made at the children's generation whether or not any are living. Thereafter, the estate descends down the various branches of descendants. No redivision is made if all members of a generation of descendants are deceased.

(2) Per capita with per stirpes representation. Under this system, the primary division of the estate is made at the first generation having any living members. Thereafter, the estate descends down the various branches of descendants, the same as pure per stirpes.

(3) Per capita with per capita representation. Under this system, the primary division of the estate is made at the first generation having any living members, the same as per capita with per stirpes representation. However, if any descending share reaches a generation

all of whose members are deceased, the estate is redivided per capita at the next generation having any living members. This is the UPC and new California system.

(4) Per capita at each generation. Under this system, the primary division of the estate is made at the first generation having any living members, the same as per capita with per stirpes representation and per capita with per capita representation. The shares of deceased members of that generation descend to the next generation where living members are allocated a proportionate share, while the shares of deceased members of that generation are aggregated and redivided per capita at the next generation. This is the system in effect in North Carolina and is advocated by Professor Lawrence Waggoner.

The staff recommends that we propose legislation to put definitions of these four representation systems in the Probate Code so that one drafting a will or trust can select the desired scheme by a simple shorthand reference in the instrument. The proposed legislation is attached to this Memorandum as Exhibit 1. If the Commission approves the proposed legislation, we could send it out to interested persons for review and comment, or we could amend the provisions into Assembly Bill 2290 if the Commission decides that it is not necessary to send the proposed legislation out for review and comment.

Respectfully submitted,

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Staff Counsel

EXHIBIT 1

Probate Code--heading for Chapter 1 (commencing with Section 240) of Part 6 of Division 2 (added)

SECTION 1. A heading is added immediately preceding Section 240 of the Probate Code, to read:

CHAPTER 1. REPRESENTATION GENERALLY

Probate Code §§ 250-253 (added). Optional representation systems

SEC. 2. Chapter 2 (commencing with Section 250) is added to Part 6 of Division 2 of the Probate Code, to read:

CHAPTER 2. OPTIONAL REPRESENTATION SYSTEMS

§ 250. Per stirpes with per stirpes representation

250. If a will or trust calls for distribution "per stirpes with per stirpes representation as provided in Section 250 of the Probate Code," the property shall be divided into as many equal shares as there are living children of the designated ancestor and deceased children who leave issue then living. Each living child of the designated ancestor is allocated one share, and the share of each deceased child who leaves issue then living is divided in the same manner.

Comment. Section 250 is new and gives one drafting a will or trust the option of selecting a pure stirpital representation system. Under such a system, the roots or stocks are determined at the children's generation, whether or not any children are then living. See generally Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. B. Foundation Research J. 321, 378-79. See also the discussion in *Maud v. Catherwood*, 67 Cal. App.2d 636, 155 P.2d 111 (1945).

§ 251. Per capita with per stirpes representation

251. If a will or trust calls for distribution "per capita with per stirpes representation as provided in Section 251 of the Probate Code," the property is divided into as many equal shares as there are living members of the nearest generation of issue then living and deceased members of that generation who leave issue then living. Each living member of the nearest generation of issue then living is allocated one share, and the remaining shares, if any, are divided in the manner provided in Section 250.

Comment. Section 251 is new and gives one drafting a will or trust the option of selecting the per capita with per stirpes representation system. See, e.g., *Balch v. Stone*, 149 Mass. 39, 20 N.E. 322 (1899); Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. B. Foundation Research J. 321, 379-80.

§ 252. Per capita with per capita representation

252. If a will or trust calls for distribution "per capita with per capita representation as provided in Section 252 of the Probate Code," the property shall be distributed in the manner provided in Section 240.

Comment. Section 252 is new and gives one drafting a will or trust the option of selecting the distribution system provided in Section 240. Section 240 is the distribution system used in case of intestate succession and for a will or trust that provides for issue or descendants to take without specifying the manner. A will or trust may make clear that this is the system intended by using the language "per capita with per capita representation as provided in Section 252 of the Probate Code" or by providing for distribution "in the manner provided in Section 240." See generally Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. B. Foundation Research J. 321, 380.

§ 253. Per capita at each generation

253. If a will or trust that calls for distribution "per capita at each generation as provided in Section 253 of the Probate Code," the property is divided into as many equal shares as there are living members of the nearest generation of issue then living and deceased members of that generation who leave issue then living. Each living member of the nearest generation of issue then living is allocated one share, and the remaining shares, if any, are combined and then divided and allocated in the same manner among the remaining issue as if the issue already allocated a share and their descendants were then deceased.

Comment. Section 253 is new and gives one drafting a will or trust the option of selecting the system of per capita at each generation representation. See generally Waggoner, A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants, 66 Nw. U.L. Rev. 626, 630-31 (1971); Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. B. Foundation Research J. 321, 380-82.