

Memorandum 84-65

Subject: Study L-605 - Probate Law and Procedure (Distribution Under a Will or Trust)

At the June meeting, the Commission considered a staff draft of a Tentative Recommendation Relating to Optional Representation Systems. The Commission decided the draft should be revised so that the terms "by right of representation" and "per stirpes" when used in a will or trust mean a pure stirpital distribution pattern--that is, the initial division of the property is made at the children's generation whether or not any are living. The Commission also decided that the proposed legislation should apply only to instruments executed on or after the operative date.

Attached to this Memorandum is a revised staff draft. We have changed the title from "Optional Representation Systems" to "Distribution Under a Will or Trust" more accurately to convey its content.

One policy question merits discussion: As the Commission decided, the new definitions of "by right of representation" and "per stirpes" apply only to instruments executed on or after January 1, 1986. See proposed Section 251(b). It is the State Bar's view that most lawyers think these terms as used in existing wills have a meaning consistent with the definition in proposed Section 251. This view is supported by language in the cases. See In re Estate of Healy, 176 Cal. 244, 168 P. 124 (1917); Lombardi v. Blois, 230 Cal. App.2d 191, 40 Cal. Rptr. 899 (1964). If the State Bar is correct, perhaps these definitions should apply retroactively as well as prospectively. On the other hand, Professor Halbach suggests that the language in the cases is only dictum, that on their facts the distribution made in the cases was also consistent with the intestate distribution pattern, and that analogous authorities from other states are divided on the question of whether these terms call for pure stirpital distribution or distribution according to the intestate pattern. Should proposed Section 251 be made retroactive?

If the Commission approves the staff draft, the staff will send it out for comment.

Respectfully submitted,

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STAFF DRAFT

TENTATIVE RECOMMENDATION

relating to

DISTRIBUTION UNDER A WILL OR TRUST

Wills and trusts often provide that if a beneficiary is deceased when distribution is made the property shall go to descendants of the deceased beneficiary.¹ How the property is to be divided and apportioned among descendants depends on the language of the instrument, but some of the terms in present use are ambiguous and lead to confusion and possible litigation over the proper interpretation of the instrument.² It would be useful to persons drafting wills and trusts to have statutory alternatives for distributing the property among descendants that could be selected by a simple reference in the instrument to the desired statutory alternative. This would bring clarity and certainty to such provisions, and would encourage those drafting wills and trusts to consider the more popular alternatives and to discuss them with clients.

The Commission recommends that three statutory choices be provided:

(1) A pure stirpital distribution pattern, pursuant to which the initial division of the property is made at the generation of the children of the deceased beneficiary, whether or not any children are living. Grandchildren and more remote generations would divide the share of their deceased parent.

(2) The distribution pattern for intestate succession, pursuant to which the initial division of the property is made at the first generation

1. See, e.g., Johnston, Outright Bequests and Devises, in California Will Drafting §§ 11.38, 11.42, at 371-72, 374 (Cal. Cont. Ed. Bar 1965); Drafting California Revocable Inter Vivos Trusts § 5.44, at 172 (Cal. Cont. Ed. Bar 1972); Drafting California Irrevocable Inter Vivos Trusts, at 377 (Cal. Cont. Ed. Bar 1973).

2. For example, wills and trusts often call for descendants to take in the deceased beneficiary's place "by right of representation" or "per stirpes." It is not clear whether this means a pure stirpital distribution pattern or refers to the intestate pattern. Halbach, Whither Distribution by Representation?, in CEB Estate Planning & California Probate Reporter 103 (February 1984).

of descendants having at least one living member.³ More remote generations divide the share of their deceased parent, except that if a descending share reaches a generation all of whose members are deceased, that share is divided equally among the living members of the next generation.

(3) The distribution pattern called "per capita at each generation," pursuant to which the initial division of the property is made at the first generation of descendants having at least one living member, the same as under the intestate succession pattern. 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 in the same manner at the next generation.⁴

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Section 240 of, to add a heading immediately preceding Section 240 of, and to add Chapter 2 (commencing with Section 250) to Part 6 of Division 2 of, the Probate Code, relating to probate law and procedure.

The people of the State of California do enact as follows:

3. See Prob. Code § 240.

4. 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).

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 § 240 (amended). Representation

SEC. 2. Section 240 of the Probate Code is amended to read:

240. If representation is called for by this code, ~~or if a will or trust that expresses no contrary intention provides for issue or descendants to take without specifying the manner,~~ the property shall be divided into as many equal shares as there are living members of the nearest generation of issue then living and deceased members of that generation who leave issue then living, each living member of the nearest generation of issue then living receiving one share and the share of each deceased member of that generation who leaves issue then living being divided in the same manner among his or her than living issue. ~~If a will or trust calls for distribution per stirpes or by right of representation, these terms shall be construed under the law that applied prior to January 1, 1985.~~

Comment. Section 240 is amended to delete the language relating to construction of a will or trust. The language deleted from the first sentence of Section 240 is continued in Section 250. The former second sentence which has been deleted from Section 240 is continued in Section 251.

Probate Code §§ 250-252 (added). Distribution under a will or trust

SEC. 3. Chapter 2 (commencing with Section 250) is added to Part 6 of Division 2 of the Probate Code, to read:

CHAPTER 2. DISTRIBUTION UNDER A WILL OR TRUST

§ 250. Distribution according to intestate pattern

250. When a will or trust calls for distribution in the manner provided in Section 240 of the Probate Code, or when a will or trust that expresses no contrary intention provides for issue or descendants to take without specifying the manner, the property shall be distributed in the manner provided in Section 240.

Comment. Section 250 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. 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. The language in Section 250 that "a will or trust that expresses no contrary intention provides for issue or descendants to take without specifying the manner" is governed by Section 240 continues a provision formerly found in Section 240.

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§ 251. Per stirpes or by right of representation

251. (a) When a will or trust calls for distribution in the manner provided in Section 251 of the Probate Code, the property shall be divided into as many equal shares as there are living children of the designated ancestor, if any, 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.

(b) Unless the will or trust expressly provides otherwise, if a will or trust executed on or after January 1, 1986, calls for distribution "per stirpes," "by representation," or "by right of representation," the property shall be distributed in the manner provided in subdivision (a).

(c) If a will or trust executed before January 1, 1986, calls for distribution per stirpes or by right of representation, these terms shall be construed under the law that applied prior to January 1, 1986.

Comment. Section 251 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).

The terms defined in subdivision (b) are subject to some other definition which may be provided in the instrument. For example, many wills define "by right of representation" to refer to the distribution pattern for intestate succession, rather than to a pure stirpital distribution pattern as under subdivision (a). See, e.g., Johnston, Outright Bequests and Devises, in *California Will Drafting* §§ 11.42-11.43, at 374 (Cal. Cont. Ed. Bar 1965). In such a case, the definition provided in the instrument will control.

Subdivision (c) continues a provision formerly found in Section 240.

§ 252. Per capita at each generation

252. (a) When a will or trust calls for distribution in the manner provided in Section 252 of the Probate Code, the property shall be divided into as many equal shares as there are living members of the nearest generation of issue then living and deceased members of that generation who leave issue then living. Each living member of the nearest generation of issue then living 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.

(b) Unless the will or trust expressly provides otherwise, if a will or trust executed on or after January 1, 1986, calls for "distribution per capita at each generation," the property shall be distributed in the manner provided in subdivision (a).

Comment. Section 252 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.