

Second Supplement to Memorandum 84-65

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

In response to the Tentative Recommendation Relating to Distribution Under a Will or Trust attached to the basic Memorandum (Memo 84-65), we have received a report from a subcommittee of the Executive Committee of the State Bar Estate Planning, Probate and Trust Law Section (attached as Exhibit 1) and a letter from Professor Jesse Dukeminier (attached as Exhibit 2). The staff has revised the Tentative Recommendation to incorporate the suggestion made by Professor Dukeminier and most of the suggestions made by the State Bar. The revised draft is attached to this Supplement.

Technical revision

Both the State Bar subcommittee and Professor Dukeminier objected to having the term "representation" mean the Uniform Probate Code representation scheme when used in the intestacy statutes, and mean pure per stirpes when used in a will or trust, as under the prior draft. Professor Halbach has made the same point. The staff thinks this objection is well taken, and has deleted the term "representation" from the intestacy statutes and from the power of appointment provisions in the revised draft.

Should the proposed statute include a definition of "per capita"?

The State Bar subcommittee suggests that our statutory options for one drafting a will or trust should include a definition of "per capita" under which all living members of the designated class take an equal share without regard to whether the parent of any member is living or dead. Thus if the gift is to "issue per capita," children, grandchildren, and more remote descendants each take an equal share, even if all of the children are living. Previous drafts have not contained a per capita provision in its pure form, since we were trying to clear up some of the confusion with respect to various systems of representation. Pure per capita is not representation at all, since the takers receive a primary share and do not take in place of a deceased ancestor.

The staff has included a per capita section (proposed Section 253) in the revised draft for the Commission's review and discussion. However, the section may be of marginal value, since the difficult problem in applying a per capita provision in a will or trust is usually the question of who are and who are not members of the designated class. In a California case, the testator left his estate to A, to all of the living children of B, and to C, "share and share alike." The trial court held that "share and share alike" referred to A, B, and C, rather than to A, the children of B, and C. Therefore, the trial court awarded one-third each to A and C, and one-ninth each to the three living children of B. The California Supreme Court reversed, holding that "share and share alike" referred to A, the living children of B, and C, with the result that each took one-fifth. In re Estate of Rauschenplat, 212 Cal. 33, 297 P. 882, 78 A.L.R. 1380 (1931).

Other cases have held that if there is more than one class, a provision for equal distribution refers to equality among the classes, and a per stirpes division is required within each class. 4 W. Bowe & D. Parker, Page on the Law of Wills § 36.10, at 563-64 (1961).

The new per capita section in the revised draft requires equality among living members of the "designated class" but is of no help whatever in determining who the members of the designated class are, the question involved in the Rauschenplat case. Shall we retain proposed Section 253, or delete it as unnecessary?

Effect of reference in the will or trust to a specific section by number

The revised draft is written in such a way that if a will or trust calls for distribution in the manner provided in a section which is referred to by number (e.g., "Probate Code Section 251"), that reference is not subject to contradiction in some other part of the instrument. The State Bar subcommittee proposes that a reference to a specific section should govern "[u]nless the will or trust otherwise expressly provides." The staff has not included this suggestion in the revised draft. Should a reference to a specific section number be subject to contradiction elsewhere in the instrument?

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

REVISED 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 four 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 of descendants having at least one living member.³ More remote generations divide the share of their deceased parent, except that if a

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, a will or trust may 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).

3. See Prob. Code § 240.

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

(4) The distribution pattern called "per capita," pursuant to which each living member of the designated class takes one share, equal to every other living member of the designated class.⁵

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

An act to amend Section 1389.4 of the Civil Code, Sections 240, 6402, and 6402.5 of, to amend the heading of Part 6 (commencing with Section 240) of Division 2 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:

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).

5. The "per capita" distribution system is not representation. Each member of the designated class takes in his or her own right, not by virtue of taking in place of a deceased ancestor. One may take per capita even when the person's parent is also living. See generally 80 Am. Jur.2d Wills § 1450, at 522-23 (1975); 4 W. Bowe & D. Parker, Page on the Law of Wills § 36.6, at 555 (1961).

Civil Code § 1389.4 (technical amendment). Power of appointment

SECTION 1. Section 1389.4 of the Civil Code is amended to read:

1389.4. (a) Except as provided in subdivision (b), if an appointment by will or by instrument effective only at the death of the donee is ineffective because of the death of an appointee before the appointment becomes effective and the appointee leaves issue surviving the donee, the surviving issue of such appointee shall take the appointed property in the same manner as the appointee would have taken had the appointee survived the donee except that the property shall pass only to persons who are permissible appointees, including those permitted under Section 1389.5. If the surviving issue are all of the same degree of kinship to the deceased appointee they take equally, but if of unequal degree then those of more remote degree take ~~by representation as in~~ the manner provided in Section 240 of the Probate Code.

(b) This section does not apply if either the donor or donee manifests an intent that some other disposition of the appointive property shall be made.

Comment. Section 1389.5 is amended to delete the reference to taking "by representation." This change is nonsubstantive.

404/675

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

SEC. 2. The heading of Part 6 (commencing with Section 240) of Division 2 of the Probate Code is amended to read:

PART 6. ~~DIVISION BY REPRESENTATION DISTRIBUTION~~
AMONG HEIRS OR BENEFICIARIES

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

SEC. 3. A heading is added immediately preceding Section 240 of the Probate Code, to read:

CHAPTER 1. INTESTATE DISTRIBUTION SYSTEM

Probate Code § 240 (amended). Distribution according to intestate
distribution system

SEC. 4. 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~~ a statute calls for property to be distributed or taken in the manner provided in this section, 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 then 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.

The former reference to "representation" is also deleted from Section 240 to avoid confusion with the definition of the term when used in a will or trust. See Section 251.

For sections applying Section 240, see Civil Code § 1389.4; Prob. Code §§ 6402, 6402.5.

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

SEC. 5. Chapter 2 (commencing with Section 250) is added to Part 6 of Division 2 of the Probate Code, to read:

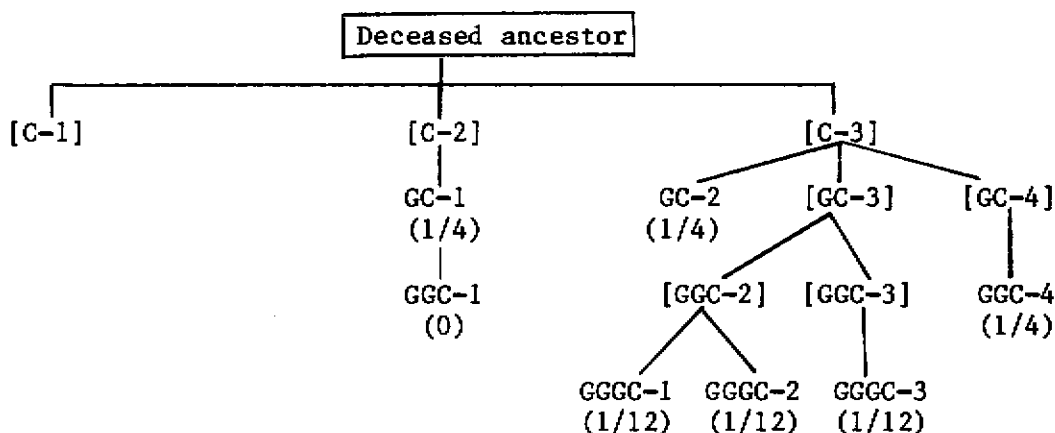
CHAPTER 2. DISTRIBUTION UNDER A WILL OR TRUST

§ 250. Distribution according to intestate distribution system

250. When a will or trust calls for property to be distributed or taken 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 to be distributed 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. Under Section 240, if the first generation of issue of the deceased ancestor are themselves all deceased, the initial division of the property is not made at that generation, but is instead made at the first descending generation of issue having at least one living member. 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.

For example, if there have been four generations of descendants of the deceased ancestor but all of the deceased ancestor's children are dead, distribution under Section 240 is made as follows (brackets indicate those who are dead when distribution is made):



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.

4465

§ 251. Per stirpes or by right of representation

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

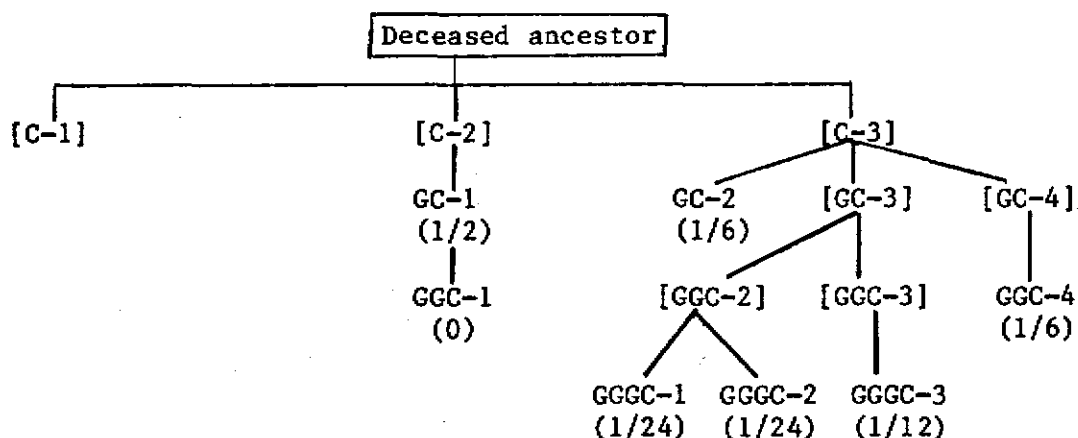
children who leave issue then living. Each living child of the designated ancestor is allocated one share, and the share of each deceased child who leaves issue then living is divided in the same manner.

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

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).

For example, if there have been four generations of descendants of the deceased ancestor but all of the deceased ancestor's children are dead, distribution under Section 251 is made as follows (brackets indicate those who are are dead when distribution is made):



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) supersedes a provision formerly found in Section 240.

§ 252. Per capita at each generation

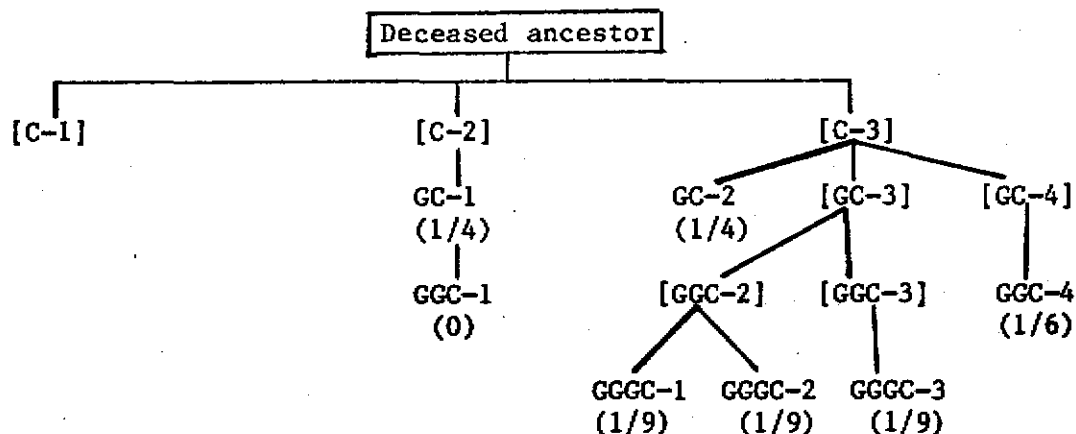
252. (a) When a will or trust calls for property to be distributed or taken in the manner provided in Section 252 of the Probate Code, the property to be distributed shall be divided into as many equal shares as there are living members of the nearest generation of issue then living and deceased members 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 property to be distributed or taken "per capita at each generation," 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 property to be distributed or taken "per capita at each generation," the property shall be distributed in the manner provided in subdivision (a), absent a contrary intent of the testator or trustor.

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.

For example, if there have been four generations of descendants of the deceased ancestor but all of the deceased ancestor's children are dead, distribution under Section 252 is made as follows (brackets indicate those who are dead when distribution is made):



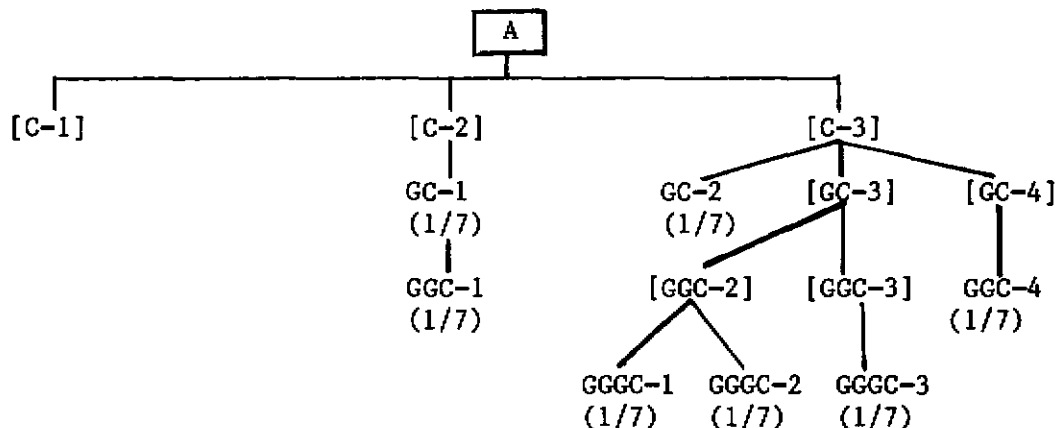
§ 253. Per capita

253. (a) When a will or trust calls for property to be distributed or taken in the manner provided in Section 253 of the Probate Code, the property to be distributed shall be divided into as many equal shares as there are living members of the designated class, and each living member of the class is allocated one share.

(b) Unless the will or trust expressly provides otherwise, if a will or trust executed on or after January 1, 1986, calls for property to be distributed among or taken by a class of persons "per capita," 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 property to be distributed among or taken by a class of persons "per capita," the property shall be distributed in the manner provided in subdivision (a), absent a contrary intent of the testator or trustor.

Comment. Section 253 is new and gives one drafting a will or trust the option of providing for distribution per capita. With per capita distribution, each member of the designated class takes an equal share without regard to whether that person's parent is living or dead. For example, if the gift is to "the issue of A per capita" and A has seven living issue in three different generations, distribution under Section 253 is made as indicated in the following diagram (brackets indicate those who are deceased when distribution is made):



An instrument which calls for distribution "per capita with representation" does not invoke Section 253. 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 (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.

Probate Code § 6402 (technical amendment). Intestate share of heirs other than surviving spouse

SEC. 6. Section 6402 of the Probate Code is amended to read:

6402. Except as provided in Section 6402.5, the part of the intestate estate not passing to the surviving spouse under Section 6401, or the entire intestate estate if there is no surviving spouse, passes as follows:

(a) To the issue of the decedent; if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree, then those of more remote degree take ~~by representation in the manner provided in Section 240.~~

(b) If there is no surviving spouse, to the decedent's parent or parents equally.

(c) If there is no surviving issue or parent, to the issue of the parents or either of them, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take ~~by representation in the manner provided in Section 240.~~

(d) If there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, to the grandparent or grandparents equally, or to the issue of such grandparents if there is no surviving grandparent, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take ~~by representation in the manner provided in Section 240.~~

(e) If there is no surviving issue, parent or issue of a parent, grandparent or issue of a grandparent, but the decedent is survived by the issue of a predeceased spouse, to such issue, the issue taking equally if they are all of the same degree of kinship to the predeceased spouse, but if of unequal degree those of more remote degree take ~~by representation in the manner provided in Section 240.~~

(f) If there is no surviving issue, parent or issue of a parent, grandparent or issue of a grandparent, or issue of a predeceased spouse, but the decedent is survived by next of kin, to the next of kin in equal degree, but when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim

through the nearest ancestor shall be preferred to those claiming through an ancestor more remote.

(g) If there is no surviving next of kin of the decedent and no surviving issue of a predeceased spouse of the decedent, but the decedent is survived by the parents of a predeceased spouse or the issue of such parents, to the parent or parents equally, or to the issue of such parents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the predeceased spouse, but if of unequal degree those of more remote degree take ~~by representation~~ in the manner provided in Section 240.

Comment. Section 6402 is amended to substitute the references to Section 240 for the former references to taking "by representation." This change is nonsubstantive.

34708

Probate Code § 6402.5 (technical amendment). Special rule for portion of decedent's estate attributable to the decedent's predeceased spouse

SEC. 7. Section 6402.5 of the Probate code is amended to read:

6402.5. (a) If the decedent had a predeceased spouse who died not more than 15 years before the decedent and there is no surviving spouse or issue of the decedent, the portion of the decedent's estate attributable to the decedent's predeceased spouse passes as follows:

(1) If the decedent is survived by issue of the predeceased spouse, to the surviving issue of the predeceased spouse; if they are all of the same degree of kinship to the predeceased spouse they take equally, but if of unequal degree those of more remote degree take ~~by representation~~ in the manner provided in Section 240.

(2) If there is no surviving issue of the predeceased spouse but the decedent is survived by a parent or parents of the predeceased spouse, to the predeceased spouse's surviving parent or parents equally.

(3) If there is no surviving issue or parent of the predeceased spouse but the decedent is survived by issue of a parent of the predeceased spouse, to the surviving issue of the parents of the predeceased spouse or either of them, the issue taking equally if they are all of the same degree of kinship to the predeceased spouse, but if of unequal degree those of more remote degree take ~~by representation~~ in the manner provided in Section 240.

(4) If the decedent is not survived by issue, parent, or issue of a parent of the predeceased spouse, to the next of kin of the decedent in the manner provided in Section 6402.

(5) If the portion of the decedent's estate attributable to the decedent's predeceased spouse would otherwise escheat to the state because there is no kin of the decedent to take under Section 6402, the portion of the decedent's estate attributable to the predeceased spouse passes to the next of kin of the predeceased spouse who shall take in the same manner as the next of kin of the decedent take under Section 6402.

(b) For the purposes of this section, the "portion of the decedent's estate attributable to the decedent's predeceased spouse" means all of the following property in the decedent's estate:

(1) One-half of the community real property in existence at the time of the death of the predeceased spouse.

(2) One-half of any community real property, in existence at the time of death of the predeceased spouse, which was given to the decedent by the predeceased spouse by way of gift, descent, or devise.

(3) That portion of any community real property in which the predeceased spouse had any incident of ownership and which vested in the decedent upon the death of the predeceased spouse by right of survivorship.

Comment. Section 6402.5 is amended to substitute the references to Section 240 for the former reference to taking "by representation." This change is nonsubstantive.

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August 23, 1984

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Dear John:

An ad hoc committee was formed from the members of the Estate Planning, Trust and Probate Law Section's Executive Committee to study the proposal on optional systems of representation. A copy of the committee's report is enclosed.

I am sending a copy to Professor Halbach.

The Executive Committee voted at its meeting on August 18th that these new code sections should also construe a will or trust provision which gives to issue "in equal shares per stirpes". The enclosed report does not deal with that particular provision. When this language appears, the draftsman has made a mistake. Probably the Section 251 meaning was intended as opposed to per capita or the Section 240 meaning. The policy question is, "Should some particular meaning be assigned to this phrase by legislation or should the mistake be a matter for the courts to resolve based on general rules of construction?" A majority of our executive committee felt that these proposed sections should address this problem. This could be done by including the phrase "in equal shares per stirpes" in Section 251.

Very truly yours,


James D. Devine

JDD:dv
Enclosure

cc: Charles A. Collier, Jr., Esq. (w/encl.)
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Kenneth M. Klug, Esq. (w/encl.)
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Prof. Edward C. Halbach, Jr. (w/encl.)

REPORT ON PROPOSED OPTIONAL
REPRESENTATION SYSTEMS
(LRC Memorandum 84-65)

An ad hoc committee composed of Bilter, Collier, Cranston, Devine, and Klug was appointed to study the proposed statutory schemes for distribution by representation and per capita. This is the report of that committee.

The adoption of AB 25 created a statutory definition of the term "representation" which many practitioners found objectionable and contrary to the commonly understood meaning of the term. AB 2290 attempts to eliminate some of the criticism by providing that "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".

Probate Code Sections 6402 (as amended by AB 2290) and 6402.5 provide in several instances for distribution to issue "by representation". Section 240 (as amended by AB 2290) establishes a scheme of distribution "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 Law Revision Commission has prepared a Tentative Recommendation, incorporated in Memorandum 84-65, attached, which amends Section 240 by deleting the language relating to the construction of a will or trust. Thus, the application of Section 240 is limited to intestate succession. The Commission further

proposes to add Sections 250, 251, and 252 to provide alternative methods of distribution to issue under a will or trust following either the intestate pattern, a pure per stirpes distribution, or distribution per capita at each generation.

The Ad Hoc Committee favors the concept of providing alternative methods of distribution by the use of shorthand references or key phrases in a will or trust. With respect to the specific proposals of the Tentative Recommendation, the Committee believes (1) that it is not desirable to give the term "representation" two different meanings in the code; (2) that a definition of "per capita" should be provided; (3) that the new sections should apply to existing wills and trusts as a rule of construction, subject to demonstrating a contrary intent; and (4) that the language used in the proposed sections could be more clear. The Ad Hoc Committee recommends that examples of the alternative distribution schemes be included in the comments to the new sections and suggests the following amendments to the proposed sections:

(1) Where the phrase "by representation" appears in Probate Code Sections 6402 or 6402.5, it should be replaced with "as provided in Section 240 of this Code".

(2) Section 240 should be amended to read:

240. If a decedent dies intestate and this Code calls for distribution to the issue of the decedent or other designated ancestor, the property to be distributed shall be divided into as many equal shares as there are living members and deceased members with living issue of the generation nearest to the

decedent or other designated ancestor, having at least one living member. Each living member of that nearest generation shall receive one share and the share for each deceased member shall be divided in the manner provided in the foregoing sentence among his or her living issue.

(3) Section 250 should be adopted in the form proposed by the LRC, namely:

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.

(4) Section 251 should be amended to read:

251. (a) Unless the will or trust expressly provides otherwise, when a will or trust, executed on or after January 1, 1986, calls for distribution "per stirpes", "by representation", "by right of representation", or in the manner provided in Section 251 of the Probate Code, the property to be distributed shall be divided into as many equal shares as there are living children of the decedent, or other designated ancestor, and deceased children who leave issue then living. Each living child of the decedent or other designated ancestor is allocated one share, and the

share of each deceased child is divided in the manner provided in the foregoing sentence among that child's then living issue.

(b) If a will or trust executed before 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), absent a contrary intent of the testator or trustor.

(5) A new Section 252 defining "per capita" should be adopted as follows:

252. (a) Unless the will or trust expressly provides otherwise, when a will or trust executed on or after January 1, 1986, calls for distribution among a class of persons "per capita" or in the manner provided in Section 252 of the Probate Code, the property to be distributed shall be divided into as many equal shares as there are living members of the designated class, and each living member of the class is allocated one share.

(b) If a will or trust executed before January 1, 1986, calls for distribution "per capita", the property shall be distributed in the manner provided in subdivision (a), absent a contrary intent of the testator or trustor.

(6) Section 252 should be renumbered as Section 253 and amended to read:

253. (a) Unless the will or trust expressly provides otherwise, when a will or trust executed on or

after January 1, 1986, calls for distribution "per capita at each generation", or in the manner provided in Section 253 of the Probate Code, the property to be distributed shall be divided into as many equal shares as there are living members and deceased members with living issue of the generation nearest to the decedent or other designated ancestor having at least one living member. Each living member of that nearest generation is allocated one share and the remainder of the property to be distributed is combined and then divided and allocated in the manner provided in the foregoing sentence among the remaining issue as if the living issue already allocated a share and their descendants were then deceased.

(b) When a will or trust executed before January 1, 1986, calls for distribution "per capita at each generation", the property shall be distributed in the manner provided in subdivision (a), absent a contrary intent of the testator or trustor.

(7) Other related sections, such as CC §1389 dealing with ineffective appointment by will or other instrument effective at death, would have to be amended to conform to the above recommendations. In the case of CC §1389.4, this could be accomplished by deleting the words "by representation" from the last sentence of §1389.4(a).

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August 24, 1984

SCHOOL OF LAW
LOS ANGELES, CALIFORNIA 90024

Mr. John DeMouilly
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Dear John:

Re: First Supplement to Memorandum 84-65

I guess I did not make myself clear in my letter about Probate Code § 240 and proposed § 250. I do not want to argue about the correct interpretation of *Lombardi v. Blois*. I cited it for the proposition that in interpreting a will, phrases in a will should be given the same meaning they have under the intestacy statutes. You cited it for the proposition that in a will distribution per stirpes, where the issue are of different degrees, you start dividing into shares at the level of children of the decedent. Obviously, on its facts, it supports both interpretations inasmuch as the pre-1985 intestacy statute called for exactly such a division.

But the real issue before the Commission is not what pre-1985 law was. You are legislating for the future. The issue is this: For the law beginning in 1985, should "per stirpes" and "by right of representation" mean the same thing in a will or trust distribution as they mean in an intestate distribution? I see no reason for enacting legislation providing that "representation" in § 240 (intestacy) means one thing and "representation" in (proposed) § 250 (wills and trusts) means another. I do not believe you can justify two different meanings on the ground of decedent's intent. But that's the issue. Would a testator or trustor who called for a distribution "by right of representation" want something different from representation as defined in § 240? The Restatement says the legislative reading of the average person's intent as set forth in the intestate succession statutes is highly persuasive evidence of what the average person would want in a will distribution under similar facts. If you are going to have different meanings in two sections of the Probate Code, I think you ought to have a persuasive justification based on the average person's intent.

Sincerely,



Jesse Dukeminier
Professor of Law

JD:mrs