

Second Supplement to Memorandum 86-59

Subject: Study L-1038 - Estate and Trust Code (Abatement)

Attached to this Supplement as Exhibit 1 is a report on the basic memorandum (Memo 86-59) of Kenneth Petrulis and Phyllis Cardoza for the Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association, discussed below.

§ 6191. Purposes for which abatement made

The report suggests technical amendments to Section 6191. The staff thinks these are an improvement, and recommends the section be revised as follows:

6191. Except as provided in Sections 6562 and 6573, shares of distributees abate as provided in this article for all purposes, including payment of the ~~testator's debts, expenses of administration, family allowance, matters specified in Section 11420,~~ satisfaction of preferred devises ~~under the testator's will~~, and payment of expenses on specifically devised property pursuant to Section 6184, and without any priority as between real and personal property.

§ 6192. Order of abatement

As discussed in the basic memo, Section 6192 presents the two most important policy issues presented by this draft: Should the Commission adhere to its previous decision (1) to require specific and general devises to abate proportionately, and (2) to require specific and general devises to nonrelatives to abate completely before abatement of such devises to a spouse or kindred of the testator? The Beverly Hills report would keep the Jenanyan rule requiring general devises to abate before specific ones, reversing the Commission's decision to have proportional abatement, and would keep the preference for spouse and kindred (but only within each class), consistent with the Commission's decision.

The report would add to Section 6192 cross-references to the sections in the preceding article (interest and income accruing during administration) where the terms "general devise," "residuary devise," and "specific devise" are defined. If a cross-reference is desirable, definitions of those terms should either be included in this article

(abatement), or we should create a new chapter (abatement; interest and income accruing during administration) with one set of definitions applicable to the entire chapter.

§ 6194. Abatement after sale or use incident to administration

Section 6194 provides:

6194. If the subject of a [preferred] devise is sold or used incident to administration, abatement shall be achieved by appropriate adjustments in, or contribution from, other interests in the remaining assets.

As used in Section 6194, "preferred devise" must mean a specific devise. Preferred devises may be either general or specific, but, since a general devise does not give a specific thing, there is no "subject" of a general devise. Therefore, Section 6194 must mean that if property specifically devised is sold or used incident to administration, the specific devisee is entitled to money equal to the value of the property sold or used, and that the money is taken as provided in Section 6192: first from intestate property until exhausted, then from residuary property until exhausted, and then payment to the specific devisee is reduced proportionately with general devises (subject to the preference for spouse and kindred). Read this way, Section 6194 appears to add nothing to Section 6191 (purposes for which abatement made). Perhaps Section 6194 should be deleted, and language added to Section 6191 to make clear that the abatement rules of this article apply for all purposes, including the case "where a specific devise is sold or used incident to administration."

The Beverly Hills report would revise Section 6194 to require "pro rata" contribution where property is sold or used incident to administration. This would create a special rule, requiring general devises to contribute proportionately with residuary and intestate property in such a case. The staff thinks this would be an undesirable result, and almost certainly contrary to the testator's intent.

Respectfully submitted,

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July 12, 1986

BEVERLY HILLS BAR ASSOCIATION
PROBATE TRUST AND ESTATE PLANNING SECTION
LEGISLATION COMMITTEE
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CALIFORNIA LAW REVISION COMMISSION
Study L-1038 - Estate and Trust Code (Abatement)
Memorandum 86-59 dated 6-2-86

BHBA Suggested Changes - Sections 6190-6194*

§6191. Purposes for which abatement made

6191. Except as provided in Sections 6562 and 6573, shares of distributees abate as provided in this article for all purposes, including ~~payment of the testator's debts, expenses of administration~~ family allowance expenses and claims as set forth in Section [950] and satisfaction of {preferred} ~~devises under the testator's will,~~ and payment of expenses on specifically devised property pursuant to Section 6184, and without any priority as between real and personal property.

*Deletions lined through; additions underlined.

§6191. Purposes for which abatement made (cont.)

BHBA Comments.

1. Since present §950 lists the priority of payment of expenses, debts, claims, and other calls upon the estate's assets, the language in the LRC proposal is out of order and thus confusing.

2. We favor leaving in the word "preferred", and also leaving in the bracketed language in the Comment which explains it.

3. The phrase "under the testator's will" is unnecessary because:

a. It is meaningless because devises are only under a testator's will.

b. The comment explains that devises are preferred when they have priority under either the will or the abatement rules, whereas the LRC language talks about devises only under the will, thus contradicting the LRC comment.

4. Some of our members feel that priority (preference) should be given to specific devises of tangible personal property, to avoid their having to be sold, when the testator's intention is clear. They realize that as a practical matter, devisees often make agreements among themselves to avoid just that result, but feel this policy should be codified.

§6192. Order of abatement

6192. Except as provided in Section 6193, shares of distributees abate [(be exhausted)] in the following order of preference:

- (a) Property not disposed of by the will.
- (b) Residuary devises, as defined in §6180(c).
- ~~(c) -- All other devises to persons not related to the testator, in proportion to the value or amount of each such devise.~~
- (c) General devises, as defined in §6180.
- ~~(d) -- All other devises to the testator's spouse or kindred, in proportion to the value or amount of each such devise.~~
- (d) Specific devises, as defined in §6180(d).
- (e) Within the classes of general and specific devises, devises shall abate in the following order of preference:

(1) Strangers

(2) Spouse and kindred

Definitions

Devise § 32
Kindred ~~§ 402~~
Person § 35
Property § 62
Will § 63

*Deletions ~~lines~~ through; additions underlined.

§ 57. Order of abatement, cont.

BHBA Comments.

1. Regarding Subparagraph (a), "property not disposed of by will", we take it, means probate property that was not mentioned specifically or in a residuary clause in the testator's will. This should be added to the Comment, which follows the code section.
2. We have added to Subparagraphs (b), (c), and (d) the places in the Estates and Trusts Code that these terms of art will be defined (although "general devises" is not defined there with specificity; perhaps that could be tightened up in proposed §6180). If the Commission wishes, they could also be added to the definitions shown below this code section.
3. There is no good reason to change (according to the LRC staff summary on page 1) " . . . the universal rule that general devises are exhausted before specific devises are reduced, . . ." especially in light of the Estate of Jenanyan, cited in the LRC summary and the Comment to §6192. Furthermore, abating specific devises (which could include family heirlooms) to family members before general devises to non-family members would cause the specific items of tangible personal property to be sold, which surely would destroy the testator's intent. We are sure the Commission does not intend this effect of the "proportional rule".
4. In LRC subparagraph (c) the phrase "not related" is too loose; it raises the question of in-laws. Thus, in BHBA proposed subparagraph (e) the word "kindred", which was used in present §752 and is used in present §6402(f), for example.
5. The BHBA Legislative Committee members generally have difficulty with the current scheme of confusing labels for different types of devises. For example, a "general pecuniary devise" has long meant a specific amount of money, where as "demonstrative devise" has meant a specific amount of money taken from a specific fund. Why should there be a difference? And furthermore, most people understand "specific" to mean just that, and general to mean unspecified, so that calling a specific amount of money "general" is contradictory. See our comments to §6180 in LRC Study L-800, Memorandum 86-60 dated 6-12-86.
6. Along those lines, perhaps in these abatement sections, specific gifts should mean abatement-free, and general gifts should be subject to abatement

§6193. Court discretion to carry out testator's intent

6193. If the will expresses an order of abatement, or if the testamentary plan or the express or implied purposes of the devise would be defeated by the order of abatement stated in Section 6192, the shares of the distributees abate as the court determines is necessary to give effect to the intention {or purpose} of the testator.

BHBA Comments.

1. We favor leaving in the phrase "or purpose".
2. Some of our members feel that unless there is a rebuttable presumption that the statutory plan controls, this section could encourage litigation. After all, the purpose of the statute is to do equity when there is an abatement situation.
3. Other members feel that if the testator's intent is not clearly expressed, the unclearly-expressed devises should not be favored over those clearly expressed.

§6194. Abatement after sale or use incident to administration

6194. If the subject of a {preferred} devise is sold or used incident to administration, ~~abatement shall be achieved by~~ appropriate pro-rata adjustments in, or contributions from, other interests in the remaining assets shall be made.

BHBA Comments

1. The language of this section does a lot toward simplifying present §753. However, the new language could give the impression that an "abatement situation" (where someone's share will be reduced and not someone else's) has arisen just because one specifically devised asset has been sold or otherwise used for administration purposes. Thus we propose a change to show that all devisees will contribute equally toward the share that has to be sold and then used for administration expenses, etc.

2. We favor leaving in the word "preferred", and also leaving in the bracketed language in the Comment which explains it.