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Memorandum 86-60

Subject: Study L-800 - Probate Code (Distribution of Interest and Income)

Attached to this Memorandum are redrafted provisions concerning distribution of interest and income accruing during administration, revised to reflect Commission decisions at the August 1985 meeting.

Liability for Expenses of Specifically Devised Property

At the August 1985 meeting, the Commission asked the staff to deal in the statute with the case where earnings on a specific devise are insufficient to pay taxes on the property and expenses of upkeep. There was support for a rule requiring such expenses to be paid by the estate for one year, and by the specific devisee thereafter. This is the rule in proposed Section 6183. Does the Commission approve Section 6183?

Commencement of Income From Testamentary Trust

Some confusion is caused by the interaction of Probate Code Sections 661 and 663(a) which provide:

661. In case of a bequest of the interest or income of a certain sum or fund, the interest or income accrues from the testator's death.

663. (a) General pecuniary legacies, including general pecuniary legacies in trust, if not paid prior to the first anniversary of the testator's death, bear interest thereafter at the rate of interest payable on a money judgment entered in this state.

In Professor Halbach's view, most practitioners believe that, when the will is silent, income from a testamentary trust does not commence until one year after the testator's death. This question is particularly important in the case of a marital deduction formula bequest. Professor Halbach wants to make clear that Probate Code Section 661 does not apply to such a case. Accordingly, the staff has drafted a new provision to apply to income from a general pecuniary devise in trust. See proposed Section 6186(a). The new language provides that such income commences one year from death (unless the

will provides otherwise).

It would seem that the only non-trust case to which the "certain sum or fund" language of Section 661 may refer is to a specific devise. By case law, a specific devise carries with it the earnings on that specific property from the date of death. Section 6183 in the attached draft codifies this case law rule. Since proposed new Section 6186 will apply to the trust case, and Section 6183 applies to earnings of a specific devise, it would appear that the confusing "certain sum or fund" language of Section 661 can be eliminated. Accordingly, the attached draft does not continue this language.

Does the Commission approve proposed Section 6186?

Respectfully submitted,

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CHAPTER 5. RULES OF CONSTRUCTION OF WILLS

Article 4. Interest and Income Accruing
During Administration

- § 6180. Definitions
- § 6181. Testator's intention controls
- § 6182. Rate of interest
- § 6183. Earnings on and expenses of specific devise
- § 6184. Interest on general pecuniary devise
- § 6185. Remaining income to residuary or intestate distributees
- § 6186. Commencement of income from testamentary trust
- § 6187. Annuities; interest on periodic payments
- § 6188. Transitional provision

DISPOSITION OF EXISTING SECTIONS

CHAPTER 5. RULES OF CONSTRUCTION OF WILLS

Article 4. Interest and Income Accruing
During Administration§ 6180. Definitions

6180. As used in this article:

(a) "Annuity" means a devise of certain specified sums periodically.

(b) A "general pecuniary devise" is a pecuniary devise which is to be taken or paid from the testator's general estate, and is not intended to give a specific thing.

(c) A "residuary devise" is a devise of that which remains after all specific devises, demonstrative devises, general devises, and annuities have been satisfied.

(d) A "specific devise" is a devise of a specific thing.

Comment. Subdivision (a) of Section 6180 restates the first clause of subdivision (c) of former Probate Code Section 662 without substantive change. See generally Estate of Luckel, 151 Cal. App.2d 481, 312 P.2d 24 (1957).

Subdivision (b) supersedes subdivision (e) of former Probate Code Section 662 ("[a]ll other legacies are general legacies") and is consistent with case law under the former provision. See Estate of Buck, 32 Cal.2d 372, 374, 196 P.2d 769 (1948); Estate of Sullivan, 128 Cal. App.2d 144, 146, 274 P.2d 946 (1954); Estate of Jones, 60 Cal. App.2d 795, 798, 141 P.2d 764 (1943).

Subdivision (c) restates subdivision (d) of former Probate Code Section 662 without substantive change.

Subdivision (d) restates a portion of subdivision (a) of former Probate Code Section 662 without substantive change, and is consistent with case law. See Estate of Ehrenfels, 241 Cal. App.2d 215, 221, 50 Cal. Rptr. 358 (1966).

CROSS-REFERENCES

Definitions

Devise § 32

§ 6181. Testator's intention controls

6181. The provisions of this article apply where the intention of the testator is not indicated by the will.

Comment. Section 6181 restates former Probate Code Section 660 and the introductory clause of subdivision (a) of former Probate Code Section 664 without substantive change. The language of Section 6181 is drawn from Sections 6140(b) and 6165.

CROSS-REFERENCES

Definitions

Will § 88

§ 6182. Rate of interest

6182. When interest is payable under this article, the rate of interest is that payable on a money judgment entered in this state.

Comment. Section 6182 restates portions of subdivisions (a) and (c) of former Probate Code Section 663 without substantive change. For the rate of interest payable on a money judgment entered in this state, see Code Civ. Proc. § 685.010 (10 per cent per annum on unpaid principal). Interest is ordinarily simple interest, but may be compounded when the personal representative is guilty of a willful breach of duty. See *Estate of Cousins*, 111 Cal. 441, 452, 44 P. 182 (1896); *Wheeler v. Bolton*, 92 Cal. 159, 172-73, 28 P. 558 (1891). Cf. Section 16441 (trustee's liability for interest) [AB 2652].

The rule of Section 6182 applies where the intention of the testator is not indicated by the will. Section 6181.

CROSS-REFERENCES

Definitions

Personal representative § 58

§ 6183. Earnings on and expenses of specific devise

6183. (a) A specific devise carries with it the earnings on that specific property from the date of death, less taxes and other expenses attributable to that property during administration of the estate.

(b) If the earnings on a specific devise are not sufficient to pay expenses of maintaining the property, including taxes on the property, such expenses shall be paid out of the estate for one year from the date of death of the decedent. Thereafter, such expenses shall be borne by the specific devisee.

(c) Except as provided in subdivision (a), a specific devise does not bear interest.

Comment. Section 6183 is new. Subdivisions (a) and (c) codify case law. See, e.g., *In re Estate of Daly*, 202 Cal. 284, 287, 260 P. 296 (1927) (stock); *Estate of McKenzie*, 199 Cal. App.2d 393, 400, 18 Cal. Rptr. 680 (1962) (inheritance from another estate); *Estate of Bixby*, 140 Cal. App.2d 326, 334, 295 P.2d 68 (1956) (stock). Section 6184 applies to specific devises both of real property and of personal property. See Sections 32 ("devise" defined), 6180 ("specific devise" defined).

If expenses relating to a specific devise are paid out of the estate pursuant to subdivision (b), the expenses are imposed on distributees according to the abatement rules in Sections 6190-94. Subdivision (b) authorizes payment from the estate to maintain the property, but not to improve it.

The rule of Section 6183 applies where the intention of the testator is not indicated by the will. Section 6181.

CROSS-REFERENCES

Definitions

Devise § 32

Specific devise § 6180

§ 6184. Interest on general pecuniary devise

6184. If a general pecuniary devise, including a general pecuniary devise in trust, is not paid prior to the first anniversary of the testator's death, the devise bears interest thereafter. In the case of a general pecuniary devise in trust, such interest shall be distributed as income to the trust, and shall be treated by the trustee as income of the trust.

Comment. The first sentence of Section 6184 continues a portion of subdivision (a) of former Probate Code Section 663 without substantive change.

The first portion of the second sentence of Section 6184 continues the last portion of subdivision (b) of former Probate Code Section 664 without substantive change. The last portion of the second sentence of Section 6184 (interest shall be treated by trustee as trust income) is new.

The rule of Section 6184 applies where the intention of the testator is not indicated by the will. Section 6181.

CROSS-REFERENCES

Definitions

Devise § 32

General devise § 6180

Rate of interest § 6182

§ 6185. Remaining income to residuary or intestate distributees

6185. (a) Net income received during administration not paid out under other provisions of this article shall be distributed pro rata as income among all distributees of residuary or intestate property. If a distributee takes in trust or for life or for a term of years, the pro rata share of income is trust income or belongs to the tenant for life or the term of years.

(b) Net income under subdivision (a) includes net income from property sold during administration.

Comment. Section 6185 restates a portion of former Probate Code Section 664 without substantive change. The reference in Section 6185 to intestate property is new, and recognizes that there may be a partial intestacy in testate estates.

The rule of Section 6185 applies where the intention of the testator is not indicated by the will. Section 6181.

CROSS-REFERENCES

Definitions

Property § 62

§ 6186. Commencement of income from testamentary trust

6186. (a) In case of a devise of income from a general pecuniary devise in trust, the income commences one year from the testator's death.

(b) In case of a devise of income from a residuary devise in trust, the income commences at the date of the testator's death.

Comment. Section 6186 is new, and supersedes former Probate Code Section 661 as it applied to trusts. Subdivision (a) of Section 6186 is consistent with subdivision (a) of former Probate Code Section 663 and with subdivision (b) of former Probate Code Section 664 as they applied to trusts. Subdivision (b) of Section 6186 is consistent with subdivision (a) of former Probate code Section 664.

The rules of Section 6186 apply where the intention of the testator is not indicated by the will. Section 6181.

CROSS-REFERENCES

Definitions

Devise § 32

General pecuniary devise § 6180

[Note. The Commission has not previously seen Section 6186.]

§ 6187. Annuities; interest on periodic payments

6187. (a) Annuities commence at the testator's death and are due at the end of the annual, monthly, or other specified period.

(b) Whenever an annuitant, devisee of a devise for maintenance, or beneficiary of a trust, is entitled to periodic payments or trust income commencing at the testator's death, he or she is entitled to interest on the amount of any unpaid accumulations of such payments or

income held by the personal representative on each anniversary of the decedent's death. No such interest accrues during the first year after the decedent's death.

Comment. Subdivision (a) of Section 6187 continues subdivision (b) of former Probate Code Section 663. The first sentence of subdivision (b) continues the substance of the first portion of subdivision (c) of former Probate Code Section 663. The second sentence of subdivision (b) continues what appears to have been the substance of the last portion of subdivision (c) of former Probate Code Section 663 (interest "computed from the date of such anniversary"). See 7 B. Witkin, Summary of California Law Wills and Probate § 449, at 5891 (8th ed. 1974); California Will Drafting Practice § 8.67, at 372, § 9.59, at 429 (Cal. Cont. Ed. Bar 1982).

The rule of Section 6187 applies where the intention of the testator is not indicated by the will. Section 6181.

CROSS-REFERENCES

Definitions

Annuity § 6180
Devise § 32
Devisee § 34
Personal representative § 58
Rate of interest § 6182

§ 6188. Transitional provision

6188. (a) The provisions of this article apply on the operative date without regard to when the will was executed or when the decedent died.

(b) A reference in a written instrument, including a will or trust, to a provision of former Chapter 8 (commencing with Section 160) of former Division 1, or former Chapter 11 (commencing with Section 660) of former Division 3, shall be deemed to be a reference to the corresponding provisions of this article.

Comment. Subdivision (a) of Section 6188 supersedes subdivision (a) of former Probate Code Section 665, and makes clear that this article applies to estate proceedings which are pending on the operative date.

Subdivision (b) continues the substance of subdivision (b) of former Probate Code Section 665, and includes a reference to former Chapter 11 of Division 3 in which former Probate Code Section 665 was found.

CROSS-REFERENCES

Definitions

Will § 88

DISPOSITION OF EXISTING SECTIONS

DIVISION 3. ADMINISTRATION OF ESTATES OF DECEDENTS

CHAPTER 11. LEGACIES AND INTEREST

§ 660 (repealed). Testator's intention controls

Comment. Former Probate Code Section 660 is restated in Estate and Trust Code Section 6181 without substantive change.

§ 661 (repealed). Bequest of interest or income of certain sum

Comment. Former Probate Code Section 661 is superseded by Sections 6183 (earnings on specific devise) and 6186 (commencement of income from testamentary trust).

§ 662 (repealed). Kinds of legacies

Comment. The first portion of subdivision (a) of former Probate Code Section 662 is restated in subdivision (d) of Estate and Trust Code Section 6180 ("specific devise" defined) without substantive change. The last portion of subdivision (a) (if specific gift fails, resort cannot be had to testator's other property) is governed by Estate and Trust Code Section 6194 (abatement after sale of specifically devised property) and by the provisions on ademption. See, e.g., Sections 6165, 6171-6173.

Subdivision (b) of former Probate Code Section 662 is not continued, since the term "demonstrative devise" is not used in Estate and Trust Code Sections 6180-6188. However, as under subdivision (b) of former Probate Code Section 662, a devise is demonstrative when the particular fund or property is pointed out from which it is to be taken or paid. If a demonstrative devise cannot be made from the particular fund or property which is pointed out, resort may be had to the general assets as in the case of other general devises. 7 B. Witkin, Summary of California Law Wills and Probate § 214, at 5725 (8th ed. 1974).

The first portion of subdivision (c) of former Probate Code Section 662 is restated in subdivision (a) of Estate and Trust Code Section 6180 ("annuity" defined) without substantive change. The last portion of subdivision (c) is superseded by Estate and Trust Code Section 6192 (order of abatement).

Subdivision (d) of former Probate Code Section 662 is restated in subdivision (c) of Estate and Trust Code Section 6180 ("residuary devise" defined) without substantive change.

Subdivision (e) of former Probate Code Section 662 is superseded by subdivision (b) of Estate and Trust Code Section 6180 ("general pecuniary devise" defined).

§ 663 (repealed). Interest; annuities

Comment. Subdivision (a) of former Probate Code Section 663 is restated in Estate and Trust Code Sections 6182 (rate of interest) and 6184 (interest on general pecuniary devise) without substantive change.

Subdivision (b) of former Probate Code Section 663 is continued in subdivision (a) of Estate and Trust Code Section 6187.

Subdivision (c) of former Probate Code Section 663 is superseded by Estate and Trust Code Section 6182 (rate of interest) and by subdivision (b) of Estate and Trust Code Section 6187 (interest on unpaid periodic payments). Under Estate and Trust Code Section 6182, interest is simple interest unless the personal representative is guilty of a willful breach of duty. See the Comment to Section 6182.

§ 664 (repealed). Distribution of income from certain property

Comment. Subdivision (a) of former Probate Code Section 664 is restated in Estate and Trust Code Sections 6181 (testator's intention controls) and 6185 (remaining income goes to residuary or intestate distributees) without substantive change.

The provision of subdivision (b) of former Probate Code Section 664 that no income received during administration shall be distributed as income of a general pecuniary legacy in trust is restated in the provision of Section 6185 that net income received during administration not paid out under other provisions of Sections 6180-6187 goes to distributees of residuary or intestate property. The provision of subdivision (b) of former Probate Code Section 664 that interest on a pecuniary legacy in trust shall be distributed as income to the trust is continued in the second sentence of Estate and Trust Code Section 6184 without substantive change.

§ 665 (repealed). Transitional provision

Comment. Subdivision (a) of former Probate Code Section 665 is superseded by subdivision (a) of Estate and Trust Code Section 6188. Subdivision (b) of former Probate Code Section 665 is continued in subdivision (b) of Estate and Trust Code Section 6188 without substantive change.