First Supplement to Memorandum 88-2

Subject: Bill to Effectuate Recommendations to 1988 Legislature
(Priority for Appointment as Administrator CTA)

The Commission's recommendation on opening estate administration continues existing law governing priority for appointment of an administrator with the will annexed. The priority for appointment of an administrator with the will annexed is the same as the priority for appointment of an administrator generally---first the surviving spouse, then children, then other more remote relatives. However, in the case of an administrator with the will annexed, "one who takes under the will has priority over one who does not." Prob. Code § 409.

Attached as Exhibit 1 is a letter from Francis B. Dillon of Sacramento. Mr. Dillon points out that under the pretermitted heir statute, an omitted spouse may take as much as half the estate, but by application of Section 409 the most minor devisee under the will would take priority over the omitted spouse for appointment as administrator with the will annexed.

The staff believes that Mr. Dillon's letter points up a defect in the statute. A strong argument can be made that simply being named in the will as a beneficiary should not be the basis of priority. Rather, priority should be based on the share of the estate being taken. Take, for example, a holographic will that gives one item of property to a friend without naming an executor, the rest of the estate passing intestate. The basis of priority should not be that the friend is named in the will as beneficiary, but that the bulk of the estate passes to the nearest relative, who should have priority for appointment as administrator with the will annexed. As a general rule, it is the largest beneficiary who has the greatest stake and interest in the estate and who therefore is the proper person to administer the estate.

The existing California law attempts to recognize this basic principal by giving beneficiaries under the will priority on the assumption that these beneficiaries have the most substantial interest

in the estate. The courts have noted that the California law "is predicated upon the policy of placing administration in the hands of persons most likely to convert the property to the advantage of those beneficially interested." See, e.g., Estate of Wanamaker, 65 Cal.App.3d 587, 592, 135 Cal.Rptr. 333 (1977). And a 1974 amendment to Probate Code Section 409 makes clear that a 50% beneficiary under the will has priority over other will beneficiaries, regardless of any other considerations. However, as Mr. Dillon's situation illustrates, many times the majority beneficiary of an estate is not a will beneficiary but takes as an omitted or intestate heir. The California statute fails to recognize this.

The law of other jurisdictions recognizes the principal that the most substantial beneficiary should have highest priority for appointment as administrator with the will annexed. "Under some statutes the same order prevails as in case of intestacy, but the more usual governing principle is that the person most beneficially interested under the will shall have the preference, and as a general rule, to cover the cases not specially provided for, the person having the right to the estate ought to have the right of administration, and the grant will be generally made to the person having the largest interest." 34 C.J.S. § 1031, at 1286 (footnotes omitted); see also Annot., 164 A.L.R. 844 (1946).

The staff would revise the draft of the proposed legislation along the following lines:

> 8441. ~~(a) Except as provided in subdivision (b),~~ ~~persons~~ Persons and their nominees are entitled to appointment as administrator with the will annexed in the same order of priority as ~~for appointment of an administrator~~ the share of the estate the persons take, the persons taking the greatest share having the highest priority.
>
> (b) ~~A person who takes under the will has priority over a person who does not. A person who takes more than 50 percent of the value of the estate under the will or the person's nominee, or the~~ The nominee of several persons who together take ~~more than 50 percent of the value of the estate under the will~~ a greater share of the estate has priority over other persons and their nominees who take ~~under the will~~ a lesser share.

The staff believes this is a more logical and practical basis than existing California law for appointment of an administrator with the will annexed.

Respectfully submitted,

Nathaniel Sterling
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December 17, 1987

Mr. Nathaniel Sterling
Assistant Executive Secretary
California Law Review Commission
4000 Middlefield Road
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Dear Mr. Sterling:

I was in attendance on November 17th at the luncheon meeting of the Probate and Estate Planning Section of our Sacramento County Bar Association. I enjoyed your presentation very much.

You suggested that if any member of the Section became aware of any change in the Probate Code that should be addressed by the Commission to forward you a memo relating thereto.

Oddly enough, at the very time involved I was representing a pretermitted spouse, the surviving husband. The decedent's Will was executed approximately 9 years before her marriage to my client. The principal beneficiary was the daughter of the decedent, so named in the Will.

I filed a petition for appointment as administrator with will annexed asserting priority under Probate Code §422. The daughter filed an objection to my petition and sought appointment under Probate Code §409.

The matter was briefed and counsel engaged in oral argument. After taking the case under submission, the court ruled that under §409 the daughter, as a "beneficiary" (and in no way dependent upon her relationship) has priority over the omitted spouse. I had urged that

§409 did not preempt the court's inherent discretion to establish priority. The court relied on Estate of Mullane, 235 Cal.App.2d 441. That case involved an interpretation of the last sentence of §409 involving nomination by a non-resident. I urged this position to the best of my ability. However, in dictum in the Mullane case in turn quoted by Witkin, the court simply said that §409 applied to all Wills and that one who takes under the Will has priority over one who does not and further stated that the person named in the Will need not be entitled to succeed to the estate or some portion thereof under the law of succession. The court felt that she could not listen to my argument that such an interpretation could lead to the preposterous situation where a pretermitted child or an omitted spouse could not be appointed administrator with will annexed (even though they would succeed to substantial interests by intestate succession) of an estate where the testatrix had, for example, left $500 to her hairdresser. The hairdresser would prevail being "one who takes under the Will."

I would respectfully request that this problem is one that could very well be addressed by the California Law Review Commission.

Very truly yours,

FRANCIS B. DILLON

FBD:jj

cc: Mr. Claude B. Fancher