rm55
10/2/89

First Supplement to Memorandum 89-89

Subject: Study L-3007 - In-Law Inheritance (Comments on TR)

We have received six more letters on the Tentative Recommendation. Four favor repeal of Probate Code Section 6402.5. Two are opposed to repeal.

In Favor of Repeal

Exhibit 1: Judge Thomas Jenkins of the San Mateo County Superior Court says he is "not sure" the equities favor repeal, but on balance he favors repeal because of the complexity and expense of in-law inheritance and the need for national uniformity of law.

Exhibit 2: Susan Hazard of Musick, Peeler & Garrett says the notice required in testate cases because of the in- law inheritance statute "only encourages will contests by the heirs of the predeceased spouse which are most often without basis."

Exhibit 3: Richard Llewellyn and Arthur Steven Brown of Holley & Galen in Los Angeles say that although "under certain circumstances in-law inheritance might be equitable, the practical difficulties are too substantial to ignore."

Exhibit 4: Andrew Landay handled a probate involving "horrendous costs" to trace in-laws, yet the in-laws ultimately took nothing.

Opposed to Repeal

Exhibit 5: Jim Willett says the in-law inheritance statute provides fairness, and that it is more important to keep fairness than to achieve efficiency in probate.

Exhibit 6: Thomas A. Craven has the same view as Jim Willett.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

1st Supp. Memo 89-89

EXHIBIT 1

Study L-3007



Thomas M. Jenkins
Judge

Hall of Justice
Redwood City, California 94063

September 25, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Gentlemen:

I am in receipt of tentative recommendations relating to repeal of Probate Code Section 6402.5 and the Uniform Statutory Form Power of Attorney Act.

With respect to the former, although I'm not sure that the equities with respect to distribution are in fact worked out better under Uniform Code, it seems that the complexities, expense and validity of uniformity would warrant this State not being one of the few exceptions.

I am fully supportive of the adoption of the Uniform Statutory Form Power of Attorney Act, with the addition of designation of coagents as recommended. The present form is unnecessarily complex, and at times confusing. Even more than in the Law and Inheritance matter above, this is one where uniformity has very substantial merit.

Please keep me on the list for tentative recommendations.

Sincerely,

Thomas M. Jenkins

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September 28, 1989

WRITER'S DIRECT DIAL NUMBER
(213) 629-7857

VIA FEDERAL EXPRESS

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Repeal of Probate Code Section (6402.5)
("In-Law Inheritance")

Uniform Statutory Form Power of Attorney Act

To Whom it may concern:

James Ludlam of our office has historically forwarded for my review all proposals relating to trust and probate law which he receives from the California Law Revision Commission. I have reviewed the tentative recommendations regarding the above-referenced matters and have the following comments:

Repeal of Probate Code Section 6402.5

I am in total agreement with the recommendation that Probate Code Section 6402.5 be repealed. The requirement that notice be sent to the heirs of a predeceased spouse if a decedent dies without a spouse or issue, even if the decedent has a valid Will, only encourages will contests by the heirs of the predeceased spouse which are most often without basis. I agree with the conclusion that Probate Code Section 6402, the general intestate statute, is a more appropriate way to ensure that certain relatives of the predeceased spouse take in preference to more remote heirs of the decedent.

Uniform Statutory Form Power of Attorney Act

I agree with the recommendation that a Uniform Statutory Form Power of Attorney Act be enacted to replace Civil Code Section 2450.

Enclosed is a copy of a separate letter to the California Law Revision Commission in which I request that future

California Law Revision Commission materials relating to the Probate Code be sent to me as well as to James E. Ludlam.

Very truly yours,

Susan J. Hazard

Susan J. Hazard
for MUSICK, PEELER & GARRETT

SJH:daw
Enclosure
cc: James E. Ludlam

S1291119

ALBERT J. GALEN
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CLYDE E. HOLLEY (1891-1980)



September 27, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Comments to Tentative Recommendation Regarding the Repeal of Probate Code §6402.5; and to the Uniformed Statutory Form Power of Attorney Act

To Whom It May Concern:

We appreciate the opportunity to comment on the above-referenced Tentative Recommendations of the Commission.

We concur with the recommendation made to repeal Probate Code §6402.5 ("in-law inheritance"). Although under certain circumstances in-law inheritance might be equitable, the practical difficulties created by the statute are too substantial to ignore. These problems come up frequently; on the other hand, we have yet to see the statute have any effect on the distribution of an estate. For these reasons, we concur.

We have several concerns with regard to the Uniform Statutory Form Power of Attorney Act.

To begin with, we do not believe that the tax powers incorporated by reference by checking paragraph (M) will be sufficient to allow the agent to represent a taxpayer with regard to tax matters. Internal Revenue Service has its own Power of Attorney form, Form 2848 which requires certain minimum information (pursuant to IRS EP and EO Southeast Bulletin, Publication No. 85-1, July 1985) requiring the taxpayers full name, address, social security number, the specific type of tax involved (reference to "all taxes" is not acceptable), the specific tax year or years involved ("all years" is not acceptable), and a declaration regarding the representative's qualifications.

An additional concern is that the headings listed next to the

LAW OFFICES
HOLLEY & GALEN



paragraphs are not descriptive enough to allow the principal to be aware of the nature and full extent of the powers which he or she has grants to the agent. Because uniform forms are often used without the advise of counsel, there appears to be a tremendous potential for abuse. Possibly the agent should be required to obtain the principal's signature on a separate document more thoroughly delineating the powers as granted. Maybe the power of attorney could be a two part form, one part that the agent keeps and the other part that the principal keeps. Signatures could also be exchanged.

Lastly, we have a comment about which the commission may not be able to do anything, but of which it should be made aware. Not everybody will accept a broad form Durable Power of Attorney if it does not have the "magic language" in it. For example, we recently were involved in an escrow involving Bank of America in which they refused to permit the power holder to purchase a new retirement condominium for the power giver since the durable general power of attorney (given years ago) did not make specific reference to the real property in question. Despite our attempts to overcome the absurdity of their requirement, we were unsuccessful. The bank would have preferred to have the signature of the power giver an amendment to the escrow, even though the power giver was clearly incompetent. The only advise we could give our client, was to deal with some other lender besides the Bank of America.

Therefore we are concerned about the increasing use of the General Durable Power of Attorney without the advise of counsel and about cases where institutions cannot be compelled to honor it.

Very truly yours,

HOLLEY & GALEN

By
Richard E. Llewellyn, II

By
Arthur Steven Brown

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REPLY TO SANTA MONICA

September 28, 2989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Subject: Repeal of Probate Code Section 6402.5 ("In-Law Inheritance")

Gentlemen:

I cannot support too strongly your proposed repeal of the subject statute.

I handled a probate a number of years ago that involved horrendous costs to trace "in-laws" who had had no contact with the decedent for many years and who were scattered from Connecticut to Florida. It was a useless expense because the court found that the in-laws were not entitled to succeed to any of the property anyway.

Thank you for asking for my comment on your proposal.

Sincerely yours,

Andrew Landay

Andrew Landay, J.D.

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September 28, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Tentative Recommendation - Repeal Of Probate Code Section 6402.5, The "In-Law Inheritance"

Dear Sir or Madam:

This letter opposes the Tentative Recommendation which would repeal Section 6402.5 of the Probate Code.

The principal reason for repeal given in the Tentative Recommendation is that the benefits of the section are outweighed by the additional expense and delay the statute causes in probate proceedings and by the "inequitable" results that sometimes occur under the statute. Obviously, intestate statutes should be designed to provide for the fairest method of distribution of an estate as best as can be determined when a decedent didn't take the opportunity to write a Will to make his or her wishes clear.

I suggest that the reason given that the statute repeal would simplify the probate process is insufficient reason if the results of repeal would make intestate distribution of assets less equitable when Section 6402.5 would apply. Basically, the plan of Section 6402.5 is to restore to the family of the predeceased spouse the property received by the surviving spouse from his or her other spouse within a reasonable time span of the death of the first spouse.

The repeal of the Secton would mean, of course, that all property would pass to the heirs of the second spouse to die, to and including issue of cousins, even when there are children of the predeceased spouse. When there are no stepchildren, relatives of any kind (ie next of kin) of the second spouse to die take over any relatives including brothers, sisters and parents

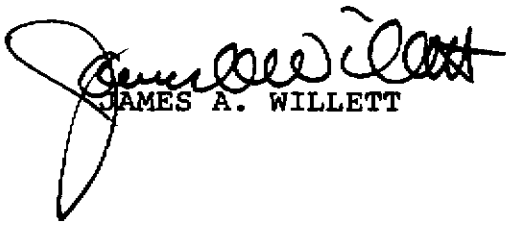
of predeceased spouse. This means that third cousins once removed could inherit prior to the brother-in-law or sister-in-law. This seems particularly unfair in light of the provisions of section 6402.5 only applying to property which the surviving spouse received from the predeceased spouse, being either the predeceased spouse's separate property or half of the community property.

The tracing problem is a straw man issue in most cases. Don't let an extreme example destroy the general fairness implicit in the Section 6402.5 scheme.

Therefore, I respectfully suggest that the focus of the Law Revision Commission in this matter should not be upon whether a particular matter is difficult to apply but whether such a solution is fair. Section 6402.5 merely restores property to the family from whence the property came as to the share the property which the first spouse owned. Such result seems to me to be an obviously fair conclusion when one is dealing with relatives who are not direct decendents of the second spouse. Why should one's brothers, cousins, or what have you inherit before the brothers and sisters of the predeceased spouse when the property that the surviving spouse has includes property which such spouse received from the first spouse? The repeal seems to be a form of legislative Russian roulette as to which spouse died first. Inheritance rights should not be based upon chance but rather upon what is a fair. I respectfully request the Law Revision Commission consider retaining Section 6402.5 in the Probate Code as presently drafted or at least retain the relevant elements of such section.

This letter is written in an individual capacity and not as an advisor to the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar.

Very truly yours,



JAMES A. WILLETT

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September 26, 1989

Re: California Law Revision Commission Comment on "In-Law Inheritance"

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Gentlemen:

I am a probate practitioner in the Sacramento area. Your published Tentative Recommendation relating to Repeal of Probate Code Section 6402.5 ("In-Law Inheritance") raised concerns with which I agree and conclusions with which I disagree.

The present rule is difficult to interpret and may well be susceptible to simplification and clarity through your good efforts. I acknowledge that the maintenance of such a provision does increase costs of administration (although I believe your comment overstates the efforts that most courts expect of the administrator in tracing family members of the predeceased spouse).

The August 1989 CLRC analysis presented is much more an advocate's product than I expected, rather than an objective

analysis. This was especially apparent in what I regard to be the core of the issue: Whether the rule defeats reasonable expectations and produces inequitable results (your pages 10 to 13).

Your spokesperson recites the cases of McInnis, Luke and Riley. However, the family strains cited in McInnis might just as well have been reversed and the present statute necessary to minimize the inequity. In Luke, the surprise to the presumed expectation of the decedent is based on an awareness of intestate laws (probably inapt, or he would have either had a will or received information respecting California law). If we are merely speculating that Mr. Luke must have presumed a basic fairness in our intestate laws, it begs the question (for I believe our rule is a fair one). In Riley, I am not the least offended by the result if the mother meant to give a completed gift. If she wanted strings attached, she could have established a trust or a life estate or some form of agreement to protect against this result.

Although we would like to successfully second-guess the wishes of intestate decedents, it is not reasonable to expect that we will wholly succeed. More often, we are dealing with folks who simply never addressed the issues. I rather think that an equitable result is more often achieved by our present rule. Why should the family of the surviving spouse of a childless couple receive the family accumulated wealth simply for surviving

his or her spouse? Statistics and our common experience show us the frequent pattern of a death of a surviving spouse rather shortly after the death of the first to die. The closeness of time of the second death underscores the inequity of the "survivor['s family] take all" approach. I accordingly favor the existing concept of personalty for five years and realty for fifteen years being divided between the families of the two spouses who died without issue. In my opinion, that represents a more fair balance of the equities and is closer to our imagined or constructive expectations for intestate decedents.

I accordingly favor a retention of the basic plan, but commend an effort to simplify and clarify the formula to be used in the application of the basic principles.

Thank you for the opportunity to comment on this matter.

Sincerely yours,

Thomas A. Craven

L:144