

#23

9/15/75

First Supplement to Memorandum 75-60

Subject: Study 23 • Partition of Real and Personal Property

Attached to this memorandum as Exhibit I (green) is a letter from the Commission's consultant, Mr. Elmore, indicating the need to conform Probate Code Section 1103 to the general partition statute. Section 1103 occurs in a chapter dealing with partition prior to distribution of the undivided interests of heirs, devisees, or legatees in the property of a decedent. Exhibit II (yellow.) The section provides for sale if division cannot be made without "great prejudice" to the owners; this standard for sale will no longer be used in the general partition statute.

The staff believes that in the interest of uniformity the language of Probate Code Section 1103 should be conformed to the language of the general partition statute in the manner suggested by Mr. Elmore. The staff sees no need to change any other provisions of the probate scheme since they serve sufficiently distinct functions that conformance would be unwarranted.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

First Supplement to
Memorandum 75-60

EXHIBIT I

September 11, 1975

MEMO. TO MESSRS. DEMOULLY; STERLING AND MURPHY

FROM: MR. ELMORE

Re: Study 23- Partition

A conforming amendment appears necessary to Probate Code § 1103 (partition procedure in decedent's estate).

Following is a draft:

1103. The court shall proceed to take evidence and to partition, allot and divide the property....., and for that purpose it may direct the executor or administrator to sell any property which-can-not-be-partitioned-without-great-prejudice-to-the-owners-and-which when, under the circumstances, sale would be more equitable than partition and when the property can not conveniently be allotted to any one party.....

This matter just came to my attention.

Garrett Elmore

EXHIBIT I I

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DEERING'S PROBATE

§ 1104

CHAPTER 18

Partition Before Distribution

Note.—The Code Commission drafted a chapter 18, entitled "Partition," composed of §§ 1100-1111, and based upon former §§ 1661, 1663 and 1675-1685, Code Civ. Proc. The legislature amended this chapter by substituting the present chapter 18, entitled "Partition before Distribution," and composed of §§ 1100-1106, in its place. The chapter provided for a new procedure in the partition of estates.

- § 1100. Petition for partition of undivided interests: Who may make.
- § 1101. Same: Time for filing: Contents: Citation: Service.
- § 1102. Notice of hearing: No plaintiff or defendant.
- § 1103. Evidence: Partition of property: Direction to sell: Conduct and confirmation of sale: Agreement to accept undivided interests.
- § 1104. Appointment of referees.
- § 1105. Costs: Apportionment among parties: Lien on allotted property: Attorneys' fees.
- § 1106. Effect of allotment by court: Modification: Review of proceedings.

§ 1100. **Petition for partition of undivided interests: Who may make.** When two or more heirs, devisees or legatees are entitled to the distribution of undivided interests in any real or personal property of the decedent and they have not agreed among themselves, before distribution, to a partition, allotment or other division thereof, any one or more of them, or the executor or administrator, at the request of any one or more of them, may petition the court to make such partition, allotment or division of the property as will be equitable and will avoid the distribution of undivided interests. [1931.] *1 Cal Jur 3d Actions § 19; Cal Jur 2d Desc & D §§ 17, 27, Ex & Ad §§ 28, 50, 444, 495, 677, 678; Cal Practice §§ 451:1, 451:2, 451:5, 451:6; Witkin Summary pp 3266, 3281.*

§ 1101. **Same: Time for filing: Contents: Citation: Service.** Such petition may be filed with the clerk at any time after the time to file or present claims has expired, and before the distribution of the property to be affected has been ordered. It shall describe the property and give the names of the persons having or claiming the undivided interests and shall state what those interests are, so far as known to the petitioner. Thereupon a citation shall be issued by the clerk directed to the persons, other than the petitioner, who are entitled to distribution of the undivided interests, and to the executor or administrator, directing them to answer the petition within 30 days after service of the citation. The citation shall be served in the manner provided by law for the service of a summons in a civil action. If there is unreasonable delay in serving the citation, the court may dismiss the proceeding. [1931; 1969 ch 1611 § 35.] *Cal Jur 2d Ex & Ad §§ 28, 677, 678, 679.*

§ 1102. **Notice of hearing: No plaintiff or defendant.** When all the persons in interest have appeared or are in default, the clerk shall set the matter for hearing by the court. The persons in interest who have filed written appearances shall be considered the parties to the proceeding, and each shall be entitled to five days' notice of hearing. No one shall be considered as a plaintiff or as a defendant. [1931.] *Cal Jur 2d Ex & Ad §§ 28, 48, 677, 683.*

§ 1103. **Evidence: Partition of property: Direction to sell: Conduct and confirmation of sale: Agreement to accept undivided interests.** The court shall proceed to take evidence and to partition, allot and divide the property so that each party shall receive property of a value proportionate to his interest in the whole, and for that purpose it may direct the executor or administrator to sell any property which cannot be partitioned without great prejudice to the owners and which cannot conveniently be allotted to any one party. The sale shall be conducted and confirmed in the same manner as other probate sales. Any two or more parties may agree to accept undivided interests. [1931.] *Cal Jur 2d Ex & Ad §§ 28, 444, 495, 677, 681, 683; Cal Practice § 451:12.*

§ 1104. **Appointment of referees.** The court, in its discretion, may appoint one or three referees to partition property capable of being partitioned, if requested to do so by any party in interest. The number of referees appointed must conform to the request of at least one of

the parties. The referees shall have the powers and perform the duties of referees in civil actions for partition, and the court shall have the same powers with respect to their report as in such actions. [1931.] *Cal Jur 2d Ex & Ad* §§ 28, 677, 682.

§ 1105. Costs: Apportionment among parties: Lien on allotted property: Attorneys' fees. The expenses of such partition shall be equitably apportioned by the court among the parties, but each party must pay his own attorney's fees. The amount charged to each party shall constitute a lien on the property allotted to him. [1931.] *Cal Jur 2d Ex & Ad* §§ 28, 100, 677, 684; *Cal Practice* §§ 173:1, 451:15; *Wilkin Procedure 2d*, p. 3255.

§ 1106. Effect of allotment by court: Modification: Review of proceedings. The allotment made by the court shall control upon proceedings for distribution, unless modified for good cause upon reasonable notice, and the proceedings leading to such allotment may be reviewed upon appeal from the decree of distribution. [1931.] *Cal Jur 2d Ex & Ad* §§ 28, 91, 677, 685. *Cal Practice* § 451:16.