

Date of Meeting: November 7-8, 1958

Date of Memo: October 28, 1958

Memorandum No. 2

Subject: Study #25 - Probate Code Section 259, et seq. -
Nonresident Alien Heirs

Attached are revisions of the Recommendation of the Commission and of the proposed statute which reflect the staff's proposals to carry out the decisions taken by the Commission at the October meeting. The changes made in the Recommendation and statute ~~from those~~ which were before you in October are shown in strike-out and underline (as finally drafted the bill would not, of course, contain the strike-out and underline shown in the proposed statute).

The following comments on changes which have been made are set forth in the order in which the changes appear in the proposed statute:

1. In October the decision was taken not to make the repeal of Section 259 et seq. and the enactment of the new impounding statute retroactive. This decision has been carried out in the case of the present statute by leaving Sections 259, 259.1 and 259.2 in the code and adding a new Section 259.3 making them inapplicable to estates of decedents dying after October 1, 1959, and by adding a new Section 1044.5 to the impounding statute making it applicable only to estates of decedents dying after October 1, 1959. The reasons for these proposals are the following:

a. Legislation enacted at the 1959 Session will go into effect on some day in September, 1959. We think that selecting a specific date will have the advantages both of being more explicit and making

it unnecessary for attorneys concerned with the legislation to ascertain the effective date of the legislative act.

b. We encountered some difficulty in drafting language which would make a repeal effective as of the effective date of the act. Moreover, it seems desirable to leave Sections 259 et seq. on the books for a number of years as a reminder to courts and counsel concerned with estates to which they apply.

c. The substance of the second sentence of Section 1044.5 was suggested by the State Bar; the purpose, as stated in the Recommendation, is to make it clear that nothing herein limits any existing inherent power of California Probate Courts to make protective orders of the kind authorized by the statute.

2. As we anticipated it would, undertaking to deal explicitly in the impoundment statute with the problem of devises and bequests which create both present and future estates proved to be difficult. The statutes we propose are somewhat complicated but, we believe, about as simple as they can be if the policy problem presented is to be resolved in these terms. The proposed revision of the impoundment statute deals with the matter as follows: Section 1045 is limited to cases of intestate succession in which, of course, all estates are present estates; Section 1045.1 simply incorporates Section 1045 in the cases of dispositions by will which create only present estates; Sections 1045.2 and 1045.3 deal with the situation where a will creates both present and future legal estates; and Section 1045.4 deals with the situation where the decedent puts property in trust, creating present and future equitable estates.

It might be noted that the following alternatives are available in dealing with the situation where the decedent by will creates both present and future legal estates in property:

a. "Except as provided in Section 1045.3," could be omitted from Section 1045.2 and Section 1045.3 could be omitted from the statute. If this were done the interest would be converted into cash in all cases and the cash divided by use of the mortality tables and impounded or not depending on the status of the taker of the particular amount. This would be a relatively simple solution but would create the problem, discussed at the October meeting, arising out of a disposition of the family home to the widow for life. Section 1045.3 is designed to deal exceptionally with that case.

b. On the other hand, the provision made in Section 1045.3 for putting the property in trust could be made applicable to all cases in which the decedent creates present and future legal estates. Or it could be applied in all cases where the taker of the present estate is not a disqualified nonresident alien, rather than limiting it to cases where the taker of the present estate gets the family home or its equivalent.

3. Changes are made in Sections 1046, 1047, 1048 and 1049 to reflect the fact that Sections 1045.1, 1045.2, 1045.3 and 1045.4 have been added to the statute.

4. The addition of the new sections also made it necessary to transfer the last paragraph of Section 1045 to new Section 1050.3 to avoid having to repeat it several times.

5. Section 1048 has been revised to authorize the Probate Court, at the end of the ten-year period and on petition of the Attorney General, to escheat the funds permanently to the state. There seemed to be no reason not to incorporate here the provision of Section 1430 of the Code of Civil Procedure which, providing for permanent escheat, contains the following language:

". . . saving, however to infants, and persons of unsound mind, the right to appear and claim such property as provided in this title; but it shall be presumed that there are no such infants nor persons of unsound mind who are or will be entitled to claim such property unless and until they appear and claim such property as provided in this title; provided, however, such presumption shall be conclusive in favor of any purchaser in good faith and for a valuable consideration from the State and everyone subsequently claiming under him, saving however, to infants and persons of unsound mind the right of recourse to the proceeds of any sale or other disposition of any such property by the State and as herein provided."

6. Section 1048.5 is designed to provide, in effect, that later accruing rights under the statute are subordinate to earlier accruing rights asserted in a petition filed during the earlier period. If the method here

utilized is satisfactory to accomplish the result, it seems better to do it in this way than to begin such sections as 1047 and 1048 with some such phrase as "Subject to the rights claimed, etc."

7. The words "by the facts existing" have been eliminated from Section 1050 at the suggestion of the State Bar, approved by the Commission.

8. The section on procedure, formerly 1050.5, has been renumbered 1050.1 and has been amended to require notice to heirs, devisees and legatees as well as to those who have requested notice. This is in accordance with a suggestion made by the State Bar and approved by the Commission. There is considerable doubt whether the second paragraph of Section 1050.1 is necessary although such notice by publication is given by the clerk under Section 327 when a petition for probate of a will is filed.

9. Section 1050.2 is designed to provide for sales of property necessary to convert it into cash for purposes of disposition; this is done simply by incorporating the chapter of the Probate Code which deals with sales of property of decedents' estates.

10. Section 1050.4 is drafted in response to a question raised by the Northern Section of the C.A.J. as to when a petition for impoundment of funds may be filed. The four months provision is found in several other sections of the Probate Code; the other provisions are designed to make it clear that a petition for impoundment must be filed before the money or property is distributed, either by the personal representative or by the trustee.

11. I believe the changes made in the Recommendation are self-explanatory. Since we do not undertake in the Recommendation to discuss and explain various matters of detail in the statute, the changes in the Recommendation do not cover all of the changes made in the statute and commented on above.

Respectfully submitted,

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Executive Secretary

Rev. 12-16-58

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

Relating to the Right of Nonresident Aliens to Inherit

Probate Code Sections 259, 259.1, and 259.2, originally enacted in 1941 as an eve-of-war emergency measure, provide in effect that a nonresident alien cannot inherit real or personal property in this State unless the country in which he resides affords United States citizens the same rights of inheritance as are given to its own citizens. Section 259.1 places on the nonresident alien the burden of proving the existence of such reciprocal inheritance rights. The Law Revision Commission recommends that these sections of the Probate Code (hereinafter collectively designated as "Section 259") be repealed¹ for the following reasons:

1. Section 259 constitutes an undesirable encroachment upon the basic principle of our law that a decedent's property should go to the person designated in his will or, in the absence of a will, to those close relatives designated in our statutes of descent to whom the decedent would probably have

¹The bill proposed by the Commission repeals these sections prospectively in effect but not in form, providing that they shall not apply to estates of decedents dying on or after October 1, 1959. The Commission's reasons for recommending this form of enactment are stated at a later point in this Recommendation.

left the property had he made a will. Section 259 has frequently caused such property either to escheat or to go to remote relatives of the decedent at the expense of those persons who were the natural objects of his bounty.

2. In the cases where Section 259 is effective it causes hardship to innocent relatives of California decedents rather than to those persons who make the policies of the countries which deny reciprocal inheritance rights to United States citizens.

3. The difficulty and expense of proving the existence of reciprocal inheritance rights is so substantial that even when such rights exist persons whose inheritances are small find it uneconomic to claim them.

4. Section 259 does not necessarily operate to keep American assets from going to unfriendly countries. Many such countries find the general balance of trade with the United States in inheritances so favorable that they provide the minimum reciprocal inheritance rights required to qualify their citizens to inherit here. Moreover, keeping American assets out of the hands of enemies or potential enemies is a function more appropriately performed by the United States Government. This responsibility is in fact being handled adequately by the federal government through such regulations as the Trading with the Enemy Act and the Foreign Assets Control Regulation of the Secretary of the Treasury.

5. Section 259 does not insure that a beneficiary of a California estate living in a foreign country will actually receive the benefit of his inheritance. If the reciprocal rights of inheritance required by the present statute exist the nonresident alien's inheritance is sent to him even though it may be wholly or

largely confiscated by his government through outright seizure, taxation, currency exchange rates or other means.

6. Section 259 has led to much litigation. The Attorney General has often been involved since an inheritance not claimed by reason of the statute may eventually escheat. Most of this litigation has been concerned with whether the foreign country involved did or did not permit United States citizens to inherit on a parity with its own citizens on the critical date. As the research consultant's report, infra, shows the results reached in the cases have often been inconsistent and otherwise open to question....

Taking all of these considerations into account, the Commission has concluded that the game at stake - retaliation against the few countries which discriminate against United States citizens in the matter of inheritance rights - has not proved to be worth the candle in terms of the frustration of decedents' wishes, the denial of inheritance rights to innocent persons, and the time and expense which have been expended by both the State of California and others in litigating cases which have arisen under Section 259.

The Law Revision Commission also recommends that, whether or not Probate Code Sections 259, 259.1 and 259.2 are repealed, California enact a statute which will preclude confiscation of a nonresident alien's inheritance by the country in which he resides. Several states have already adopted such a policy through the enactment of legislation which provides for impounding an inheritance for the account of a nonresident alien heir when it appears that if it were sent to him he would not have the benefit or use or

control of the money or other property due him. Drawing on the experience of these states the Commission has drafted an impounding statute, set forth below, which it recommends for enactment in this State. The principal features of the proposed statute are the following:

1. When it appears that a nonresident alien will not have the substantial benefit or use or control of the money or other property due him under an estate or testamentary trust the property is converted into cash and deposited to his account at interest in a California bank.² At any time within five years thereafter the alien (or, if he is dead, his heir, legatee or devisee) may claim the deposit upon showing that no reason for further impoundment exists. If no such claim is made, more distant heirs of the decedent are authorized to claim the deposit within the second five-year period after the date of impoundment. If the money remains on deposit at the end of the second five-year period it escheats permanently to the State, saving the same rights to minors and persons of unsound mind as are provided for in Section 1430 of the Code of Civil Procedure in other cases of permanent escheat.

²Special provision is made in proposed new Sections 1045.2, 1045.3 and 1045.4 for cases in which the decedent leaves a will creating both present and future estates.

2. To simplify the determination of whether a nonresident alien heir would have the substantial benefit or use or control of the money or other property due him, the proposed statute provides that there is a disputable presumption that he will not if the country in which he resides is designated by the Secretary of the Treasury of the United States or other federal official as being a country as to which there is not a reasonable assurance that the payee of a United States check residing there would both receive the check and be able to negotiate it for full value. Such a federal official is ordinarily in a better position than a California probate court to make such a determination and keep it current. Another advantage of this coordination of state and federal policy is that, as the research consultant's report shows, the Secretary of the Treasury has thus far in practice designated the several "iron curtain" countries as countries in which there is no assurance that the payee of a United States check will have the benefit of it. So long as this practice is followed - and there would seem to be no reason to suppose that it will be abandoned - California assets will automatically be prevented from disappearing behind the iron curtain.

3. The statute may not be circumvented by a nonresident alien heir's assigning his rights thereunder since an assignee's rights are explicitly made no greater than those which the assignor has under the statute.

4. The court is authorized to provide for the payment of reason-

able attorney's fees to any attorney who represented either the person on whose behalf the funds were impounded or the person to whom the payment is ordered to be made.

There is a serious question whether either the repeal of Probate Code Sections 259-259.2 or the enactment of the impounding statute can constitutionally be made retroactive. Under California law title to a decedent's property vests in his successors as of the date of death, at least in the case of intestacy. To give an interest in the estate of a decedent dying prior to the effective date of the proposed legislation to a person who on the date of the decedent's death took no such interest because he was disqualified by Section 259 would in the usual case involve taking that same interest away from some other heir who acquired it on the date of death under the present law. This might be held to be an unconstitutional deprivation of vested property rights. Moreover, it is arguable that to impound the interest of a nonresident alien heir not disqualified by Section 259 which he was entitled to take free of impoundment on the date of decedent's death would impair his vested right in such property.³

The Commission has concluded that neither the repeal of Sections 259-259.2 nor the enactment of the impounding statute should be made retroactive.⁴ Thus, under the recommended

³This seems more doubtful, however, since the very basis of impoundment is that the heir would not have the substantial benefit or use or control of the money or other property due him. Thus the statute works to protect rather than impair his rights.

legislation Sections 259-259.2 would not be repealed; instead, they would be made inapplicable to estates of decedents dying after the effective date of the legislation. Similarly, the new impoundment statute expressly provides that it is inapplicable to estates of decedents dying prior to its effective date, but with the provision that nothing in the proposed legislation shall be construed to limit the power of a court to make protective orders in administering such estates. The latter provision is included because the research consultant's report discloses that some probate courts in other states have made impounding orders somewhat similar to those authorized by the new statute in the exercise of what they considered to be their inherent power to protect the interest of a nonresident alien heir.

Once it is made clear that the repeal of Sections 259-259.2 and the enactment of the impoundment statute are not to be retroactive there would appear to be little ground for doubt about the constitutionality of the legislation which the Commission proposes, given the very substantial powers which a state has over the disposition of the decedents' estates. The Commission has included a severability clause in the proposed legislation, however, out of an abundance of caution.

Finally, the Commission proposes an amendment to Section 1026 of the Probate Code which provides that a nonresident alien who becomes entitled to property by succession must appear and demand the property within five years from the time of succession. Under the impounding statute proposed by the Commission such an alien's inheritance could be impounded without his knowledge upon the petition of the personal representative, the Attorney General or an interested party. The Commission believes that when such an impoundment order is made the inheritance should thereafter be disposed of under the provisions of the impounding statute, even in cases in which this would result in its distribution to a nonresident alien more than five years after the original right of succession accrued. Accordingly, the Commission recommends that Section 1026 be amended so to provide.

The Commission's recommendation would be effectuated by the enactment of the following measure:

An act to add Section 259.3 and Article 4.5 of Chapter 16 of Division 3 to the Probate Code, to amend Section 1026 of said code and to declare the severability of the provisions of this act, all relating to the right of nonresident aliens to inherit property in this State.

The people of the State of California do enact as follows:

SECTION 1. Section 259.3 of the Probate Code is enacted, to read:

259.3 The provisions of this chapter do not apply to estates of decedents dying on or after October 1, 1959.

SEC. 2. Article 4.5 is added to Chapter 16 of Division 3 of the Probate Code, to read:

Article 4.5. Disqualified Nonresident Aliens.

1044. As used in this article, "disqualified nonresident alien" means a person:

- (a) Who is an alien not residing in the United States or any of its territories; and

(b) Who a court finds would not, as an heir, legatee, devisee or distributee of an estate probated under the laws of this State or a beneficiary of a testamentary trust administered under such an estate, have the substantial benefit or use or control of the money or other property due him.

There is a disputable presumption that a person would not have the substantial benefit or use or control of money or other property due him under an estate or testamentary trust if he resides in a country which is designated by the Secretary of the Treasury of the United States, pursuant to Title 31, U.S.C. Section 123 or any other provision of law, or by any other department, agency or officer of the United States pursuant to law, as being a country as to which there is not a reasonable assurance that the payee of a check or warrant drawn against funds of the United States will actually receive such check or warrant and be able to negotiate the same for full value.

1044.5. The provisions of this article do not apply to estates of decedents dying prior to October 1, 1959. Nothing in this article shall be construed to limit the power of a court to make appropriate orders in estates of decedents dying prior to October 1, 1959 to protect and safeguard the interests of heirs, legatees, devisees or beneficiaries of testamentary trusts who are entitled to inherit or take under the laws of this State as they existed prior thereto.

1045. Whenever a person having a right of intestate succession to all or any part of a decedent's estate is a disqualified nonresident alien,

the court shall, on the petition of the executor or administrator, any party in interest or the Attorney General, order that such person's interest be converted into cash and deposited at interest to the credit of such person in any state or national bank or banks in the State. The passbook or other evidence of such deposit shall be delivered to the clerk of the court. The bank in which the deposit is made shall make no payment therefrom unless authorized by a court order made pursuant to the provisions of this article.

1045.1. When a decedent leaves a valid will Section 1045 is applicable to any property passing thereunder as to which only a present estate is created.

1045.2. Except as provided in Section 1045.3, when a decedent leaves a valid will creating present and future legal estates in property passing under the will and the person entitled to any such estate is a disqualified nonresident alien at the time of the decedent's death, the court shall, upon petition filed as provided in Section 1045, order the property converted into cash. Using mortality tables as provided in Section 13953 of the Revenue and Taxation Code, the court shall divide the fund realized into sums representing the present value of the present and future estates. Any sum representing the value of an estate to which a disqualified nonresident alien is entitled under the will shall be deposited as provided in Section 1045 and the provisions of this article relating to the disposition of such deposited funds shall be applicable thereto. All other sums shall be distributed in the course of administration to the persons who are entitled under the will to the estates which such sums represent.

1045.3. When a decedent leaves a valid will creating present and future legal estates in property passing under the will and the person entitled to the future estate is, at the time of the decedent's death, a disqualified nonresident alien but the person entitled to the present estate is not, the court, on petition filed as provided in Section 1045 shall, at the option of the owner of the present estate, either proceed as provided in Section 1045.2 or convey the property to a trustee to be appointed by the court upon security satisfactory to the court. The court shall retain jurisdiction for the settlement of the accounts of such trustee, in all matters necessary for the proper administration of such trust, and for final distribution of the trust property. The expense of administration of the trust shall be borne by the owner of the present estate and at the termination of such estate the owner or his estate shall have a lien on the trust property for the amount of such expense plus interest thereon to be fixed by the court at a rate not exceeding seven per cent per annum.

1045.4. When the beneficiary under a testamentary trust or a trust established under Section 1045.3 is a disqualified nonresident alien at the time he is entitled to receive money or other property from the trust, the court shall, on petition of the trustee, any party in interest, or the Attorney General, order the property then due the beneficiary converted into cash by the trustee and deposited as provided in Section 1045. The court shall also order the trustee to make similar disposition of all other money or property which may become due the beneficiary in the future until such time as the court shall, on petition of the beneficiary, have determined

that the beneficiary is no longer a disqualified nonresident alien. The provisions of this article relating to the disposition of deposited funds shall be applicable to funds deposited pursuant to this section, except that for the purpose of Sections 1046, 1046.5, 1047 and 1048 the date of entry of the court's order shall be deemed to be the date upon which the deposits were made by the trustee.

1046. At any time before the expiration of five years after the date of entry of an order for deposit made pursuant to Sections 1045, 1045.1, 1045.2, 1045.3 or 1045.4, the person for whom the deposit was made may file in the court which made the order a petition to have the funds on deposit paid to him. If the court finds that the petitioner is no longer a disqualified nonresident alien the petition shall be granted.

1046.5. If the person authorized by Section 1046 to petition for payment of the funds is deceased, the petition therein authorized may be filed by his heir, legatee or devisee, provided that such petitioner is not a disqualified nonresident alien. If the court finds that the petitioner is not a disqualified nonresident alien and is entitled to the funds on deposit the petition shall be granted.

1047. At any time after the expiration of five years and before the expiration of ten years after the date of entry of an order for deposit made pursuant to Sections 1045, 1045.1, 1045.2, 1045.3 or 1045.4, any person who is not a disqualified nonresident alien and who would have been entitled to the property distributable to the person on whose behalf the order was made

had the latter predeceased the decedent may petition the court to order the funds on deposit paid over to him. If a person who would otherwise have been authorized by this Section to petition for payment of the deposited funds is unable to do so because he is a disqualified nonresident alien, the right of others to petition hereunder shall be determined as though such person had also predeceased the decedent. If the court finds that a petitioner hereunder is not a disqualified nonresident alien and is entitled to the funds on deposit the petition shall be granted.

1048. After the expiration of ten years from the date of entry of an order for deposit made pursuant to Sections 1045, 1045.1, 1045.2, 1045.3 or 1045.4, the court shall, upon the petition of the Attorney General, order the funds on deposit escheated permanently to the State, saving however to infants and persons of unsound mind the rights provided in Section 1430 of the Code of Civil Procedure.

1048.5. A petition filed within the time provided in Sections 1046, 1046.5, 1047 or 1048 need not be heard or decided within such time. If two or more petitions for the payment or escheat of the same impounded fund or part thereof are filed, they shall be decided in the order in which they are filed.

1049. When an order is made for the deposit of funds pursuant to Sections 1045, 1045.1, 1045.2, 1045.3 or 1045.4 or for the payment or escheat of a deposit pursuant to Sections 1046, 1046.5, 1047 or 1048, or at any intervening time, the court may order payment of reasonable attorney's

fees out of such funds or such deposit to any attorney who represented the person on whose behalf such deposit is or was ordered. When an order is made for the payment of a deposit pursuant to Sections 1046, 1046.5 or 1047, the court may order payment of reasonable attorney's fees out of such deposit to any attorney who represented the person to whom payment is ordered made.

1049.1. If a disqualified nonresident alien having an interest in all or any part of a decedent's estate probated under the laws of this State or of a testamentary trust administered thereunder or having an interest in funds deposited pursuant to the provisions of this article assigns such interest, his assignee has only the rights given to the assignor by this article. No payment of funds may be made to an assignee who is a disqualified nonresident alien.

1049.2. Whether a person is a disqualified nonresident alien within the meaning of this article shall be determined as of the date of the order.

1049.3 Any petition filed pursuant to Sections 1045, 1045.1, 1045.2, or 1045.3 shall be verified and shall state the names, ages, and post office addresses of the heirs, devisees, and legatees of the decedent, so far as known to the petitioner.

When the petition is filed the clerk shall set the petition for hearing by the court and notice thereof shall be given for the period and in the manner required by Section 1200 of this code to the Attorney General, to the persons named in the petition, to all persons to whom notice is required to be mailed by Section 1200 of this code, and to such other persons, if any, as

the court may direct. A copy of the petition shall be mailed to the Attorney General with the notice given to him.

1049.4. Any petition filed pursuant to Sections 1045.4, 1046, 1046.5, 1047 or 1048 shall be verified and shall state the names and the post office addresses, so far as known to the petitioner, of all persons who are known by the petitioner to have, under the provisions of this article, an existing or contingent interest in the trust money or property or the deposited fund to which the petition relates.

When the petition is filed the clerk shall set the petition for hearing by the court and notice thereof shall be given for the period and in the manner required by Section 1200 of this code to the Attorney General, the persons named in the petition and such other persons, if any, as the court may direct. A copy of the petition shall be mailed to the Attorney General with the notice given to him.

1049.5. Whenever an order is made pursuant to the provisions of Sections 1045, 1045.1, 1045.2 or 1045.3 for the conversion of an interest in a decedent's estate into cash the interest shall be sold in conformity with the provisions of Chapter 13 of Division 3 (commencing at Section 750) of this code.

1049.6. The court may make an order authorized in Sections 1045, 1045.1, 1045.2 or 1045.3 on its own motion. In such case notice of the court's intention to make the order shall be given by the clerk of the court to the same persons and in the manner as though a petition had been

filed.

1049.7. A petition authorized by Sections 1045, 1045.1, 1045.2, or 1045.3 may be filed only after four months have elapsed after the first publication of notice to creditors and prior to distribution of the interest involved. A petition authorized by Section 1045.4 may be filed at any time before the trustee has transferred the money or property to the beneficiary.

SEC. 3. Section 1026 of the Probate Code is amended, to read:

A nonresident alien who becomes entitled to property by succession must appear and demand the property within five years from the time of succession; otherwise, his rights are barred and the property shall be disposed of as escheated property, provided, if an order impounding such alien's property is made pursuant to Sections 1045, 1045.1, 1045.2, 1045.3 or 1045.4, the provisions of Article 4.5, Chapter 16, Division 3, (commencing at Section 1044) and not of this section, are applicable.

SEC. 4. If any provision of this act or the application of such provision to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application and to this end the provisions of this act are declared to be severable.