

8/7/69

Second Supplement to Memorandum 69-85

Subject: Suggested New Topic

Harold I. Boucher, San Francisco Attorney, took the view that our study of Civil Code Section 715.8 is relatively unimportant and suggested a new topic that he believes should be studied at "the earliest possible opportunity." (We take up his comments concerning Civil Code Section 715.8 in connection with Memorandum 69-92. His letter is attached to that memorandum as Exhibit XX.)

The study suggested by Mr. Boucher is described in Exhibit I, attached. The staff believes that this study would be a worthwhile one and that the Commission should request authority to study this topic in its next annual report. Exhibit I is designed to serve as the statement that could be included in the annual report if the Commission decides it wishes to request authority to make this new study.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

## EXHIBIT I

A study to determine whether Probate Code Sections 40-43, relating to charitable bequests and devises, should be revised or repealed

Probate Code Sections 40-43 limit the testator who desires to make a charitable bequest or devise, primarily by specifying time periods prior to his death which must elapse after the making of the bequest or devise.<sup>1</sup> The sections are designed to discourage "death bed wills" which make charitable gifts at the expense of persons who ordinarily would be the objects of the testator's bounty.

These sections can be completely evaded by the use of a provision in the will providing a substitutional gift in case the gifts to charity are challenged.<sup>2</sup> The substitutional gift in practice never takes effect but does

1. No gift may be made to any charitable or benevolent society or corporation or in trust for charitable uses, under a will executed less than 30 days before the testator's death if he is survived by a spouse, brother, sister, nephew, niece, descendant, or ancestor who would otherwise have taken the property under the will or by the laws of succession. Further, the total of all such gifts under the will is limited to one third of the testator's estate, even if the will is executed at least 30 days before his death. Prob. Code § 41. However, if the testator survives the execution of his will by at least six months and leaves no surviving spouse, child, grandchild, or parent, or if all such heirs have executed a written waiver of the restriction at least six months prior to the death of the testator, the previously stated limitations are inapplicable. Prob. Code § 43. The limitations also are inapplicable to gifts to, or for the use or benefit of, the state, any political subdivision within the state, an institution of the state or of a political subdivision within the state, or any educational institution of collegiate grade within this state that is conducted not for profit. Prob. Code § 42. For further discussion of these provisions, see 4 Witkin, Summary of California Law 3018-3024 (1960). See also California Will Drafting §§ 3.19-3.20 (Cal. Cont. Ed. Bar 1965).
2. For further discussion of the use of a substitutional gift to avoid the charitable restrictions, see 4 Witkin, Summary of California Law 3022-3024 (1960).

effectively operate to avoid the limitations of Probate Code Sections 40-43 and thus frustrates the policy behind these sections. One estate planner, commenting on the situation, has written:

[T]he "policy" behind section 41 is now so devoid of content that the section is routinely nullified in every will containing a charitable bequest by inclusion of a "charitable protection clause." See section 3.19 of California Will Drafting (Cal. Cont. Ed. Bar 1965). The resort to this ritualistic paper exercise and the necessity of explaining it to clients is, in this day and age, nothing short of a disgraceful and embarrassing waste of time. The recent opinion of the Appellate Court in Heyer v. Flaig (1968) 67 Cal. Rptr. 92; 260 A.C.A. 100 raises the spectre of malpractice liability in the rare but fatal case where, due to clerical error or lack of understanding of the operation of section 41, the protective clause is omitted from or mishandled in a will.<sup>3</sup>

Accordingly, the Commission has concluded that a study should be made of Probate Code Sections 40-43 to determine whether they should be revised or repealed.

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3. Ltr. August 5, 1969, to Law Revision Commission from Harold I. Boucher, Esq., San Francisco, (on file with Law Revision Commission).