

## Memorandum 87-47

Subject: Study L - Probate Code - Assembly Bill 708 (Amendments)

The Commission decided in the urgency legislation of AB 362 to cure the proration problem caused by Internal Revenue Code Section 4981 (estate tax increased by 15% of excess retirement accumulations). Inexplicably, the draftsman handling this matter in the Legislative Counsel's office chose to revise the draft submitted by the Commission. As a result, the provision as enacted by AB 362 will read:

20114.5. (a) As used in this section: (1) A reference to Section 4981 of the Internal Revenue Code means Section 4981 as enacted by Section 1133(a) of the Tax Reform Act of 1986 (Public Law 99-514); (2) "Excess retirement accumulation" has the meaning given it in Section 4981(d)(3) of the Internal Revenue Code.

(b) If the federal estate tax is increased under Section 4981(d) of the Internal Revenue Code, the amount of the increase shall be a charge against the persons who receive the excess retirement accumulation that gives rise to the increase, and shall be equitably prorated among all persons who receive interests in qualified employer plans and individual retirement plans to which the excess retirement accumulation is attributable.

The problem with this formulation is that it implies that the new provision applies to Internal Revenue Code Section 4981 only in the form in which it was enacted. It appears to be an express negation of the general rule that a reference to an Internal Revenue Code provision picks up subsequent amendments and provisions enacted in its place. This is particularly unfortunate, since it is not unlikely that Internal Revenue Code Section 4981 will be renumbered and relocated, and possibly amended.

The staff suggests that we remedy this problem in AB 708 by adding the following provision:

SEC. 100.5. Section 20114.5 of the Probate Code, as added by Assembly Bill No. 708 of the 1987-88 Regular Session, is amended to read:

20114.5. (a) As used in this section: ~~(1)~~

(1) A reference to Section 4981 of the Internal Revenue Code means the Section 4981 as enacted by Section 1133(a) of the Tax Reform Act of 1986 (Public Law 99-514); ~~-(2).~~

(2) "Excess retirement accumulation" has the meaning given it in Section 4981(d)(3) of the Internal Revenue Code.

(b) If the federal estate tax is increased under Section 4981(d) of the Internal Revenue Code, the amount of the increase shall be a charge against the persons who receive the excess retirement accumulation that gives rise to the increase, and shall be equitably prorated among all persons who receive interests in qualified employer plans and individual retirement plans to which the excess retirement accumulation is attributable.

This provision would be added to the list of sections in AB 708 that become operative on January 1, rather than July 1, 1988:

(b) The following sections of this act shall become operative on January 1, 1988:

...

(31) Section 100.5 (amending Section 20114.5 of the Probate Code).

(32) Section 101 (adding Division 11 (commencing with Section 21100) to the Probate Code).

Respectfully submitted,

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