

First Supplement to Memorandum 88-7

Subject: Study L-2008 - AB 2779 (Marital deduction gifts--comments on proposed amendment)

Memorandum 88-7 sets out a proposed amendment to the marital deduction gift statute that clarifies the legislative intent to apply the statute to self-defeating marital deduction gift clauses that erroneously require the spouse to survive the decedent by a period that could exceed six months.

We have received the letter attached as Exhibit 1 from Ken Klug suggesting that the general intent of the marital deduction gift statute be elaborated in the Comment, thus:

Prob. Code § 21525 (amended). Survival requirement

21525. (a) If an instrument that makes a marital deduction gift includes a condition that the transferor's spouse survive the transferor by a period that exceeds or may exceed six months, other than a condition described in subdivision (b), the condition shall be limited to six months as applied to the marital deduction gift.

(b) If an instrument that makes a marital deduction gift includes a condition that the transferor's spouse survive a common disaster that results in the death of the transferor, the condition shall be limited to the time of the final audit of the federal estate tax return for the transferor's estate, if any, as applied to the marital deduction gift.

Comment. Subdivision (a) of Section 21525 is amended to make it clear that a survival requirement that is not fixed in duration is limited to six months for a marital deduction gift, just as a survival requirement of fixed duration that exceeds six months. This clarification is a specific application of the general intent of the statute ~~to save marital deduction gifts to the greatest extent practical; it~~ that a testator's intent to make a marital deduction gift overrides any conflicting intent as may be expressed by language in the document which may disqualify the devise from the Federal Estate Tax marital deduction. Therefore, testamentary language which would disqualify a gift from the marital deduction should be disregarded or interpreted in light of the overriding intent to obtain the marital deduction. This amendment is declaratory of, and not a change in, existing law.

The staff believes such an elaboration would be useful, although we would edit it somewhat to refer to gifts and instruments generally, not just testamentary gifts, and to make other minor editorial changes.

In addition to this change in the Comment, the staff now believes it is important to state in the statute itself that the amendment is declaratory not only of existing law, but of the law from which existing law was drawn. We would add to the statute a provision along the following lines:

The amendment made by this act is declaratory of, and not a change in, either existing law or former Section 1036.

Comment. This provision emphasizes the fact that the amendment made by this act merely clarifies the Legislature's intent in originally enacting Section 1036 (Cal. Stats. 1982, ch. 41, § 3) as well as in restating former Section 1036 without substantive change in Section 21525 (Cal. Stats. 1987, ch. 923, § 101). See also Section 21501 (application of part) and former Section 1031 (application of former article).

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

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March 1, 1988

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Re: Memo 88-7

Dear Nat:

I approve of the proposed amendment to Probate Code Section 21525. I wonder, however, if the last sentence to the comment about the general intent of the statute "to save marital deduction gifts" might be better stated. The problem to be cured by the statute is where the testator really intended a marital deduction gift, but as a result of some technical defect, the gift does not qualify for the marital deduction under the Internal Revenue Code, statutes or rulings. What we have, then, is an ambiguity in the document: do we give effect to the testator's intent or to the language of the document?

The legislature has always had power to provide for a statutory construction in the event of an ambiguity, to give effect to the testator's intent. In this regard, the legislature has determined by statute that the decedent's intent of preserving the marital deduction is paramount, and that other language should be disregarded (or imputed) if necessary to uphold the paramount intent.

If I am correct, then perhaps the comment should read as follows:

Comment. Subdivision (a) of Section 21525 is amended to make it clear that a survival requirement that is not fixed in

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duration is limited to six months for a marital deduction gift, just as a survival requirement of fixed duration that exceeds six months. This clarification is a specific application of the general intent of the statute that a testator's intent to make a marital deduction gift overrides any conflicting intent as may be expressed by language in the document which may disqualify the devise from the Federal Estate Tax marital deduction. Therefore, testamentary language which would disqualify a gift from the marital deduction should be disregarded or interpreted in light of the overriding intent to obtain the marital deduction. This amendment is declaratory of, and not a change in, existing law.

Very truly yours,



Kenneth M. Klug

cc: Professor Jerry A. Kasner
Robert Mills