

Memorandum 83-64

Subject: Study L-626 - Wills and Intestate Succession

Assembly Bill 25 has passed the Legislature and has been sent to the Governor for his approval. The conforming provisions (formerly contained in Assembly Bill 68) were amended into Assembly Bill 25 before it was passed by the Legislature. A copy of Assembly Bill 25 as passed by the Legislature is attached.

This memorandum considers various matters in connection with Assembly Bill 25 that are not considered in other material prepared for the September meeting.

The staff suggests that one bill be submitted to the Legislature in 1984 proposing all the changes in Assembly Bill 25 (and perhaps additional probate law revisions) that meet the approval of the Commission and the Estate Planning, Trust and Probate Law Section of the State Bar. Other Commission proposals that are controversial should, we believe, be submitted as separate proposals.

We plan to study Assembly Bill 25 carefully within the next few months and may discover additional matters in the bill that need to be dealt with. For example, Professor Halbach is now studying the bill, but we have not yet received his suggestions for technical and substantive corrections. Any additional revisions the Commission decides at future meetings to make in Assembly Bill 25 can be added to the bill that is introduced in 1984 to make the revisions the Commission decides at the September meeting to make.

The following are matters that should be considered in connection with Assembly Bill 25.

Division by Representation

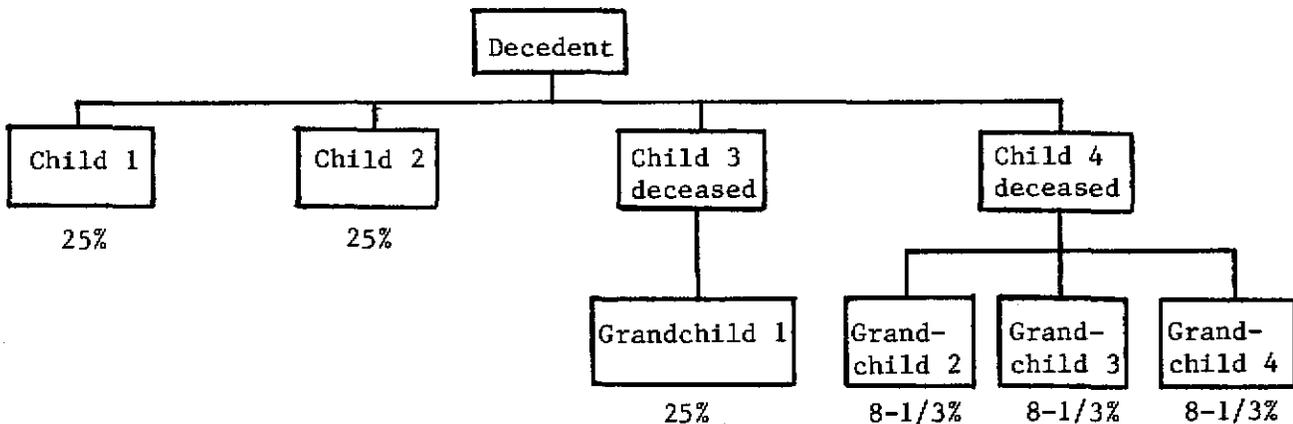
The staff recommends that Section 240 be revised to read:

240. If representation is called for by this code, or if a will that expresses no contrary intention calls for distribution per stirpes or by representation or provides for issue or descendants to take without specifying the manner, the property shall be is divided into as many equal shares as there are living members of the nearest generation of issue then living and deceased members of that generation who leave issue then living, each. Each living member of the nearest generation of issue then living receiving is allocated one share, and the share of each

deceased member of that generation who leaves issue then living being divided in the same manner among his or her then living issue remainder of the property is divided in the same manner as if the issue already allocated a share and their descendants had predeceased the decedent.

Section 240 in AB 25 adopts the Uniform Probate Code rule on representation. Under UPC Section 2-106, the estate is divided at the generation nearest the decedent which has at least one living member. The estate is divided into as many shares as there are surviving members in that generation and deceased members in that generation who leave surviving descendants. The share of each deceased member is then divided in the same manner, that is, a per capita division is made at the nearest generation having a surviving member. As a consequence of this scheme, if the primary division is made at the decedent's children's level and, for example, two of the decedent's four children predeceased the decedent, the surviving grandchildren will take substantially unequal shares in a situation where there is one grandchild in one line of descent and three grandchildren in another line.

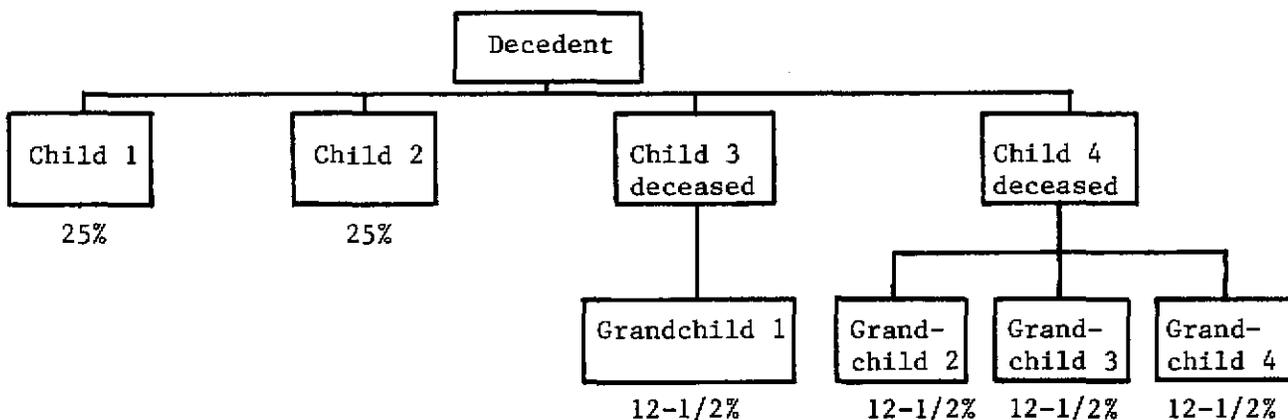
Example



The Commission recommended the UPC rule because it would bring California law closer to a per capita distribution scheme and thus correspond more closely to the popular preference. See Tentative Recommendation Relating to Wills and Intestate Succession, 16 Cal. L. Revision Comm'n Reports 2301, 2340 (1982). Under existing law, distribution is made per stirpes unless all surviving descendants are in the same generation. See Prob. Code §§ 221, 222.

The Commission considered a proposal to divide the property per capita at each generation as recommended by Professor Lawrence Waggoner. See Waggoner, A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants, 66 Nw. U.L. Rev. 626 (1971). Under this proposal, in the situation discussed above, the estate not distributed to children is distributed to the next generation per capita so that the four grandchildren in the two lines would take equal shares. Hence, the same principle of distribution is applied at each generation without regard to stirpital notions.

Example



The Tentative Recommendation reports that the Commission found the Waggoner scheme "theoretically appealing, but chose the Uniform Probate Code rule in the interest of national uniformity of intestate succession law." Tentative Recommendation, supra, at 2340 n.108. The latest draft of the Uniform Statutory Will Act would adopt the rule requiring per capita distribution at each generation and it is not unlikely that a conforming revision of the UPC provisions will ultimately be approved. Accordingly, the staff recommends that the Commission follow its earlier preference.

California Statutory Will §§ 6200-6248

The Uniform Law Commissioners, together with the American Bar Association, have been working for a number of years on a Uniform Statutory Will Act. The Uniform Act contemplates that a testator will adopt the statutory will through incorporation by reference in a simple will. The act does not provide a battery of optional schemes or provisions, but it does permit modifications and additions to be made by the will which

adopts the statutory scheme. The statutory will may be the entire will of a testator, or it is adoptable as part of a will which includes other devises. Unlike the California Statutory Will, the Uniform Statutory Will is not a form will; the Uniform Act provides provisions that can be incorporated by reference.

The staff believes that it may be desirable to adopt the Uniform Act in California. However, the Uniform Act is still being developed at this time. We are not now considering whether the Uniform Act should be recommended for enactment in California.

The reason why the Uniform Act needs to be taken into account at this time is that the Commission needs to consider whether the name of "California Statutory Will" should be changed. When the Uniform Act is enacted in California, the staff believes that it will be confusion to have a "California Statutory Will" and a "Uniform Statutory Will." Assembly Bill 25 will not become operative until January 1, 1985. We can change the name of the California Statutory Will now before any new forms are printed and this will avoid the need for a change later. For this reason, the staff recommends that the "California Statutory Will" be changed to "California Short Form Will." This new name would be consistent with the name recommended in the proposals of the staff for "Statutory Short Form Power of Attorney" and a "Statutory Short Form Durable Power of Attorney for Health Care."

Also in the provisions relating to the California Statutory Will, Section 6209 should be amended to incorporate the general provision found in Section 240.

Devise Subject to Uniform Gifts to Minors Act §§ 6340-6349

The National Conference of Commissioners on Uniform State Laws has approved the Uniform Transfers to Minors Act which will replace the Uniform Gifts to Minors Act. The enactment of the new Uniform Act in California will require thoughtful revision of a number of the Probate Code provisions to reflect the enactment of the new Uniform Act in California and the possibility of the enactment of the new Uniform Act in other states. (For example, Probate Code Sections 6245(b)(2)(C) and 6246(b)(2)(C) refer to "the Uniform Gifts to Minors Act of any state.") Sections 6340-6349 may be unnecessary in light of the new Uniform Act, and these sections will require revisions if they are to be retained.

In addition, Sections 3300-3612 of the Probate Code should be reviewed to determine whether any revisions are needed to conform to the enactment of the new Uniform Act and whether any revisions should be made in light of the enactment of the Uniform Act. Other conforming revisions may be needed in other provisions.

Most, but not all, of the conforming revisions would only be necessary if California enacted the new Uniform Act. The job of reviewing the various Probate Code provisions could be left to the California Uniform Laws Commission or to the author of the bill proposing enactment of the new Uniform Act. Or should the Commission prepare a bill proposing enactment of the new Uniform Act with necessary conforming and supplementary revisions in existing statutes?

Definition of "Predeceased Spouse"

The term "predeceased spouse" is used in Sections 6402 and 6402.5. The staff believes that this term should be defined. If the Commission agrees, we will prepare a definition to be considered at the November meeting.

Inheritance by Remote Relatives

The Commission's original wills and intestate succession recommendation proposed ending California's unlimited inheritance which permits a blood relative of the decedent to inherit no matter how remote the relationship may be. See Prob. Code § 226. The Commission proposal would have conformed California law to the Uniform Probate Code by limiting inheritance by intestate succession to lineal descendants of the decedent, parents and their lineal descendants, and grandparents and their lineal descendants, and eliminating inheritance by more remote relatives. The Commission justified its recommendation as follows:

- (1) It simplifies the administration of estates (and of trusts where there is a final gift to "heirs") by avoiding the delay and expense of attempting to find remote missing heirs and by minimizing problems of service of notice.
- (2) It eliminates the standing of remote heirs to bring will contests or trust litigation and thus minimizes the opportunity for unmeritorious litigation being brought for the sole purpose of coercing a settlement.
- (3) It removes a significant source of uncertainty in land titles.

(4) It is consistent with the decedent's probable desire in a case where the decedent had a predeceased spouse, since it reduces the number of remote relatives who take in preference to close former in-laws of the decedent, and thus gives the property to persons for whom the decedent probably had real affection rather than remote relatives who probably were not acquainted with the decedent.

However, it was necessary to amend the bill (AB 25) to restore unlimited inheritance in order to obtain passage of the bill. The pertinent section is Section 6402 of Assembly Bill 25.

The staff recommends that we propose to the 1984 session of the Legislature that unlimited inheritance be eliminated in California, consistent with the Commission's original recommendation. This should tend to simplify probate and reduce delay and expense. It should be recognized that there will be substantial opposition to such a recommendation.

Sale of Community Property in Probate Administration

As originally introduced, the Commission's wills and intestate succession legislation (AB 68) revised the provision of Probate Code Section 754 that in making estate sales the executor or administrator "may sell the entire interest of the estate in the property or any lesser interest or estate therein." As revised, the provision would have limited the quoted language to separate property, and would have added new language to the section as follows:

If the property to be sold is community or quasi-community property, the executor or administrator may sell half or less of the total amount of each class of fungible property, and half or less of each item of nonfungible property. The surviving spouse may object to a sale which does not comply with this subdivision without electing against the will of the decedent, unless the will expressly provides for an election if such objection is made.

The staff deleted this new language from AB 68 because of some uneasiness about its effect. We were particularly concerned how the new language would be construed if the surviving spouse elected to have all the community property--the share of the decedent and the share of the surviving spouse--administered in the probate proceeding.

The question now posed is whether this proposal should be included in our 1984 legislative program. The above language was put in the bill to deal with a potential problem raised by Professor Reppy. In Pro-

fessor Reppy's view, the problem is created by California's item theory of community property ownership pursuant to which a married person owns a one-half interest in each item of community property, not half of the aggregate. See *Dargie v. Patterson*, 176 Cal. 714, 169 P. 360 (1917). According to Professor Reppy, strict application of the item theory means that if the executor must sell community property to raise funds to pay a specific cash bequest in the decedent's will, the executor may sell only a half interest in each item of community property, an indefensible result when the property is fungible such as, for example, shares of stock.

The difficulty with the amendment referred to above is that it may make it more difficult to sell community property rather than less difficult. The existing language of Probate Code Section 754 could be read as authorizing sale of the entire interest in community property as well as separate property. This view is suggested in the case of *In re Haselbud*, 26 Cal. App.2d 375, 380, 79 P.2d 443 (1938), and is assumed in the C.E.B. book on the subject. See Hudner, *Sales of Estate Property*, in 1 California Decedent Estate Administration § 14.5, at 506 (Cal. Cont. Ed. Bar 1971). However, Professor Reppy disagrees with this view on the basis that the drafters of Section 754 simply did not think about this problem.

In view of the uncertainty of the application of Section 754 to this problem, staff doubts about the proposed amendment, and the utter absence of any complaint about Section 754 from any California practitioner, the staff is inclined not to pursue the proposed amendment to Section 754. Does the Commission agree?

Respectfully submitted,

John H. DeMouilly
Executive Secretary