L-625 7/7/82

Eleventh Supplement to Memorandum 82-70

Subject: Study L-625 - Probate Code (Tentative Recommendation--Children Unprovided for in Will §§ 254.110-254.140)

Attached are staff recommended statutory provisions relating to pretermitted children. For background on this matter, see Memorandum 82-73.

The attached staff recommended provisions provide two different rules for treatment of an omitted child, the applicable rule depending on whether there were children in existence at the time the will was executed. If there were one or more children in existence when the will was executed, the afterborn child receives a share in the estate equal in amount to the average of the amounts received under the will by the testator's other children who existed at the time the will was executed. This seems the fairest method of treating the afterborn child where there were children in existence when the will was executed.

The basic problem with giving an afterborn child the same average share as the other children of the testator is that the will may be made before any children are born and, in that case, the children receive nothing. For this reason, the staff recommended provisions provide a different rule where there are no children in existence at the time the will was executed. In that case, the afterborn children receive the share they would have received if the testator died intestate. Where all of the afterborn children are children of the testator and the surviving spouse, the afterborn children will receive nothing. This is because they are not entitled to any intestate share since the surviving spouse is their parent. If there is no surviving spouse or if there are afterborn children by another marriage of the testator, then the afterborn child will receive a share, and the amount of the share will depend on the number of children.

There is one difficulty with this solution. The reason that children of the marriage of the decedent and surviving spouse are given nothing by intestate succession is that the surviving spouse receives the entire estate and can take care of the children. However, where there is a will, there is no assurance that the surviving spouse will receive the entire estate. The testator may by will dispose of the

testator's half of the community and quasi-community property and all of the testator's separate property to another person. If this happens, the surviving spouse has only his or her half of the community and quasi-community property. (This scheme may not apply where the will was executed before the marriage. See the Twelfth Supplement to Memorandum 82-70.) Under existing law, the child is always entitled to a share in the separate property by intestate succession and a pretermitted child will receive that same share.

The staff recommends the above scheme because the family allowance and family maintenance provisions will provide protection to afterborn children (as well as the other children) who are in need of support after the death of the testator. We believe that the family maintenance provisions for children will be enacted. The attached provisions are recommended because they will assure to some extent that an afterborn child is treated fairly (without regard to need) when compared to children in existence at the time the will is executed and they will provide a share to an afterborn child (without regard to need) where the testator dies without a surviving spouse.

Respectfully submitted,

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Executive Secretary

Pretermitted Children

California has a broad pretermission statute that provides an intestate share for a child of the testator, or issue of a deceased child, who is omitted from the testator's will.[1] The statute applies not only to a child born after the will was made but also a child living at that time. The statute does not apply if the will includes express words of disinheritance or strong or convincing language that the omission was intentional.[2]

The purpose of the pretermission statute is to carry out the testator's presumed intent and protect against disinheritance where it appears that the omission from the will was unintentional.[3] For this purpose the proposed law makes changes in the California statute so it will operate in a manner more consistent with the intent of most testators:

(1) The proposed law continues to protect a child born after the making of the will but no longer protects a child living when the will was made.[4] It is more likely than not that omission of a child living when the will was made was intentional.[5]

(2) The protection of the proposed law is limited to an omitted child of the testator; it does not extend to omitted grandchildren or more remote issue of the testator. If the testator's child is alive when the will is made, more remote issue are protected by the anti-lapse statutes; if the testator's child is not alive when the will is made, the omission of more remote issue is ordinarily intentional.

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1. Prob. Code § 90.

2. See, e.g., Estate of Smith, 9 Cal.3d 74, 78-79, 507 P.2d 78, 106 Cal. Rptr. 774 (1973); 7 B. Witkin, Summary of California Law Wills and Probate § 5, at 5524 (8th ed. 1974).

3. Cf. T. Atkinson, Handbook of the Law of Wills § 36, at 141-45 (2d ed. 1953).

4. The proposed law would protect a child living when the will was made if the testator mistakenly believed the child to be dead or was unaware of its birth.

5. See Evans, Should Pretermitted Issue Be Entitled to Inherit?, 31 Calif. L. Rev. 263, 265, 269 (1943); Niles, Probate Reform in California, 31 Hastings L.J. 185, 197 (1979).

(3) The intestate share given to an omitted child under existing law is usually larger than the share received by the other children, contrary to the testator's probable intent.[6] In cases where the testator has other children at the time the will is executed, the proposed law gives the omitted child only a share equal in value to the average of the shares received by the testator's other children after they have contributed to the share of the omitted child.[7]

(4) The rule that the pretermission statute applies unless the testator's intent to omit a child is shown clearly on the face of the will may defeat the testator's intent. The proposed law permits the court to look to surrounding circumstances in determining the testator's intent when the language of the will is doubtful; this is consistent with the general rules for construction of a will.[8]

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6. See Mathews, Pretermitted Heirs: An Analysis of Statutes, 29 Colum. L. Rev. 748, 768 (1929); Sweet, Rights of a Pretermitted Heir in California Community Property--A Need for Clarification, 13 Stan. L. Rev. 80, 88 (1960).

7. This provision is drawn from South Carolina law. See S. C. Code §§ 21-7-450, 21-7-460 (1976).

8. See 7 B. Witkin, Summary of California Law Wills and Probate § 160, at 5676 (8th ed. 1974).

Article 2. Pretermitted Children

§ 254.110. Share of pretermitted child

254.110. Except as provided in Section 254.120, if a testator fails to provide in his or her will for a child of the testator born or adopted after the execution of the will:

(a) If the testator had one or more children at the time the will was executed, the child born or adopted after the execution of the will shall receive a share in the estate equal in amount to the average of the amounts received under the will (after the apportionment provided for in Section 254.140 has been made) by the testator's other children who existed at the time the will was executed.

(b) If the testator did not have any children at the time the will was executed, the child born or adopted after the execution of the will shall receive a share in the estate equal in value to that which the child would have received if the testator had died intestate.

Comment. Sections 254.110-254.130 supersede former Section 90. Section 254.110 limits the children that are considered to be pretermitted children in two significant ways:

(1) Unlike former Section 90, an omitted child living when the will was made does not receive a share of the estate under Section 254.110 unless the child is one described in Section 254.130 (child omitted solely because the testator mistakenly believed the child to be dead or was unaware of the birth of the child). When the omission is not based on such mistaken belief, it is more likely than not that the omission was intentional. See Evans, Should Pretermitted Issue Be Entitled to Inherit?, 31 Calif. L. Rev. 263, 269 (1943); Niles, Probate Reform in California, 31 Hastings L.J. 185, 197 (1979).

(2) Unlike former Section 90, Section 254.110 does not protect omitted grandchildren or more remote issue of a deceased child of the testator. If the testator's child is deceased at the time the will is made and the testator omits to provide for a child of that child (the testator's grandchild), the omission would seem to be intentional in the usual case. If the testator's child is living when the will is made and is a named beneficiary under the will and dies before the testator leaving a child surviving, the testator's grandchild will be protected by the anti-lapse statute (Section 204.050) which substitutes the deceased child's issue.

Former Section 90 gave an omitted child an intestate share in the deceased testator's estate. This rule is continued in subdivision (b) of Section 254.110, but subdivision (b) applies only in the case where the testator did not have any children when the will was executed. If the testator had one or more children when the will was executed, subdivision (a) of Section 254.110 gives the omitted child a share equal in value to the average of the shares received by the testator's other children, rather than giving the child an intestate share. This should

result in treating all the children fairly, both those in existence when the will was executed and those born after its execution. Giving a child born after the will was executed an intestate share rather than a share equal to the average of that given the other children by the will would almost surely result in the omitted child receiving substantially more or less than the other children. Subdivision (a) is drawn from Sections 21-7-450 and 21-7-460 of the Code of Laws of South Carolina.

Where the testator did not have any children when the will was executed, the afterborn child is entitled to a share equal in value to that which the child would have received if the testator had died intestate. Where the testator leaves a surviving spouse, the child may receive little or nothing. Under Section 220.020, as under former law, the surviving spouse takes all of the community and quasi-community property by intestate succession. And, under the same section, the surviving spouse takes all of the separate property unless there are surviving issue of the decedent one or more of whom are not issue of the surviving spouse. Hence, the omitted child will receive a share only in those situations where the decedent leaves no surviving spouse or leaves a surviving spouse and issue who are not issue of the surviving spouse. As to the intestate share of the omitted child, see Sections 220.020 and 220.030. Although the omitted child may receive nothing under this article, the child is eligible for family maintenance if in need of support after the testator's death. See Sections 253.010-253.070.

38044

§ 254.120. No share if child intentionally omitted or otherwise provided for

254.120. A child does not receive a share of the estate under Section 254.110 if either of the following is established:

(a) The testator's failure to provide in his or her will for the child was intentional and that intention appears from the will or is shown by statements of the testator or by other evidence.

(b) The testator provided for the child by transfer outside the will and the intention that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or by other evidence.

Comment. Section 254.120 supersedes a portion of former Section 90. Unlike the former section, subdivision (a) of Section 254.120 does not require that it appear "from the will" that the omission was intentional. This expands former law, which permitted surrounding circumstances to be considered only to show that the omission was unintentional. See Estate of Smith, 9 Cal.3d 74, 79-80, 507 P.2d 78, 106 Cal. Rptr. 774 (1973) (extrinsic evidence inadmissible to prove intent to disinherit).

Subdivision (b) substitutes more precise and complete language from Section 2-302 of the Uniform Probate Code for the phrase that the children

"are unprovided for by any settlement, and have not had an equal proportion of the testator's property bestowed on them by way of advancement" which appeared in former Section 90.

37001

§ 254.130. Certain children treated as children born after execution of will

254.130. If at the time of execution of the will the testator fails to provide in the will for a living child solely because the testator believes the child to be dead or is unaware of the birth of the child, the child shall be deemed for the purposes of this article to be a child born after the execution of the will.

Comment. Section 254.130 is drawn from subsection (b) of Section 2-302 of the Uniform Probate Code, but Section 254.130 expands the UPC provision to include the case where the testator is unaware of the birth of the child. Former Section 90 protected any omitted child in existence when the will was made, not just those children described in Section 254.130. See the Comment to Section 254.110.

38029

§ 254.140. Manner of satisfying share of pretermitted child

254.140. (a) Except as provided in subdivision (b), in satisfying a share of the estate as required by Section 254.110:

(1) The share shall first be taken from the testator's estate not disposed of by will, if any.

(2) If that is not sufficient, so much as may be necessary to satisfy the share shall be taken from all the devisees in proportion to the value they may respectively receive under the testator's will.

(b) If the obvious intention of the testator in relation to some specific devise or other provision of the will would be defeated by the application of subdivision (a), the specific devise or provision may be exempted from the apportionment under subdivision (a), and a different apportionment, consistent with the intention of the testator, may be adopted.

Comment. Section 254.140 continues the substance of former Section 91. See also Sections 100.090 ("devise" means testamentary disposition of real or personal property), 100.100 ("devisee" means a person designated in a will to receive a devise).