#L-625 9/15/82

Memorandum 82-94

Subject: L-625 - Probate Law (Disclaimer of Testamentary and Other Interests)

At the July meeting, the Commission considered the portion of the Probate Code relating to disclaimers and made several changes in the staff draft presented at that meeting. (See the Third Supplement to Memorandum 82-70, on the agenda for the September meeting.) Attached to this memorandum is a copy of a draft tentative recommendation relating to disclaimers that incorporates the decisions made at the last meeting. This recommendation was distributed for comment in August; the comments we have received are discussed below.

The staff proposes that this recommendation, as revised to include any changes made at the September meeting, be submitted as a separate recommendation to the 1983 session of the Legislature. The subject of disclaimers is easily severable from the main body of material relating to wills and intestate succession. If the proposed legislation is a separate bill, there will be no need to defer its operative date. The disclaimer statute would be added to the Probate Code as Division 2c--Sections 298.010-298.510. This would avoid the need to renumber these sections when the main recommendation is introduced.

General Reaction to Tentative Recommendation

We did not receive very many comments on this recommendation, perhaps in part because of the length of time allotted for responding and the timing of distribution. In any event, it does not appear that this is a very controversial area. Favorable comments were received from Professor Dobris (Exhibit 2 attached hereto), Mr. Paul Avery (see Exhibit 6 attached to Memorandum 82-82), and Justice Kingsley (see Exhibit 3 attached to Memorandum 82-82). Mr. Kenneth M. Klug made suggestions for revision of the proposed statute which are discussed below. (See Exhibit 1 attached hereto.)

Disclaimers of Joint Tenancy Interests

Mr. Klug suggests that more detailed treatment be given disclaimers of joint tenancy interests. (See Exhibit 1, pp. 1-3.) Under the proposed legislation, it is clear that a joint tenancy interest (which is created

when a joint tenancy is created) may be disclaimed. It is also clear that the interest created by surviving the death of another joint tenant may be disclaimed. See Sections 190.030 ("creator of the interest" defined), 190.070 ("interest" defined). We do not know whether Mr. Klug is suggesting that a person should be able to accept a joint tenancy interest (however created) but disclaim the "right of survivorship" prior to the death of the other joint tenant or tenants. If such a disclaimer were permitted, what kind of an interest would we have? The nondisclaiming joint tenant would hold in joint tenancy with the right of survivorship, but the disclaiming joint tenant would have some other kind of interest--perhaps a tenancy in common subject to being extinguished if the disclaimant does not survive the other joint tenant. The staff would prefer not to attempt to deal with this problem. If the grantee of an interest in joint tenancy wishes to eliminate the survivorship aspect, then the joint tenancy may be severed to create a tenancy in common, but this need not involve a disclaimer. If this is not desired, then the joint tenant may await the death of the other joint tenant and then disclaim. In any case, if the problem is one involving federal tax law, the proposed legislation recognizes any disclaimer that is recognized under federal tax law. It is difficult to say what would satisfy the requirements of federal law which will remain unsettled for years to come.

Disclaimer by Personal Representative (§§ 190.220, 190.230)

Mr. Klug suggests that an executor should be able to disclaim without first obtaining court approval pursuant to draft Section 190.230. (See Exhibit 1, p. 3.) He argues that since most disclaimers by executors would be executed for tax purposes, the ultimate distribution of the property would not be affected. He may also be suggesting that a conservator should not need to obtain prior court approval under Section 190.220.

The provision requiring prior court approval for a disclaimer by an executor was drawn from the substituted judgment provisions of the guardianship-conservatorship law. The staff is concerned that a disclaimer could result in a significant shift in the ultimate disposition of the property. The latest draft of the Beverly Hills Bar Association proposal on disclaimers requires prior court approval for a disclaimer

made by a conservator, executor, or person acting on behalf of a minor. However, Mr. Klug fears that there may be a delay in obtaining court approval that effectively precludes making a disclaimer in certain circumstances.

The staff does not believe that the Commission should propose a change in the existing provision that requires prior court approval for a disclaimer by a conservator. That provision was reviewed by numerous practitioners before it was enacted and we have not been informed of any problems under the provision.

The staff believes that the need to make a disclaimer on behalf of a minor will be rare and the requirement of prior court approval in the case of a minor is consistent with the traditional protections afforded minors.

The staff does not believe a case can be made for treating an executor any different than a guardian of a minor or conservator of a conservatee. In the case of the conservator, the conservator knows that he must act in the best interests of the conservatee, but court approval nevertheless is required. The person or persons in whose interest the executor is acting is making a disclaimer on behalf of a decedent is less clear. The staff believes that the persons affected should have an opportunity to present their positions to the court before any action is taken that may have an adverse effect on them. Accordingly, we recommend that the prior approval requirement be retained. It should be noted, however, that if avoidance of federal taxes is the motive for the disclaimer, there is some uncertainty concerning whether a qualified disclaimer may be made under federal law by a person other than the beneficiary. See Bennett, Using Disclaimers, in Using Disclaimers and Power of Appointment 17 (Cal. Cont. Ed. Bar 1981).

Binding Effect of Disclaimers (§ 190.270)

Mr. Klug believes there is an ambiguity in existing law and draft Section 190.270 where it is provided that a disclaimer is binding on the beneficiary and all persons claiming by, through, or under the beneficiary. (See Exhibit 1, p. 4.) He thinks it arguable that issue of a disclaiming beneficiary who take under a will or by intestate succession may be viewed as claiming through or under the beneficiary and by operation of this language would be prevented from taking. The staff assumes this

language is intended to preclude an attack on the disclaimer by persons who are deprived of property or an expectation by virtue of the disclaimer. We are not troubled by the ambiguity detected by Mr. Klug and would not alter the section. Similar language also appears in the Uniform Probate Code Section 2-801(d) and the other uniform acts on this subject.

Liability for Making Disclaimer (§§ 190.270, 190.290)

Mr. Klug recommends addition of a provision granting a personal representative immunity from personal liability to estate creditors for making a disclaimer. (See Exhibit 1, p. 3.) He believes there is a danger that the personal representative may be liable because of a fiduciary duty to all persons interested in the estate. If the draft of Section 190.225 set forth above is approved, the question of liability would appear to be answered. If this provision, or one similar to it, is not approved, Section 190.270 could be revised to provide also that "no one is liable for exercising the right to disclaim."

Place of Filing Disclaimers (§ 190.260)

At the July meeting, the Commission asked the staff to investigate whether disclaimers are being filed under existing Probate Code Section 190.4 in "superior courts in counties where administration would be proper." The suggestion was made that it might be preferable to provide for filing of disclaimers with the Secretary of State.

Mr. Carl Olsen, San Francisco County Clerk, at our request discussed this question at a meeting of superior court clerks from throughout the state and reported that no one was aware of any problems under existing law. It appears that different clerks might process a disclaimer filed where there is no pending petition for probate or administration in different ways and that some would charge a fee to set up a file and others would not. A representative of the clerk for the Superior Court of Los Angeles County reported to the staff that he could not remember anyone ever trying to file a disclaimer outside of probate; he also said that a fee of $86 would have to be paid to open a file in such a case.

The staff concluded that there did not appear to be a sufficient need for filing disclaimers with the superior court outside probate to justify setting up a filing system in the Secretary of State's Office. If such a system were established and made applicable to all disclaimers

in this state, then everyone would have to pay a fee to file a disclaimer, whereas under existing law no fee is required if the disclaimer is filed in a pending probate proceeding, and in some counties there is no fee even if there is no pending proceeding. Draft Section 190.260 is also less strict than existing law in that it allows filing in a variety of places if there is no administration. Accordingly, we have retained the existing language as to place of filing in the draft Section 190.260.

Comments of State Bar

Attached as Exhibit 3 is a copy of comment on the disclaimer draft from the State Bar. These issues were raised orally by the State Bar representatives at the July meeting and so we do not discuss them in this memorandum.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

Exhibit 1

THOMAS, SNELL, JAMISON, RUSSELL, WILLIAMSON & ASPERGER
ATTORNEYS AT LAW

HOWARD B. THOMAS
OLIVER M. JAMISON
PAUL ASPERGER
ROGER E. FIPPS
JAMES E. LA FOLLETTE
ROBERT J. TYLER
NICKOLAS J. DIBIASO
JOHN E. PETERSON
RUSSELL E. TEMPLETON
JOHN J. McGREGOR
WILLIAM A. DAHL
STEVEN H. McCLEAN
BRUCE D. BICKEL
TRACY A. AGRALL

WILLIAM N. SNELL
T. NEWTON RUSSELL
CHARLES E. SMALL
PHILIP H. WILE
JAMES O. DEMSEY
JOHN G. MENGSHOL
JAY V. JORY
KENNETH M. KLUG
GERALD D. VINNARD
HOWARD A. SAGASER, INC.
DENISE A. ROUTHIER
JEFFREY P. KANE
G. DANA FRENCH

TENTH FLOOR DEL WEBB BUILDING
POST OFFICE BOX 1461
FRESNO, CALIFORNIA 93716
TELEPHONE (209) 442-0600

OF COUNSEL
FENTON WILLIAMSON, JR.

August 18, 1982

John DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 99306

Re: Tentative Recommendations Relating to Disclaimer of Testamentary and Non-Testamentary Interests

Dear Mr. DeMoully:

I have reviewed the above tentative recommendation and have the following comments:

First, I believe that joint tenancy should be treated separately from other interests that may be disclaimed. With the exception of joint tenancy, all of the other interests listed in proposed Section 190.030 are interests that vest, if at all, at one time. A joint tenancy interest can be viewed as vesting twice; first when the joint tenancy is created, and second when one joint tenant dies. To be sure, the second "vesting" is not really an acquisition by the surviving joint tenant, but is more of an abandonment or an extinguishing of the rights of the deceased joint tenant in the property. Nonetheless, it would not be improper to treat the interest of the survivor as an additional acquisition at the time of the first joint tenant's death, and give the survivor the right to disclaim the interest.

The proposal as presently drafted does not make a clear demarcation between the creation of the joint tenancy and the survivorship right of the joint tenant. I believe that one should be able to accept the initial gift resulting from the creation of the joint tenancy while being able to later disclaim whatever additional interest may be obtained by survivorship.

Second, Section 190.030 (11) defines the deceased joint tenant to be a "creator of the interest" with respect

to an interest created by surviving the death of another joint tenant. But it is possible that the surviving joint tenant may be the one who originally created the joint tenancy. In such event, the surviving joint tenant should not be permitted to disclaim the joint tenancy, because the original creation of a joint tenancy by the surviving joint tenant would have been an acceptance of all interests created, and the subsequent disclaimer would probably not be valid under Internal Revenue Code §2518(b)(3).

This dichotomy can probably best be illustrated by example. If "H" takes his separate property and converts it to joint tenancy with "W", "W" should be free to accept the interest acquired by the creation of the joint tenancy without necessarily agreeing to accept the survivorship right. Therefore, if "W" were to disclaim the survivorship right, she should continue to own one-half of the joint tenancy property and "H's" half of the joint tenancy property should pass to his estate. The tentative recommendation does not make clear that "W" can accept the original creation of the joint tenancy without accepting the survivorship right. Query: Since the additional interest acquired by the survivorship right does not "vest" until "H's" death, can "W" wait until nine months from "H's" death to disclaim the survivorship right, or must that right be disclaimed within nine months from the creation of the joint tenancy? My preference is to allow "W" nine months from the date of "H's" death to disclaim the survivorship right.

To continue the example, if "W" were to die first, "H" should not be permitted to disclaim the interest acquired by survival. Since "H" was the creator of the joint tenancy, it would appear that he has accepted the survivorship right on creation. If he did not want the survivorship right, he could have conveyed the property to "H" and "W" as tenants in common. Having chosen the joint tenancy form, it would appear that he has accepted the interest within the meaning of the Internal Revenue Code, and he should not subsequently be permitted to disclaim the interest.

Because of the unusual nature of joint tenancy property, I would recommend that these questions be addressed by a separate section dealing exclusively with disclaimers of joint tenancies.

Sections 190.220 and 190.230(c) require court authorization before a personal representative can execute a disclaimer on behalf of a conservatee, a minor, or a decedent. As a matter of policy, the trend as evidenced by other Law Revision Commission proposals is to reduce the court supervision of the estate. Should the executor have authority to make a decision on the disclaimer without court approval, subject to the executor making the estate whole if the disclaimer were made imprudently? A cautious executor will obtain court approval in a questionable case. But is there a compelling reason to require all executors to obtain court approval? I can visualize that in most cases where a disclaimer would be made by a personal representative, the disclaimer would be made for tax reasons, and would not materially affect the ultimate distribution of the property. In those cases, court approval would appear unnecessary.

Furthermore, in many counties a four to six week delay in obtaining a hearing date is not unusual. Such a delay in obtaining a hearing date for court approval would have the effect of reducing the nine month period proposed by §190.250 to seven and one-half or eight months. I would recommend that a sub-paragraph (g) be added to §190.250 to make it clear that a disclaimer by a personal representative shall be effective if filed within the period required by §190.250, notwithstanding the fact that court approval may be obtained subsequent to such period.

Proposed §190.290 provides that a disclaimer by a beneficiary shall not constitute a fraudulent conveyance. Under this proposal, a beneficiary could disclaim a potential inheritance and leave his creditors begging. Should the beneficiary's representative have the same power, or does his fiduciary duty to all persons interested in the estate make him responsible to the creditor? Since the creditor probably did not lend in expectation of the beneficiary's inheritance (or the creditor would have demanded a waiver under §190.300) it would appear that the creditor should not be heard to complain about a disclaimer by a personal representative. I would recommend the addition of a provision granting the personal representative immunity from personal liability to estate creditors for making the disclaimer.

I believe that there is an ambiguity in present §190.5 which is carried over into proposed §190.270. That section provides that a disclaimer is binding on the beneficiary and all persons claiming by, through, or under the beneficiary. A colorable argument can be made that in an intestate situation a disclaiming beneficiary's children, who would take by right of representation, are claiming "through or under" the beneficiary. To be sure, a disclaimer by a beneficiary is not intended to eliminate all of the beneficiary's decendants who may otherwise take under the Will or by intestate succession. I believe the ambiguity could be cured by rewording §190.270 as follows: "A disclaimer, when effective, is irrevocable and binding upon the beneficiary and the beneficiary's estate, including creditors of the beneficiary and of the beneficiary's estate."

Very truly yours,

Kenneth M. Klug

Exhibit 2

UNIVERSITY OF CALIFORNIA, DAVIS

BERKELEY • DAVIS • IRVINE • LOS ANGELES • RIVERSIDE • SAN DIEGO • SAN FRANCISCO SANTA BARBARA • SANTA CRUZ

SCHOOL OF LAW DAVIS, CALIFORNIA 95616

August 30, 1982

California Law Revision
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Ladies and Gentlemen:

I teach trusts, wills and estates at the above law school. I am writing to say that I approve of the commission's tentative recommendation relating to disclaimer of testamentary and nontestamentary interest. Thank you.

Sincerely,

Joel C. Dobris
Professor of Law

JCD:lbp

EXHIBIT 3

LAW REVIEW COMMISSION

THIRD SUPPLEMENT TO MEMORANDUM # 82-70

DISCLAIMERS OF TESTAMENTARY AND NONTESTAMENTARY INTERESTS

Summary of Third Supplement:

This Supplement contains the proposed legislation relating to disclaimers which was drawn in part from the latest draft prepared by the Beverly Hills Bar Association, which has been studying this subject for some time. The staff raises several issues that need to be considered.

Comment:

The Team feels the proposed legislation raises basic policy questions. We feel that since disclaimers are mostly done for tax purposes, and the only reason for disclaiming for tax purposes is for Federal tax purposes, we should try to track the Federal rules. (Since the California inheritance tax has been repealed, there is no longer any California tax purpose for disclaimers). The legislation as proposed seems to be going in a different direction from the Federal law and also it would not be recognized for Federal purposes.

also defeat creditors

A. The following are comments on the issues pointed out by the Staff:

1. Timeliness of Disclaimer: The Staff states that Section 112.250 of the proposed legislation provides a conclusive presumption that a disclaimer has been filed within a reasonable time if it is filed within 9 months after the death of the creator of the interest, or after an interest becomes indefeasibly vested, whichever is later. It further states that this rule is consistent with Keinath v. Commissioner, 480 F.2d 57 (8th Cir. 1973), which permitted a person who had a vested remainder subject to divestment if he failed to survive the life tenant to disclaim at a time six months after the death of the life tenant, but 19 years after the creation of the remainder. There is some concern that disclaimers should not be exercisable such a long time after the creation of the interest. Such a delay can result in a person having an obligation to pay estate tax because of the tax allocation rules on an asset which is never received by the person. Also, if the person did pay the tax, such payment may be deemed to be a form of acceptance of the interest in the property, so that it cannot later be disclaimed.

Does not meet federal standard

2. Knowledge of the Interest. Section 112.250 relates the time within which disclaimers can be filed to the time "first knowledge" of an interest is acquired by the ~~disclaimant~~. The Federal law refers to the time when the right "accrues" and does not refer to "knowledge". The question is raised as to whether knowledge refers to actual or constructive knowledge. Constructive knowledge would be difficult to prove. The Team feels that it shouldn't be a question of knowledge at all, but strictly a time period.

Disclaimers (continued)

3. Permissability of Disclaimant taking disclaimed interest by other means: The Staff draft provides that a disclaimant is treated as predeceasing the creator of the interest, but does not preclude the disclaimant from taking by another route. The Staff questions whether this should be permitted. The Team feels that if a person disclaims in one category and receives the property by reason of another category, it should be all right.

B. The following are comments on proposed legislation:

Chapter 4: DISCLAIMER OF TESTAMENTARY AND NONTESTAMENTARY INTERESTS.

Article 1. Definitions:

§ 112.030, Definition of Creator of the Interest. The Team questions whether or not another category should be added for Orders of ~~Distribution in a~~ probate estate, since such an order supersedes a decedent's Will.

Paragraph (b)(5) is not clear as to whether this definition refers to the testator or the elector.

This Section sets forth 13 definitions of creator of the interest. Shouldn't there also be a fourteenth definition, which is the same as paragraph 14 of Section 112.070, i.e., with respect to an interest created by any testamentary or intervivos instrument or by operation of law.

(It should be noted that Section 112.070 appearing on Page 3 of the proposed legislation also appears on Page 4 of the proposed legislation.)

§ 112.250, Time Within Which Disclaimer Must Be Filed.

Paragraph (a) states that it is effective if filed within a reasonable time after the person acquires knowledge of the interest. We feel it should be measured from the time the interest is created, and not when the person acquired knowledge.

Paragraph (b) provides that a disclaimer is conclusively presumed to have been filed within a reasonable time if it is filed within nine months after the death of the creator of the interest or within nine months after the interest becomes indefeasibly vested, whichever occurs later. This raises the question as to whether or not a person with a remainder interest can disclaim many years after the interest was created.

Paragraphs (c) and (d) refer to time of "first knowledge" of the interest is acquired, or time the interest becomes "indefeasibly vested." Again, we feel it should be from the time the interest was created.

Disclaimers (continued)

Paragraph (e)(1) refers to the time the interest becomes an "estate in possession". This should be clarified since you cannot disclaim an interest after you have obtained possession.

§ 112.260, Filing a Disclaimer; Recording of Disclaimers Affecting Real Property.

Paragraph (a)(1) provides that a disclaimer shall be filed with the Superior Court in the County in which the estate of the decedent is administered, or if there is no administration, in the Superior Court in any County in which administration would be proper. This might create an administrative problem and the Superior Court clerks should be consulted in this matter. If there is no probate proceeding initiated for the decedent, there would be no procedure whereby such a petition could be filed and indexed unless there is some miscellaneous category of filing available. Thus, the mechanism for filing may be complicated. Perhaps where no probate proceeding is pending, the disclaimer could be lodged with the person described in paragraphs (a)(2), (3) and (4), i.e., the trustee, etc.

§ 112.280, Effect of Disclaimer.

The last sentence of Paragraph (a) provides that a disclaimer relates back for all purposes to the date of death of the creator of the disclaimed interest, or the determinative event, as the case may be. Some instruments make other provision, and thus the words "for all purposes" should be deleted, and that sentence should start with "Except as otherwise provided in the controlling instrument. . . "

#L-625

STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION

relating to

DISCLAIMER OF TESTAMENTARY AND NONTESTAMENTARY INTERESTS

August 8, 1982

Important Note: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you object to the tentative recommendation or that you believe that it needs to be revised. COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN SEPTEMBER 10, 1982.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

STATE OF CALIFORNIA EDMUND G. BROWN JR., *Governor*

CALIFORNIA LAW REVISION COMMISSION
4000 MIDDLEFIELD ROAD, ROOM D-2
PALO ALTO, CALIFORNIA 94306
(415) 494-1335

LETTER OF TRANSMITTAL

This recommendation proposes the enactment of a new, comprehensive statute governing the disclaimer of testamentary and nontestamentary interests. The new statute makes disclaimers that are valid under federal law also valid under the California statute. The new statute also makes clear that a disclaimer is not a fraudulent conveyance against creditors of the beneficiary who disclaims.

This recommendation is submitted pursuant to Resolution Chapter 37 of the Statutes of 1980, which directed the Law Revision Commission to study the Probate Code.

STAFF DRAFT

RECOMMENDATION

relating to

DISCLAIMERS

The California disclaimer statute[1] permits the recipient of an interest under a will, by intestate succession, or by some other mechanism[2] to disclaim the interest within a reasonable time, with the effect that the person is treated as if he or she never received the property.[3] The Commission has concluded that a new, comprehensive disclaimer statute is needed to improve the organization of the existing statute, to make clarifying and substantive changes in existing law, and to bring the California statute into closer conformity with federal law.

The new disclaimer statute would make the following significant clarifications or changes in existing law:[4]

(1) The new statute makes clear that a qualified disclaimer under federal law[5] is also valid under the California statute. This facilitates

---

1. Prob. Code §§ 190-190.10. Disclaimers may also be termed renunciations. See Uniform Probate Code §2-801 (1977). "Disclaimer" seems to be the preferred term. See I.R.C. § 2518; Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act (1978); Uniform Disclaimer of Transfers Under Nontestamentary Instruments Act (1978).

2. Such as by inter vivos gift, as a surviving joint tenant, or as a beneficiary under an insurance policy or retirement plan. The disclaimer statute was amended in 1982 to expand the types of interests that may be disclaimed. 1982 Cal. Stats. ch. 41, § 1.

3. Prob. Code § 190.6. But see the text at note 7, infra.

4. The proposed disclaimer statute is drawn in part from a draft statute prepared by the Probate, Trust and Estate Planning Committee of the Beverly Hills Bar Association on file in the Commission's office.

5. Section 2518 of the Internal Revenue Code provides:
   (a) For purposes of this subtitle, if a person makes a qualified disclaimer with respect to any interest in property, this subtitle shall apply with respect to such interest as if the interest had never been transferred to such person.
   (b) For purposes of subsection (a), the term "qualified disclaimer" means an irrevocable and unqualified refusal by a person to accept an interest in property but only if--

the primary purpose of disclaimers to minimize taxes.[6]

(2) Under the new statute, a disclaimer is not a fraudulent conveyance as against creditors of the person disclaiming. This adopts the majority rule and rejects the contrary California case-law rule[7] that pre-dates enactment of the California statute. The new statute permits the beneficiary to waive the right to disclaim a specific interest, and

---

(1) such refusal is in writing,

(2) such writing is received by the transferor of the interest, his legal representative, or the holder of the legal title to the property to which the interest relates not later than the date which is 9 months after the later of--

(A) The day on which the transfer creating the interest in such person is made, or

(B) the day on which such person attains age 21,

(3) such person has not accepted the interest or any of its benefits, and

(4) as a result of such refusal, the interest passes without any direction on the part of the person making the disclaimer and passes either--

(A) to the spouse of the decedent, or

(B) to a person other than the person making the disclaimer.

(c) For purposes of subsection (a)--

(1) A disclaimer with respect to an undivided portion of an interest which meets the requirements of the preceding sentence shall be treated as a qualified disclaimer of such portion of the interest.

(2) A power with respect to property shall be treated as an interest in such property.

(3) For purposes of subsection (a), a written transfer of the transferor's entire interest in the property--

(A) which meets requirements similar to the requirements of paragraphs (2) and (3) of subsection (b), and

(B) which is to a person or persons who would have received the property had the transferor made a qualified disclaimer (within the meaning of subsection (b)),

shall be treated as a qualified disclaimer.

6. See Comment, How to Look A Gift Horse in the Mouth--Disclaimers Under California Law and the Tax Reform Act of 1976, 18 Santa Clara L. Rev. 217, 218-23 (1978). A disclaimer may meet the requirements of California law but fail under federal law, particularly where timeliness of filing is involved. See I.R.C. § 2518; Jewett v. Commissioner, ___ U.S. ___ (1982).

7. See In re Estate of Kalt, 16 Cal.2d 807, 108 P.2d 401 (1940); Bennett, Using Disclaimers § 5.9, in Using Disclaimers and Powers of Appointment 9-10 (Cal. Cont. Ed. Bar 1981). See also the Comment to Section 3 of the Uniform Disclaimer of Transfers by Will, Intestacy

the creditor may require such a waiver as a condition to extending the credit. This protects the creditor who extends credit in reliance upon the beneficiary's anticipated acceptance of a disclaimable interest.

(3) The new statute liberalizes the requirements for filing disclaimers. This liberalization will avoid a disclaimer from being held ineffective because it was filed with the wrong person or in the wrong place. The new statute does not continue the existing requirement that a disclaimer of an interest in real property be acknowledged,[8] but acknowledgment is required in order to record the disclaimer under the laws relating to the recording of instruments affecting real property.

(4) The new statute rejects language in a recent case to the effect that the normal disclaimer rules are inapplicable to a devise conditioned on survival.[9]

(5) The provision of existing law permitting common law disclaimers[10] is not continued in the new statute. This avoids the possibility of litigation resulting from the uncertainty created under existing law when a disclaimer that fails to satisfy the requirements of the disclaimer statute is claimed to be a valid common law disclaimer. Moreover, common law disclaimers are no longer needed in view of the expansion of the scope of the disclaimer statute[11] and the provision of the new statute that makes a disclaimer valid under federal law also valid under the California statute.[12]

---

or Appointment Act (1978). Since the disclaimed interest is treated in Probate Code Section 190.6 as never having belonged to the disclaimant, there is nothing for the creditor to reach.

8. Prob. Code § 190.4.

9. See Estate of Murphy, 92 Cal. App.3d 413, 426, 154 Cal. Rptr. 859 (1979) (dictum).

10. Prob. Code § 190.10. See also Estate of Murphy, 92 Cal. App.3d 413, 422, 154 Cal. Rptr. 859 (1979).

11. See n.2 supra.

12. See text at n.5 supra.

Proposed Legislation

The Commission's recommendations would be effectuated by enactment of the following measure:

An act to amend Section 2580 of, to add Chapter 12 (commencing with Section 190.010) to Division 1 of, and to repeal Chapter 12 (commencing with Section 190) of Division 1 of, the Probate Code, relating to disclaimers.

The people of the State of California do enact as follows:

5368

Probate Code §§ 190-190.10 (repealed). Disclaimer of testamentary and other interests

SECTION 1. Chapter 12 (commencing with Section 190) of Division 1 of the Probate Code is repealed.

Comment. Former Chapter 12 (commencing with Section 190) is superseded by a new Chapter 12 (commencing with Section 190.010). The disposition of former Sections 190-190.10 is indicated below.

§ 190. Definitions. The substance of the introductory clause of former Section 190 is continued in Section 190.010 (application of definitions). The substance of subdivision (a) is continued in Sections 190.010 ("beneficiary" defined) and 190.070 ("interest" defined). Subdivision (b) is continued in Section 190.070(a) ("interest" defined). Subdivision (c) is continued in Section 190.050 ("disclaimer" defined). Subdivision (d) is continued in Section 190.040 ("disclaimant" defined).

§ 190.1. Disclaiming interest; contents of disclaimer. The first sentence of former Section 190.1 is continued in Section 190.210 (right to disclaim interest). The substance of the second sentence is continued in Section 190.240 (contents of disclaimer).

§ 190.2. Disclaimer by guardian, conservator, or representative. The substance of former Section 190.2 is continued in Sections 190.220 (disclaimer on behalf of conservatee), 190.230(a) (disclaimer on behalf of minor), and 190.230(b) (disclaimer on behalf of decedent).

§ 190.3. Effectiveness of disclaimer. The introductory clause and subdivisions (a) and (b) of former Section 190.3 are superseded by Section 190.250 (time within which disclaimer must be filed). Subdivision (c) is not continued.

§ 190.4. Filing of disclaimer. Former Section 190.4 is superseded by Section 190.260 (filing and recording of disclaimers).

§ 190.5. Binding effect of disclaimer; waiver. The first sentence of former Section 190.5 is continued in Section 190.270 (disclaimer irrevocable and binding). The substance of the second sentence is continued in Section 190.300 (waiver of right to disclaim).

§ 190.6. Disposition of disclaimed interest. Former Section 190.6 is superseded by Section 190.280 (effect of disclaimer).

§ 190.7. Restriction on making disclaimer. The first sentence of former Section 190.7 is continued in Section 190.310(a). The substance of the second sentence is continued in Section 190.310(c). The third sentence is superseded by Section 190.310(b).

§ 190.8. Right to disclaim not affected by spendthrift or other restrictions. Former Section 190.8 is continued in Section 190.320.

§ 190.9. Operative effect of chapter. The substance of former Section 190.9 is continued in Section 190.330 as applied to the operative date of the new statute.

§ 190.10. Savings clause. The substance of former Section 190.10 is continued in Section 190.340, except that the new statute is the exclusive method of making disclaimers after its operative date. A purported repudiation, renunciation, or disclaimer made after the operative date must comply with the requirements of the new statute and, if it does not, it is not recognized as valid as a common law disclaimer or renunciation.

5381

Probate Code §§ 190.010-190.510 (added). Disclaimer of testamentary and nontestamentary interests

SEC. 2. Chapter 12 (commencing with Section 190.010) is added to Division 1 of the Probate Code, to read:

CHAPTER 12. DISCLAIMER OF TESTAMENTARY AND NONTESTAMENTARY INTERESTS

Article 1. Definitions

§ 190.010. Application of definitions

190.010. Unless the provision or context otherwise requires, the words and phrases defined in this article govern the construction of this chapter.

Comment. Section 190.010 is new.

992/913

§ 190.015. Account

190.015. "Account" means a contract of deposit of funds between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account, and other like arrangement.

Comment. Section 190.015 is new and is the same in substance as Section 6-101(1) of the Uniform Probate Code (1977).

§ 190.020. Beneficiary

190.020. "Beneficiary" means the person entitled, but for the person's disclaimer, to take an interest.

Comment. Section 190.020 continues the substance of the first portion of subdivision (a) of former Section 190. See also Section 190.075 ("person" defined).

5383

§ 190.030. Creator of the interest

190.030. (a) "Creator of the interest" means a person who establishes, declares, creates, or otherwise brings into existence an interest.

(b) "Creator of the interest" includes, but is not limited to, the following:

(1) With respect to an interest created by intestate succession, the person dying intestate.

(2) With respect to an interest created under a will, the testator.

(3) With respect to an interest created under a trust, the trustor.

(4) With respect to an interest created by succession to a disclaimed interest, the disclaimant of the disclaimed interest.

(5) With respect to an interest created by virtue of an election to take against a will, the testator.

(6) With respect to an interest created by creation of a power of appointment, the donor.

(7) With respect to an interest created by exercise or nonexercise of a power of appointment, the donee.

(8) With respect to an interest created by an inter vivos gift, the donor.

(9) With respect to an interest created by surviving the death of a depositor of a trust account or P.O.D. account, the deceased depositor.

(10) With respect to an interest created under an insurance or annuity contract, the owner, the insured, or the annuitant.

(11) With respect to an interest created by surviving the death of another joint tenant, the deceased joint tenant.

(12) With respect to an interest created under an employee benefit plan, the employee or other owner of an interest in the plan.

(13) With respect to an interest created under an individual retirement account, annuity, or bond, the owner.

Comment. Section 190.030 is new. See also Sections 190.060 ("employee benefit plan" defined), 190.070 ("interest" defined), 190.075 ("person" defined), 190.080 ("P.O.D. account" defined), 190.090 ("trust account" defined).

5385

§ 190.040. Disclaimant

190.040. "Disclaimant" means a beneficiary who executes a disclaimer on his or her own behalf or a person who executes a disclaimer on behalf of a beneficiary.

Comment. Section 190.040 continues subdivision (d) of former Section 190.

5386

§ 190.050. Disclaimer

190.050. "Disclaimer" means any writing which declines, refuses, renounces, or disclaims any interest that would otherwise be taken by a beneficiary.

Comment. Section 190.050 continues subdivision (c) of former Section 190.

5387

§ 190.060. Employee benefit plan

190.060. "Employee benefit plan" includes, but is not limited to, any pension, retirement, death benefit, stock bonus, or profit sharing plan, system, or trust.

Comment. Section 190.060 is new.

5437

§ 190.070. Interest

190.070. (a) "Interest" includes the whole of any property, real or personal, legal or equitable, or any fractional part, share, or particular portion or specific assets thereof, or any estate in any such property, or any power to appoint, consume, apply, or expend property,

or any other right, power, privilege, or immunity relating to property.

(b) "Interest" includes, but is not limited to, an interest created in any of the following manners:

(1) By intestate succession.

(2) Under a will.

(3) Under a trust.

(4) By succession to a disclaimed interest.

(5) By virtue of an election to take against a will.

(6) By creation of a power of appointment.

(7) By exercise or nonexercise of a power of appointment.

(8) By an inter vivos gift, whether outright or in trust.

(9) By surviving the death of a depositor of a trust account or P.O.D. account.

(10) Under an insurance or annuity contract.

(11) By surviving the death of another joint tenant.

(12) Under an employee benefit plan.

(13) Under an individual retirement account, annuity, or bond.

(14) Any other interest created by any testamentary or inter vivos instrument or by operation of law.

Comment. Subdivision (a) of Section 190.070 continues the substance of subdivision (b) of former Section 190. Subdivision (b) of Section 190.070 continues a portion of subdivision (a) of former Section 190 (as amended by 1982 Cal. Stats. ch. 41). See also Sections 190.060 ("employee benefit plan" defined), 190.080 ("P.O.D. account" defined), 190.090 ("trust account" defined).

6244

§ 190.075. Person

190.075. "Person" means an individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, or other entity.

Comment. Section 190.175 makes clear that artifical persons are included within the meaning of "person" as used in this chapter.

§ 190.080. P.O.D. account

190.080. "P.O.D. account" means an account subject to a pay-on-death provision as provided in Section 852.5, 7604.5, 11203.5, 14854.5, or 18318.5 of the Financial Code.

Comment. Section 190.080 is new. See also Section 190.015 ("account" defined).

404/112

§ 190.090. Trust account

190.090. "Trust account" means an account in the name of one or more parties as trustee for one or more beneficiaries where the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sums on deposit in the account. In a trust account, it is not essential that payment to the beneficiary be mentioned in the deposit agreement. A trust account does not include (1) a regular trust account under a testamentary trust or a trust agreement which has significance apart from the account or (2) a fiduciary account arising from a fiduciary relation such as attorney-client.

Comment. Section 190.080 is new and is the same in substance as Section 6-101(14) of the Uniform Probate Code (1977). See also Section 190.015 ("account" defined).

6245

Article 2. General Provisions

§ 190.210. Right to disclaim interest

190.210. A beneficiary may disclaim any interest, in whole or in part, by filing a disclaimer as provided in this chapter.

Comment. Section 190.210 continues the first sentence of former Section 190.1. A disclaimer may be valid under this article but not meet the requirements of federal law. See I.R.C. § 2518; Jewett v. Commissioner, ___ U.S. ___ (1982). Hence, if a disclaimer is executed to avoid federal taxes, the requirements of federal law must be met.

§ 190.220. Disclaimer on behalf of conservatee

190.220. A disclaimer on behalf of a conservatee shall be made by the conservator of the estate of the conservatee pursuant to a court order obtained under Article 10 (commencing with Section 2580) of Chapter 6 of Part 4 of Division 4 authorizing or requiring the conservator to execute and file the disclaimer.

Comment. Section 190.220 continues the substance of a portion of former Section 190.2 and adds a reference to the substituted judgment provisions of the guardianship-conservatorship law. This continues prior law which made the substituted judgment provisions specifically applicable to disclaimers. See paragraph (9) of subdivision (b) of Section 2580 as amended by 1980 Cal. Stats., ch. 246, § 5.

6247

§ 190.230. Disclaimer on behalf of minor or decedent

190.230. (a) A disclaimer on behalf of a minor shall be made by the guardian of the estate of the minor if one has been appointed or, if none has been appointed, by a guardian ad litem of the minor.

(b) A disclaimer on behalf of a decedent shall be made by the personal representative of the decedent.

~~(c)~~ A disclaimer by a guardian or personal representative is not effective unless made pursuant to a court order obtained under this section that authorizes or requires the guardian or personal representative to execute and file the disclaimer. A petition for such an order shall be filed in the superior court in the county in which the estate of the minor or decedent is administered or, if there is no administration, the superior court in any county in which administration would be proper. The petition may be filed by the guardian, personal representative, or other interested person.

~~(d)~~ The petition shall:

(1) Identify the creator of the interest.

(2) Describe the interest to be disclaimed.

(3) State the extent of the disclaimer.

(4) Identify the person or persons the petitioner believes would take the interest in the event of the disclaimer.

(e) Notice of the hearing on the petition shall be given as follows:

(1) If the petition is for an order authorizing or requiring the guardian of the estate of a minor to execute and file the disclaimer, notice of the hearing on the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1 of Division 4 to all of the persons (other than the petitioner or persons joining in the petition) required to be given notice under that chapter.

(2) If the petition is for an order authorizing or requiring the personal representative of a decedent to execute and file the disclaimer, notice of the hearing on the petition shall be given for the period and in the manner provided in Section 1200.5.

(3) If the petition is for an order authorizing or requiring a guardian ad litem of a minor to execute and file the disclaimer, notice of the hearing on the petition shall be given to the persons and in the manner that the court directs.

(4) The court may require that additional notice be given in the manner that the court directs.

(f) After hearing, the court in its discretion may make an order authorizing or requiring the guardian or personal representative to execute and file the disclaimer if the court determines, taking into consideration all of the relevant circumstances, that the minor or decedent as a prudent person would disclaim the interest if he or she had the capacity to do so.

Comment. Subdivision (a) of Section 190.230 continues the substance of a portion of former Section 190.2 but adds a reference to a guardian ad litem. Subdivision (b) continues the substance of a portion of former Section 190.2. Subdivisions (c), (d), (e), and (f) are new. Paragraph (1) of subdivision (e) is drawn from Civil Code Section 1388.3 (release of power of appointment on behalf of minor donee). Subdivision (f) adopts the standard provided by Civil Code Section 1388.3 for release of a power of appointment on behalf of a minor donee.

6253

§ 190.240. Contents of disclaimer

190.240. The disclaimer shall be in writing, shall be signed by the disclaimant, and shall:

(a) Identify the creator of the interest.

(b) Describe the interest to be disclaimed.

(c) State the disclaimer and the extent thereof.

Comment. Section 190.240 continues the substance of the second sentence of former Section 190.1.

6256

§ 190.250. Time within which disclaimer must be filed

190.250. (a) A disclaimer to be effective shall be filed within a reasonable time after the person able to disclaim acquires knowledge of the interest.

(b) In the case of any of the following interests, a disclaimer is conclusively presumed to have been filed within a reasonable time if it is filed within nine months after the death of the creator of the interest or within nine months after the interest becomes indefeasibly vested, whichever occurs later:

(1) An interest created under a will.

(2) An interest created by intestate succession.

(3) An interest created pursuant to the exercise or nonexercise of a testamentary power of appointment.

(4) An interest created by surviving the death of a depositor of a trust account or P.O.D. account.

(5) An interest created under a life insurance or annuity contract.

(6) An interest created by surviving the death of another joint tenant.

(7) An interest created under an employee benefit plan.

(8) An interest created under an individual retirement account, annuity, or bond.

(c) In the case of an interest created by an inter vivos trust, an interest created by the exercise of a presently exercisable power of appointment, an outright inter vivos gift, a power of appointment, or an interest created or increased by succession to a disclaimed interest, a disclaimer is conclusively presumed to have been filed within a reasonable time if it is filed within nine months after whichever of the following times occurs latest:

(1) The time of the creation of the trust, the exercise of the power of appointment, the making of the gift, the creation of the power of appointment, or the disclaimer of the disclaimed property.

(2) The time the first knowledge of the interest is acquired by the person able to disclaim.

(3) The time the interest becomes indefeasibly vested.

(d) In case of an interest not described in subdivision (b) or (c), a disclaimer is conclusively presumed to have been filed within a reasonable time if it is filed within nine months after whichever of the following times occurs later:

(1) The time the first knowledge of the interest is acquired by the person able to disclaim.

(2) The time the interest becomes indefeasibly vested.

(e) In the case of a future estate, a disclaimer is conclusively presumed to have been filed within a reasonable time if it is filed within whichever of the following times occurs later:

(1) Nine months after the time the interest becomes an estate in possession.

(2) The time specified in subdivision (b), (c), or (d), whichever is applicable.

(f) If the disclaimer is not filed within the time provided in subdivision (b), (c), (d), or (e), the disclaimant has the burden of establishing that the disclaimer was filed within a reasonable time after the disclaimant acquired knowledge of the interest.

Comment. Section 190.250 supersedes former Section 190.3. See also Sections 190.030 ("creator of the interest" defined), 190.060 ("employee benefit plan" defined), 190.075 ("person" defined), 190.080 ("P.O.D. account" defined), 190.090 ("trust account" defined). Section 190.250 provides a more liberal rule concerning time of filing than does federal law. See I.R.C. § 2518; Jewett V. Commissioner, ___ U.S. ___ (1982). Federal law should be consulted if the disclaimer is executed to avoid federal taxes.

6258

§ 190.260. Filing of disclaimer; recording of disclaimers affecting real property

190.260. (a) A disclaimer shall be filed with any of the following:

(1) The superior court in the county in which the estate of the decedent is administered or, if there is no administration of the decedent's estate, the superior court in any county in which administration of the estate of the decedent would be proper.

(2) The trustee, personal representative, other fiduciary, or person responsible for distributing the interest to the beneficiary.

(3) Any other person having custody or possession of or legal title to the interest.

(4) The creator of the interest.

(b) If a disclaimer made pursuant to this chapter affects real property or an obligation secured by real property and the disclaimer is acknowledged and proved in like manner as a grant of real property, the disclaimer may be recorded in like manner and with like effect as a grant of real property, and all statutory provisions relating to the recordation or nonrecordation of conveyances of real property and to the effect thereof apply to the disclaimer with like effect, without regard to the date when the disclaimer was filed pursuant to subdivision (a). Failure to file a disclaimer pursuant to subdivision (a) which is recorded pursuant to this subdivision does not affect the validity of any transaction with respect to the real property or the obligation secured thereby, and the general laws on recording and its effect govern any such transaction.

Comment. Subdivision (a) of Section 190.260 supersedes the first paragraph of former Section 190.4 and is less restrictive than the former law. Subdivision (b) supersedes the second paragraph of former Section 190.4 and makes clear that acknowledgment of a disclaimer affecting real property is permissible but is not a prerequisite to the effectiveness of the disclaimer. However, acknowledgment of a disclaimer affecting real property remains a prerequisite to recording the disclaimer under subdivision (b).

6259

§ 190.270. Disclaimer irrevocable and binding

190.270. A disclaimer, when effective, is irrevocable and binding upon the beneficiary and all persons claiming by, through, or under the beneficiary, including creditors of the beneficiary.

Comment. Section 190.270 continues the substance of the first sentence of former Section 190.5 and also makes clear the effect of a disclaimer on creditors of the beneficiary. See also Section 190.290 (disclaimer not a fraudulent conveyance).

§ 190.280. Effect of disclaimer

190.280. Unless the creator of the interest provides for a specific disposition of the interest in the event of a disclaimer, the interest disclaimed shall descend, go, be distributed, or continue to be held (1) as to a present interest, as if the disclaimant had predeceased the creator of the interest or (2) as to a future interest, as if the disclaimant had died before the event determining that the taker of the interest had become finally ascertained and the taker's interest indefeasibly vested. A disclaimer relates back for all purposes to the date of the death of the creator of the disclaimed interest or the determinative event, as the case may be.

Comment. Section 190.280 supersedes former Section 190.6. The introductory clause makes clear that a condition of survivorship is not a contingency otherwise provided in the will, disapproving dictum in Estate of Murphy, 92 Cal. App.3d 413, 426, 154 Cal. Rptr. 859 (1979).

Clause (2) of the first sentence is a new provision making clear that a disclaimer has the effect of accelerating the possession and enjoyment of subsequent interests. This provision is drawn from Section 3 of the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act (1978) and Section 3 of the Uniform Disclaimer of Transfers Under Nontestamentary Instruments Act (1978). The pertinent portion of the Uniform Commissioners' Comment to Section 3 of the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act explains the provision in the second clause of subdivision (a) as follows:

> Acceleration of Future Interests: If a life estate or other future interest is disclaimed, the problem is raised of whether succeeding interests or estates accelerate in possession or enjoyment or whether the disclaimed interest must be marshalled to await the actual happening of the contingency. Section 3 provides that remainder interests are accelerated, the second clause specifically stating that any future interest which is to take effect in possession or enjoyment after the termination of the estate or interest disclaimed, takes effect as if the disclaimant had predeceased the event which determines that the taker has become finally ascertained and his interest indefeasibly vested. Thus, unless the decedent or donor of the power has otherwise provided, if T leaves his estate in trust to pay the income to his son S for life, remainder to his son's children who survive him, and S disclaims with two children then living, the remainder in the children accelerates; the trust terminates and the children receive possession and enjoyment, even though the son may subsequently have other children or one or more of the living children may die during their father's lifetime. The will or instrument of transfer may be drafted to avoid acceleration if desired.

§ 190.290. Disclaimer not a fraudulent conveyance

190.290. A disclaimer is not a fraudulent conveyance by the beneficiary under Title 2 (commencing with Section 3439) of Part 2 of Division 4 of the Civil Code.

Comment. Section 190.290 rejects the rule of Estate of Kalt, 16 Cal.2d 807, 108 P.2d 401 (1940), that the disclaimer of a legacy after the testator's death may be a fraudulent conveyance. See also Section 190.270 (binding effect of disclaimer).

6263

§ 190.300. Waiver of right to disclaim

190.300. A person who, under this chapter, could file a disclaimer may instead file a written waiver of the right to disclaim. The waiver shall specify the interest to which the waiver applies. Upon being filed as provided in Section 190.260, the waiver is irrevocable and is binding upon the beneficiary and all persons claiming by, through, or under the beneficiary.

Comment. Section 190.300 continues the substance of the second sentence of former Section 190.5.

6264

§ 190.310. Disclaimer not permitted after interest accepted

190.310. (a) A disclaimer may not be made after the beneficiary has accepted the interest sought to be disclaimed.

(b) For the purpose of this section, a beneficiary has accepted an interest if any of the following occurs before a disclaimer is filed with respect to that interest:

(1) The beneficiary, or someone acting on behalf of the beneficiary, makes a voluntary assignment, conveyance, encumbrance, pledge, or transfer of the interest or part thereof, or contracts to do so.

(2) The beneficiary, or someone acting on behalf of the beneficiary, executes a written waiver under Section 190.300 of the right to disclaim the interest.

(3) The beneficiary, or someone acting on behalf of the beneficiary, accepts the interest or part thereof or benefit thereunder.

(4) The interest or part thereof is sold at a judicial sale.

(c) An acceptance does not preclude a beneficiary from thereafter disclaiming all or part of an interest if both of the following requirements are met:

(1) The beneficiary became entitled to the interest because another person disclaimed an interest.

(2) The beneficiary or other person acting on behalf of the beneficiary at the time of the acceptance had no knowledge of the interest to which the beneficiary so became entitled.

Comment. Section 190.310 supersedes former Section 190.7. Subdivision (b) is drawn in part from Section 4(a) of the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act (1978).

6265

§ 190.320. Right to disclaim not affected by spendthrift or similar restriction

190.320. The right to disclaim exists regardless of any limitation imposed on the interest of a beneficiary in the nature of an expressed or implied spendthrift provision or similar restriction.

Comment. Section 190.320 continues former Section 190.8. As to the effect of a disclaimer, see Sections 190.270-190.290.

6268

§ 190.330. Application of chapter to interest created before January 1, 1984

190.330. An interest created before January 1, 1984, that has not been accepted may be disclaimed after December 31, 1983, in the manner provided in this chapter, but no interest that arose before January 1, 1984, in a person other than the beneficiary may be destroyed or diminished by any action of the disclaimant taken pursuant to this chapter.

Comment. Section 190.330 is drawn from former Section 190.9 but the former provision has been revised to insert the operative date of Section 190.330.

6991

§ 190.340. Preexisting rights not affected

190.340. This chapter does not limit or abridge any right a person may have under any other law to assign, convey, or release any

property or interest, but after December 31, 1983, an interest that would otherwise be taken by a beneficiary may be declined, refused, renounced, or disclaimed only as provided in this chapter.

Comment. Section 190.340 continues the substance of former Section 190.010 except that this section makes ineffective a common law renunciation or disclaimer that does not satisfy the requirements of this chapter. See also Section 190.510 (disclaimers effective under federal law are effective under this chapter).

6993

Article 3. Disclaimers Effective Under Federal Law

§ 190.510. Disclaimers effective under federal law effective under this chapter

190.510. Notwithstanding any other provision of this chapter, if as a result of a disclaimer or transfer the disclaimed or transferred interest is treated pursuant to the provisions of Title 26 of the United States Code, as now or hereafter amended, or any successor statute thereto, and the regulations promulgated thereunder, as never having been transferred to the beneficiary, then the disclaimer or transfer is effective as a disclaimer under this chapter.

Comment. Section 190.510 is a new provision intended to make disclaimers valid under federal law effective under California law even though the disclaimer would not otherwise be effective under this chapter. See I.R.C. § 2518 (qualified disclaimers for purposes of federal gift tax). Section 190.510 also makes clear that certain transfers qualifying as disclaimers under federal law are effective as disclaimers under California law. See I.R.C. § 2518(c)(3).

100/953

Probate Code § 2580 (technical amendment). Petition for conservator to exercise substituted judgment

SEC. 3. Section 2580 of the Probate Code is amended to read:

2580. (a) The conservator or other interested person may file a petition under this article for an order of the court authorizing or requiring the conservator to take a proposed action for any one or more of the following purposes:

(1) Benefiting the conservatee or the estate.

(2) Minimizing current or prospective taxes or expenses of administration of the conservatorship estate or of the estate upon the death of the conservatee.

(3) Providing gifts for such purposes, and to such charities, relatives (including the other spouse), friends, or other objects of bounty, as would be likely beneficiaries of gifts from the conservatee.

(b) The action proposed in the petition may include, but is not limited to, the following:

(1) Making gifts of principal or income, or both, of the estate, outright or in trust.

(2) Conveying or releasing the conservatee's contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety.

(3) Exercising or releasing the conservatee's powers as donee of a power of appointment.

(4) Entering into contracts.

(5) Creating for the benefit of the conservatee or others, revocable or irrevocable trusts of the property of the estate, which trusts may extend beyond the conservatee's disability or life.

(6) Exercising options of the conservatee to purchase or exchange securities or other property.

(7) Exercising the rights of the conservatee to elect benefit or payment options, to terminate, to change beneficiaries or ownership, to assign rights, to borrow, or to receive cash value in return for a surrender of rights under any of the following:

(i) Life insurance policies, plans, or benefits.

(ii) Annuity policies, plans, or benefits.

(iii) Mutual fund and other dividend investment plans.

(iv) Retirement, profit sharing, and employee welfare plans and benefits.

(8) Exercising the right of the conservatee to elect to take under or against a will.

(9) Exercising the right of the conservatee to ~~renounce or~~ disclaim any interest ~~acquired by testate or intestate succession or by inter vivos transfer~~ that may be disclaimed under Chapter 12 (commencing with Section 190.010) of Division 1 ~~, including exercising the right of the conservatee to surrender the right to revoke a revocable trust~~ .

(10) Exercising the right of the conservatee (i) to revoke a revocable trust or (ii) to surrender the right to revoke a revocable

trust , but the court shall not authorize or require the conservator to exercise the right to revoke a revocable trust if the instrument governing the trust ~~(A)~~ (i) evidences an intent to reserve the right of revocation exclusively to the conservatee, ~~(B)~~ (ii) provides expressly that a conservator may not revoke the trust, or ~~(C)~~ (iii) otherwise evidences an intent that would be inconsistent with authorizing or requiring the conservator to exercise the right to revoke the trust.

(11) Making an election or an election and agreement referred to in Section 202.

Comment. Section 2580 is amended to correct the reference in subdivision (b)(9), to transfer a portion of subdivision (b)(9) (relating to revoking revocable trusts) to subdivision (b)(10), and to make other nonsubstantive revisions.