Hastings Law Journal

Volume 8 | Issue 3 Article 13

1-1957

# Wills: Rights of Pretermitted Heirs under California Probate Code, Section 90

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inserting a residual clause did not intend to die intestate as to any of his property, there is the doctrine of *cy pres* to consider whereby if it is found that the trustor had a general charitable intent, a substitute beneficiary will be named by the court.[29] The *actual* intent of the testator is probably the same whether the residual devisees are named individuals or charitable organizations, and it would seem that the same rule should apply in both instances.

Section 101 of the California Probate Code requires a will to be construed according to the intent of the testator; to allow a lapsed residual gift to pass by the laws of intestacy does not seem to be within the spirit of that section.

From the *Stauffer* case it appears that California will allow probate of a will in part if the provisions are severable; but, if the residuary clause creates a tenancy in common, then a lapsed residual gift will pass by the laws of intestacy rather than to the remaining residual devisees. It is submitted that the California holding on the latter point is: 1) contra to the presumption that the testator does not intend to die intestate as to any of his property when a residual clause is inserted; 2) is not in accord with the intention of the testator; and 3) is not within the spirit of section 101 of the California Probate Code. For these reasons, it seems that the most appropriate and desirable rule is to allow a residue of a residue. Nevertheless, California, at least for the present, is very definitely committed to the majority view, and to this writer a change, either by judicial interpretation or legislative enactment would be a desirable result.

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WILLS: RIGHTS OF PRETERMITTED HEIRS UNDER CALIFORNIA PROBATE CODE, SECTION 90.

In *Van Strien v. Jones*,[1] a testator's daughter claimed as a pretermitted heir. The will in question read in part as follows:

> "If any person who is, or claims under . . . this Will, or any person who if I died intestate would be entitled to share in my estate, shall, in any manner whatsoever directly or indirectly contest this Will . . . then I hereby bequeath to each such person the sum of One Dollar ($1.00) only . . ."[2]

The daughter, who was the only child of the testator, was not otherwise mentioned. The specific issue was this: Did the quoted clause show the testator's intention to provide for and/or specifically disinherit his daughter and thus prevent application of section 90 of the California Probate Code? That code section provides as follows:

> When a testator omits to provide in his will for any of his children, or for the issue of any deceased child, whether born before or after the making of the will or before or after the death of the testator, and such child or issue 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, unless it appears from the will that such omission was intentional, such child or such issue succeeds to the same share in the estate of the testator as if he had died intestate.[3]

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[29] 4 SCOTT, TRUSTS §§ 397.2; 397.3; 399.2 (2d ed. 1956).

[1] 46 Cal. 2d 705, 299 P.2d 1 (1956).

[2] *Id.* at 705, 299 P.2d at 2.

[3] CALIF. PROBATE CODE § 90.

The California Supreme Court held that the testator did have his daughter in mind and disinherited her sufficiently to exclude the operation of section 90 of the Probate Code.

Under the common law, a child who had not been provided for by the testator had no recourse.[4] Today, however, modern legislation in the United States almost unanimously seeks to protect the "forgotten" child insofar as it is deemed consistent with the presumed intent of the testator.[5] The substance of the customary statutory provision in favor of pretermitted children appears to be that they shall take the same share of the estate as they would have taken had the testator died intestate.

The California courts in interpreting this statute[6] in the past have evolved certain rules and principles which they now seem to use as guides. For example, it appears that it is not essential that the claimant be named or identified specifically by the will. The use by the testator of a word which describes a class of persons, such as "children" or "relatives" is generally considered sufficient to exclude the application of the pretermitted heir statute.[7] Also, the use of the word "heirs" in a will to describe the class of persons who are not to participate in the testator's estate has been held sufficient to show the intention of the testator to exclude his children from participating in the estate.[8] For example, in *In re Estate of Lindsay*[9] the court held that the appellants, who were illegitimate children of the testator but who were sufficiently acknowledged under California Civil Code section 1387 to give them rights of inheritance, were sufficiently disinherited by the following clause in testator's will:

> "Should any other person or persons present themselves claiming to be *heirs* of mine, I give and bequeath to such person or persons the sum of $5.00 . . ."[10]

The Court, in support of its holding in the *Van Strien* case, cited *In re Estate of Kurtz*.[11] There the testator made a will one day before being married to the complainant, leaving everything to his father and sister, and further providing:

> "I hereby generally and expressly disinherit each and all persons whatsoever claiming to be, and *who may be, my heirs at law,* except as such may be determined by this will, and if any of such parties or such heirs, or any person whomsoever *who, if I died intestate, would be entitled to any part of my estate,* shall either directly, singly, or in conjunction with other persons, seek or establish or assert any claim to my estate, or any part thereof, excepting under this will . . . I hereby give and bequeath to said person or persons the sum of one ($1.00) dollar . . ."[12]

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[4] 29 COLUM. L. REV. 748, 749 (1929).

[5] *But see* LA. CIVIL CODE, art. 1495, where civil law still applies.

[6] CALIF. PROBATE CODE § 90 adopted May 11, 1931, was based upon former sections 1306, 1307 and 1309 of the CALIF. CIVIL CODE.

[7] Rhoton v. Blevin, 99 Cal. 645, 34 Pac. 513 (1893) where testator left everything to his wife ". . . to the exclusion of all my children . . ." Held: An intentional omission to provide for issue of deceased children. *In re* Estate of Trickett, 197 Cal. 20, 239 Pac. 406 (1925) held that word "relatives" or "relations" in devise or bequest means, unless contrary intention appears, those next of kin who, in case of intestacy, would take under statutes of distribution.

[8] *In re* Minear's Estate, 180 Cal. 239, 180 Pac. 535 (1919); *In re* Hassell's Estate, 168 Cal. 287, 142 Pac. 838 (1914); *In re* Doell's Estate, 113 Cal. App. 2d 37, 247 P.2d 580 (1952); *In re* Lombard's Estate, 16 Cal. App. 2d 526, 60 P.2d 1000 (1936).

[9] 176 Cal. 238, 168 Pac. 113 (1917).

[10] *Id.* at 238, 168 Pac. at 113.

[11] 190 Cal. 146, 210 Pac. 959 (1922).

[12] *Id.* at 146, 210 Pac. at 960.

This was held a sufficient mention to disinherit the wife. The case can be sustained in that the testator expressly disinherited " . . . all persons whatsoever claiming to be, *and who may be, my heirs at law* . . ." (Emphasis added), and as pointed out previously, the use of the word "heirs" by the testator to describe a class of people who are not to participate in the estate is sufficient to exclude the operation of the statute.[13]

In cases where the testator fails to "mention" his lineal descendants, either by providing for or specifically disinheriting them as a class (e.g., using the words "children" and/or "heirs") or individually, it is generally agreed that the pretermitted heir statute applies. The law presumes that the omission by a testator of all mention of a child was from accident or forgetfulness, and not from an intention to disinherit his children or issue.[14] A case in point is *Estate of Price*,[15] where the testatrix devised and bequeathed all of her property to her living children, without mentioning the children of a deceased son, and where the exclusion clause read:

> " . . . I purposely refrain from leaving anything by this my last will and testament to any other person or persons . . . hereby declaring that I have only at this date two surviving children . . ."[16]

It was held that the testatrix's grandchildren by the deceased son were entitled to take their intestate share. The Court here said: " . . . [T]he grandchildren are not mentioned and nothing is contained therein which would indicate that the testatrix had them *in mind* when the will was executed . . ."[17] (Emphasis added.)

On viewing the cases on hindsight, it is apparent that where the testator inserts a *general disinheritance clause* which uses words describing a class to which the claimant belongs ("heirs," "children," etc.) it will exclude the application of section 90 of the California Probate Code.

The clause in the *Van Strien* case which reads: " . . . any person who if I died intestate would be entitled to share in my estate . . ." is concededly equivalent to the word "heirs," and therefore it appears at first glance that the result is consistent with prior cases; but, the clause continues " . . . shall in any manner whatsoever directly or indirectly *contest this will* . . ." (Emphasis added.) These words qualify those which precede them and make the description read, in effect, "heirs who contest." This clause does not even describe the child who claims as a pretermitted heir for although she is an heir she is not a contestant.[18] Her claim is independent of the will, her interest in the estate vesting immediately on the death of the ancestor from whose will she is omitted.[19]

No case has been found in this state which holds that a non-contest clause (as distinguished from a general disinheritance clause) is sufficiently descriptive of a particular claimant to exclude the operation of the pretermitted heir statute. Certainly none of the cases cited in the *Van Strien* case has gone so far. Some of these

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[13] Estate of Lindsay, 176 Cal. 238, 168 Pac. 113 (1917).

[14] Estate of Cochran, 116 Cal. App. 2d 98, 253 P.2d 41 (1953); *In re* Estate of Lindsay, 56 Cal. App. 2d 335, 132 P.2d 485 (1943).

[15] 56 Cal. App. 2d 335, 132 P.2d 485 (1943).

[16] *Id.* at 335, 132 P.2d at 486.

[17] *Id.* at 335, 132 P.2d at 487.

[18] Estate of Price, 56 Cal. App. 335, 132 P.2d 485 (1942); Estate of Sankey, 199 Cal. 391, 249 Pac. 517 (1926); ATKINSON, WILLS 142 (1937).

[19] *In re* Estate of Sankey, 199 Cal. 391, 249 Pac. 517 (1926); Smith v. Olmstead, 88 Cal. 582, 26 Pac. 521 (1891); *In re* Grides, 81 Cal. 571, 22 Pac. 908 (1887); Pearson v. Pearson, 46 Cal. 609 (1873); 57 AM. JUR., *Wills* § 573 (1948).

involved wills with contest clauses similar to that in the *Van Strien* case, but which also contained clauses expressly declaring the testator's intent to disinherit those heirs not mentioned.[20] It appears that in each of these it was the disinheritance clause and not the contest clause which showed the intended omission. Two of the cited cases concerned clauses giving nominal gifts to persons claiming to be heirs,[21] and another involved a clause disinheriting one who attempts to "succeed to any part of my estate otherwise than through this will . . ."[22] The other cases relied upon construed clauses which expressly declared the intentional omission.[23] In all of these decisions the clauses were broad enough to include section 90 claimants, and none rested solely on a non-contest clause.

The legislative policy expressed in the pretermitted heir statutes, as interpreted by the California courts in prior decisions, is to require a testator to clearly declare his intent to omit a particular heir.[24] This has been the keynote in all the cases discussed above. Does a non-contest clause show such intent? Isn't such a clause generally inserted by the draftsman and tacitly approved by the testator without substantial understanding of its effect and in many cases without knowledge of its presence in the will? Even if he is assumed to know its purpose, can such a clause be said to show the testator's intent to disinherit a particular claimant when that claimant is not a contestant, and hence is not brought within the operation of the clause? These questions were not satisfactorily answered in *Van Strien v. Jones.*

The decision seems an unfortunate and unnecessary limitation on the operation of the statute; unfortunate because contest clauses are too commonly incorporated in wills to be a safe indication of the uncommon intent to disinherit a child, and unnecessary because neither compelled nor supported by prior decisions.

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[20] *In re* Hassell, 168 Cal. 287, 142 Pac. 838 (1914); *In re* Lombard's Estate, 116 Cal. App. 2d 526, 60 P.2d 1000 (1936).

[21] *In re* Minear's Estate, 180 Cal. 239, 180 Pac. 535 (1919); *In re* Estate of Lindsay, 176 Cal. 238, 168 Pac. 113 (1917).

[22] *In re* Estate of Dixon, 28 Cal. App. 2d 598, 83 P.2d 98 (1938).

[23] Estate of Trickett, 197 Cal. 20, 239 Pac. 406 (1925); *In re* Estate of Kurtz, 190 Cal. 146, 210 Pac. 959 (1922); Rhoton v. Blevin, 99 Cal. 545, 34 Pac. 513 (1893); *In re* Estate Doell, 113 Cal. App. 2d 37, 247 P.2d 580 (1952).

[24] For a review of the cases emphasizing this point see the dissenting opinion of Carter, J., in the principal case, and the cases cited therein, 46 Cal. 2d 705, 708, 299 P.2d 1, 3 (1956).