

First Supplement to Memorandum 2019-5

Disposition of Estate Without Administration: Discussion of Issues

Memorandum 2019-5 presented a partial draft of proposed legislation to effectuate certain reforms that the Commission¹ has provisionally approved.

Since the release of that memorandum, the staff has spotted a few issues with the proposed language that should be addressed. They are discussed below.

In the interests of economy, this supplemental memorandum does not reiterate the explanatory background provided in Memorandum 2019-5. It should be read together with that memorandum.

All statutory references in this memorandum are to the Probate Code. As in Memorandum 2019-5, the term “designated successor” is used to refer to a person who takes property under one of the probate avoidance procedures, “transferred property” refers to the property that was taken, and “person with a superior right” means the person who *should* have received the property by will or intestate succession, instead of the designated successor.

PROPOSED SECTION 13205.5. VOLUNTARY RETURN OF TRANSFERRED PROPERTY

Proposed Section 13205.5 would permit a designated successor to voluntarily return property to the decedent’s estate for administration. A designated successor who does so would be relieved of personal liability under Sections 13204 (liability for decedent’s unsecured debts) and 13205 (liability to person with superior claim). The staff has spotted two issues with the language of proposed Section 13205.5. They are discussed below.

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

Treble Damages

Existing Section 13205(b) provides for treble damages as an added penalty when a designated successor acts fraudulently to take property under the probate avoidance procedure.

Under proposed Section 13205.5(b) the return of property under that section would relieve a designated successor of personal liability under “Sections 13204 and 13205.” That language is too broad. Returning property to the estate voluntarily should not relieve a designated successor of the treble damage penalty imposed under Section 13205(b). Under existing law, the treble damage penalty is *in addition to* the obligation to return the property to the estate.

To cure that problem, proposed Section 13205.5(b) could be revised along the following lines:

(b) A designated successor who returns transferred property to the estate voluntarily under this section has no liability for that property under Section 13204 or subdivision (a) of Section 13205.

If the Commission approves proposed Section 13205.5 for the purposes of a tentative recommendation, the staff recommends that it be revised as shown above.

Liability Adjustments

Proposed Section 13205.5(c) provides for reimbursement of a designated successor if (1) the designated successor voluntarily returns the transferred property to the estate, and (2) the designated successor has paid any of the decedent’s unsecured debts.

That reimbursement rule seems appropriate, but insufficient. As was discussed at length in earlier memoranda, there are other situations in which a designated successor should be reimbursed for having made a contribution to the value of returned property (or having made a payment toward the estate’s obligations). Conversely, there are situations in which the estate should be reimbursed by a designated successor who has reduced the value of the returned property or increased the obligations of the estate.

Under existing Section 13206 and proposed Section 13207, those kinds of adjustments can be made when property is *required* to be returned to the estate. The staff sees no reason why the same range of adjustments should not be available when property is *voluntarily* returned. In each case, the point is to

restore the estate to the status quo ante, as if the property had not been removed from the estate by the designated successor.

If the Commission agrees, the proposed law should be revised to make Section 13207 applicable to the voluntary return of property under proposed Section 13205.5. That could be achieved by revising proposed Sections 13205.5(c) and 13207 as follows:

~~13205.5. ... (c) If a designated successor made any payment toward any of decedent's unsecured debts prior to returning the transferred property to the estate, the personal representative shall reimburse the designated successor for the amount paid. The property to be restored to the estate under this section shall be reduced or increased as provided in Section 13207.~~

13207. (a) If the designated successor's action or inaction increased the value of property returned to the estate or decreased the estate's obligations, the personal representative shall reduce the ~~designated successor's restitution liability property to be returned~~ under Section ~~13205.5 or 13206~~ by the same amount. Actions or inaction that may increase the value of returned property or decrease the estate's obligations include, but are not necessarily limited to, the following actions:

(1) A payment toward an unsecured debt of the decedent.

(2) A payment toward a debt secured against the returned property.

(3) A significant improvement of the returned property that increased the fair market value of the property.

(b) If the designated successor's action or inaction decreased the value of property returned to the estate or increased the estate's obligations, the personal representative shall increase the ~~designated successor's restitution liability property to be returned~~ under Section ~~13205.5 or 13206~~ by the same amount. Actions or inaction that may decrease the value of the returned property or increase the estate's obligations include, but are not necessarily limited to, the following actions or inaction:

(1) An action or inaction that resulted in a lien or encumbrance being recorded against the property.

(2) The receipt of income from the property, if that income would have accrued to the estate had the property not been transferred to the designated successor.

(c) The personal representative shall provide the designated successor a written statement of any increase or decrease in ~~restitution liability~~ under this section, along with a statement of the reasons for the increase or decrease.

(d) If the designated successor returns tangible property to the estate and is entitled to a reduction in ~~restitution liability~~ under this section, the estate shall pay the designated successor an amount

equal to the reduction in liability. For the purposes of Section 11420, this payment shall be deemed an expense of administration.

(e) In the event that the designated successor and the personal representative cannot agree on how the ~~designated successor's liability~~ the property to be returned should be adjusted under this section, the designated successor or personal representative may petition the court for an order determining the amount of the adjustment. In making a decision under this subdivision, the court should consider the surrounding circumstances, including whether the parties acted in good faith and whether a particular adjustment would impose an unfair burden on the designated successor or the estate.

If the Commission approves the proposed legislation for inclusion in a tentative recommendation, the staff recommends that it be revised along the lines shown above.

SECTION 13206. PROPERTY RETURN PROVISION

Existing Section 13206 provides authority for a personal representative to require that transferred property (or its value) be returned to the estate. The Commission has provisionally proposed a number of changes to that section. In drafting one of the changes, the staff made an error.

The proposed legislation would revise Section 13206(a)(2) as follows (with emphasis added in bold):

(2) ~~The~~ If the designated successor no longer has the transferred property, restitution to the decedent's estate of the fair market value of the transferred property ~~if the person no longer has the property together with (A) the net income the person received from the property prior to disposing of it and (B) plus interest from the date of disposition at the rate payable on a money judgment on the fair market value of the transferred property.~~ For the purposes of this paragraph, the "fair market value of the transferred property" is the fair market value of the transferred property, determined as of the time of the disposition of the transferred property, ~~of the property the person took under the certified copy of the affidavit, less the amount of any liens and encumbrances on the transferred property at the that time the certified copy of the affidavit was issued.~~

Under existing law, the last sentence refers to two different points in time. The fair market value of the property is determined *at the time of disposition of the property* (e.g., when the property was sold by the designated successor). Liens and encumbrances on the property are determined *at the time the certified copy of*

the affidavit was issued (i.e., when the property was transferred to the designated successor).

As drafted, the revisions to paragraph (a)(2) would collapse the second point of time into the first. That was not intentional. **If the Commission decides to include the revision of Section 13206 in a tentative recommendation, the staff will correct the error.**

Respectfully submitted,

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