

Memorandum 90-95

Subject: Study L-1030 - Disposition of Small Estate Without Probate
(Comments on TR)

Attached is the *Tentative Recommendation Relating to Disposition of Small Estate Without Probate*. We have received 16 letters, all in support of the TR. Four of these have suggestions, discussed below. We also received one comment handwritten on the face of the TR in support (from Linda Silveria, not attached). The letters are attached as Exhibits 1 through 16:

Exhibit 1: Jack E. Cooper
Exhibit 2: Paul Gordon Hoffman
Exhibit 3: Alvin Buchignani
Exhibit 4: Irwin D. Goldring
Exhibit 5: Wilbur L. Coats
Exhibit 6: Paul H. Roskoph
Exhibit 7: Michael J. Anderson
Exhibit 8: Frank M. Swirles
Exhibit 9: Henry Angerbauer
Exhibit 10: John G. Lyons
Exhibit 11: Alan D. Bonapart
Exhibit 12: Joseph E. Tinney
Exhibit 13: Thomas R. Thurmond
Exhibit 14: Howard Serbin
Exhibit 15: Ruth A. Phelps
Exhibit 16: Ruth E. Ratzlaff

SUGGESTED REVISIONS RECOMMENDED BY STAFF

Under existing Probate Code Section 13111, if a person collects decedent's property by affidavit and probate is later commenced, but the person no longer has the property and so cannot turn it over to the probate estate, the person must pay the estate the "fair market value of the property," defined as its value "excluding any liens and encumbrances on the property." Jack Cooper (Exhibit 1) has a problem with the word "excluding." He asks, in effect, whether "excluding" means "without regard to," making the person liable for the gross value of the property, or whether it means "minus" liens and encumbrances, making the person liable for the net value of the property.

By contrast, Section 13112 limits liability for unsecured debts to the property value "less" liens and encumbrances. Use of the word "less" in Section 13112 and "excluding" in Section 13111 is not the

best drafting. The intent of Section 13111 appears to be to make the person liable for net value. The staff recommends we make this clear by changing "excluding" to "less" in subdivisions (a) and (b) of Section 13111.

SUGGESTED REVISIONS DEALT WITH IN ANOTHER MEMO

The TR permits the affidavit procedure to be used to substitute a successor for the decedent in pending litigation. Paul Hoffman (Exhibit 2) says we also need legislation to permit someone to act for the decedent in litigating tax matters with the federal government where the estate is too small to justify a probate. He had a case where the Internal Revenue Service refused to recognize the authority of decedent's surviving spouse who had collected all decedent's property using the spousal set-aside procedure to act for the decedent, so he had to open a "dry probate."

The staff has recommended revisions to the *Tentative Recommendation Relating to Litigation Involving Decedents* to solve Mr. Hoffman's problem. See Memo 90-121.

SUGGESTED REVISIONS NOT RECOMMENDED BY STAFF

Liability for Net Income and Interest

Under existing Probate Code Section 13111, if a person collects decedent's property by affidavit and probate is later commenced, but the person no longer has the property and so cannot turn it over to the probate estate, in addition to the property value, the person must pay the estate the net income the person received from the property, plus interest on the value of the property from the date of its disposition. Jack Cooper (Exhibit 1) thinks this is too harsh.

However, this is not a double liability as it might at first appear: The person is liable for income from the property only while the person had it, and is liable for interest between the time it was disposed of and the time the person is required to make restitution to the estate. The staff thinks the provision is satisfactory.

Increase \$60,000 Limit for Use of Summary Procedures?

Sixty thousand dollars is the maximum gross estate value for use of the affidavit procedure and summary court proceeding. Prob. Code §§ 13100, 13151. Alvin Buchignani (Exhibit 3) would increase this to \$100,000, particularly for the summary court proceeding.

The \$60,000 amount was enacted in 1984 on Commission recommendation. Before that, the amount had been \$30,000. The Commission recommended increasing the amount to \$100,000, observing that it was increased from \$1,000 to \$2,000 in 1961, to \$3,000 in 1967, to \$5,000 in 1972, to \$10,000 in 1974, to \$20,000 in 1976, and to \$30,000 in 1979. 17 Cal. L. Revision Comm'n Reports 428 n.18 (1984). The Commission noted the affidavit procedure was then being used in about 20 percent of California estates. *Id.* Although the bill as introduced would have increased the amount to \$100,000, it was amended to accept \$60,000 as a compromise figure. Six years have elapsed since the \$60,000 figure was enacted.

The staff recommends against trying to make this change in this Recommendation. If the Commission wants to do this, we should prepare a separate TR and send it out for comment. Rather than increasing the maximum estate value for use of summary collection procedures, it might be better to recommend something similar to the community property set-aside petition (Prob. Code §§ 13650-13660) for use by other successors of the decedent, since notice of the petition would be required. The present affidavit procedure may be used without notice.

Race Between Guardian or Conservator and Decedent's Successor to Collect Property?

Howard Serbin (Exhibit 14) is concerned about a problem under existing law. He is concerned that if the decedent is subject to a guardianship or a conservatorship, decedent's successors may use the affidavit procedure to collect the property before the guardian or conservator can obtain a court order under Section 2631 permitting the guardian or conservator to liquidate the estate, pay expenses, and distribute the remaining property to the successors. He says that if this happens, the conservator may not be able to pay expenses of the guardianship or conservatorship.

But a successor who uses the affidavit procedure to collect decedent's property is personally liable for unsecured debts of the decedent to the extent of the value of the property collected. Prob. Code § 13109. So a successor has no incentive to engage in a race with the guardian or conservator to collect the assets.

Moreover, a creditor may petition for probate (*id.* § 8000), and if a personal representative is appointed, the personal representative may

require the successor who collected the property to restore it to the estate (*id.* § 13111). So there does not seem to be any real conflict between the guardian or conservator and the successor in the case described by Mr. Serbin.

Finality of Court's Order in Summary Proceeding

The TR permits the personal representative to consent to use of the affidavit procedure. No notice is given. If the property is later needed for estate administration, the personal representative may require its return. Section 13111.

The TR also permits personal property to be included the summary court proceeding to transfer title to real property. Section 13154. Notice is given to heirs and devisees of the decedent. Sections 13152, 13153. Upon becoming final, the court's order has conclusive effect. Section 13155.

Jack Cooper (Exhibit 1) does not agree with allowing the personal representative to have a change of heart and require property collected by affidavit to be restored to the estate, but not allowing this when the summary court proceeding is used. However, if necessary, a petition to reopen may be made under Code of Civil Procedure Section 473, within six months after the order, for mistake, inadvertence, surprise, or excusable neglect. See 7 B. Witkin, *Summary of California Law Wills and Probate* § 506, at 5928 (8th ed. 1974). The staff would not relax this further. Court orders made after notice to interested parties must be given some finality.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

JACK E. COOPER
ATTORNEY AT LAW
530 B STREET, SUITE 910
SAN DIEGO, CALIFORNIA 92101
(619) 232-4525

CA 1991 DEV. COMM'N

MAY 25 1990

RECEIVED

May 23, 1990

California Law Revision Commission
4000 Middlefield Road, Ste. D-2
Palo Alto, CA 94303-4739

Gentlemen:

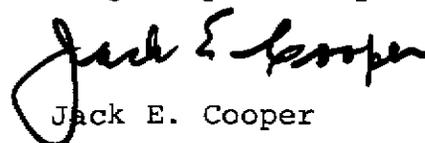
I have read the Tentative Recommendations relating to Disposition Of Small Estate Without Probate, Compensation Of Counsel In Guardianship And Conservatorship Proceedings, and Recognition Of Trustees' Powers.

I have a problem with the provisions of your proposed section 13111. If a person, in good faith, collects assets and is later required to make restitution to a personal representative, it seems inequitable to make that person restore all income collected, principal, and interest on the fair market value of the property. If the asset collected was a term account earning interest at a fixed rate you would require payment of interest at what would undoubtedly be a higher rate than the person received and require payment of the interest (income) received. In addition, no recognition is made for the effort required to collect income and, if necessary, manage the asset.

I personally also have a problem with the use of the word "excluding" in defining the meaning of "fair market value of property". It seems unclear to me. If it means what I hope it means, why not use the word "less"?

I do not agree with the concept that if the personal representative consents to a transfer and the court makes an order under section 13154, determining that the property passes to a petitioner, the personal representative cannot later change his mind, yet under section 13111 the personal representative can later change his mind to the detriment of the beneficiary.

Very respectfully,


Jack E. Cooper

HOFFMAN
SABBAN &
BRUCKER

LAWYERS

10880 Wilshire
Boulevard
Suite 1200
Los Angeles
California 90024
(213) 470-6010
FAX (213) 470-6735

CA LAW REV. COMM'N

MAY 11 1990

RECEIVED

May 8, 1990

California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, CA 94303-4739

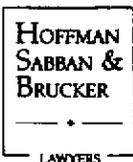
Re: Tentative Recommendation Relating to
Disposition of Small Estates Without Probate

Ladies and Gentlemen:

I concur with the proposals contained in the March, 1990 tentative recommendation referred to above. Anything which eliminates the need for involvement of legal counsel in matters involving small amounts of money is of clear benefit to the public.

Your discussion in the recommendation section did trigger another issue in my mind which you may wish to investigate. As you correctly point out, a dry probate may be necessary to handle tax controversies that arose during the decedent's lifetime. I have, on at least two occasions, been involved in situations where a decedent died, and the surviving spouse collected all of the assets through a spousal set aside procedure pursuant to Section 13650 of the Probate Code. Subsequently, the Internal Revenue Service issued a Notice of Deficiency on behalf of the decedent and the surviving spouse, alleging a deficiency in a joint income tax return filed while the spouses were both living. The Internal Revenue Service refused to recognize the surviving spouse as a sole party to the case (acting as successor in interest to the decedent). If the surviving spouse did not open a dry probate and file a Tax Court petition, the Internal Revenue Service could have assessed a tax and proceeded against the surviving spouse notwithstanding the fact that the surviving spouse filed a petition on her own behalf.

On these occasions, I argued with the Internal Revenue Service that the provisions of Sections 13500 and 13550 gave the surviving spouse standing to represent the deceased spouse, without the need for a probate



California Law Revision Commission
May 8, 1990
Page 2.

administration. When the Internal Revenue Service refused to accept my arguments, it was, of course, the easier course to simply open the dry probate, rather than to file motions in the Tax Court for a determination as to whether the position of the Service was warranted or not.

I urge the Law Revision Commission to make a recommendation for amendment of the Probate Code which would clearly authorize a surviving spouse to act on behalf of a deceased spouse in litigating tax controversies, where no probate administration has occurred. Certainly, the opening of a dry probate creates needless expense and administrative burdens for the courts, and we should take all appropriate actions to reduce or eliminate the need for dry probates.

Very truly yours,

Paul Gordon Hoffman

PGH/mem/P12/3

ALVIN G. BUCHIGNANI
ATTORNEY AT LAW

RECEIVED

ASSOCIATED WITH
JEDEIKIN, GREEN, SPRAGUE & BISHOP
FAX (415) 421-5658

300 MONTGOMERY STREET, SUITE 450
SAN FRANCISCO, CA 94104-1906
(415) 421-5650

May 8, 1990

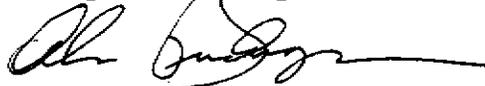
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Disposition of Small Estate Without Probate

Ladies & Gentlemen,

I approve of the tentative recommendation of March, 1990, insofar as it expands the availability of the affidavit procedure. However, the main limitation which needs to be addressed is the existing monetary limitation, particularly in the case of real property. I believe the monetary limitation should be increased to at least \$100,000. Also, there is no particularly valid reason for having a separate monetary limitation for real as opposed to personal property.

Very sincerely,



Alvin G. Buchignani

AGB/pzg

IRWIN D. GOLDRING
ATTORNEY AT LAW
1888 CENTURY PARK EAST, SUITE 350
LOS ANGELES, CALIFORNIA 90067
TELEPHONE (213) 551-0222
TELECOPIER (213) 277-7903

CA LAW REV. COMMISSION

JUN 06 1990

R E C E I V E D

June 4, 1990

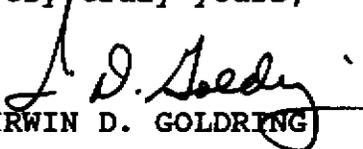
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Disposition of Small Estate
Without Probate

Gentlemen:

I have reviewed the tentative recommendation in regard to the above subject. This is something, as you know, the Estate Planning Executive Committee was very much in favor of and I believe this recommendation meets the objectives as originally brought up by Richard Kinyon.

Very truly yours,


IRWIN D. GOLDRING

IDG:hs

STATE REV. COMMISSION
Study L-1030
MAY 10 1990

WILBUR L. COATS
ATTORNEY AND COUNSELOR AT LAW

RECEIVED

TELEPHONE (619) 748-6512

May 8, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

In re: Tentative Recommendations relating to:

- Recognition of Trustees' Power
- Disposition of Small Estate Without Probate
- Compensation of Counsel in Guardianship Conservator Proceedings

Dear Administrator:

I concur in the tentative recommendations of the Commission concerning the three areas set forth above.

I do not have any experience with third parties unwillingness to rely on automatic statutory powers under the revised Trust Law. However, I believe specific reference to liability for refusal to accept the trustee's powers as defined in the statutes will be helpful to a trustee.

As to Disposition of Small Estate Without Probate. I had a situation where a probate was commenced only to find that the only need for the probate was to obtain property that could have been transferred by the Affidavit procedure if probate had not been initiated. Therefore, I believe the tentative recommendation as set forth by the Commission will provide for greater flexibility in dealing with small estate distribution without probate. Often the person designated as Personal Representative in a small estate is not knowledgeable concerning the decedent's property. It is only after Letters are issued and the property inventoried that it is determined the Affidavit procedure is applicable in lieu of probate.

Respectfully submitted,


Wilbur L. Coats

FENWICK, DAVIS & WEST

A LAW PARTNERSHIP INCLUDING
PROFESSIONAL CORPORATIONSTWO PALO ALTO SQUARE
PALO ALTO, CALIFORNIA 94306

MAY 09 1990

RECEIVED
1920 N STREET NORTHWEST
SUITE 650
WASHINGTON, D.C. 20036
(202) 463-6300TELEPHONE
(415) 494-0600
CABLE: MAYFIELD
TELEX: 345583
FACSIMILE:

(415) 494-1417 • (415) 857-0381

May 8, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D2
Palo Alto, CA 94303Re: Probate Code Revision Proposals

Gentlemen:

Thank you for forwarding your tentative recommendations relating to:

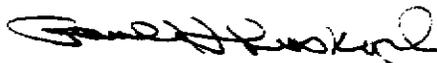
- (1) Recognition of trustees' powers;
- (2) Disposition of small estate without probate; and
- (3) Compensation of counsel in guardianship and conservatorship proceedings.

It is a great frustration to have entities within and outside California fail to acknowledge a clear statement of California law with respect to trustees powers and procedures to transfer assets. Your proposal should assist to enforce the existing law. Obviously, when dealing with title companies, they still have the right to say "shop elsewhere" if their internal procedures are not satisfied.

The proposal regarding compensation of counsel seems appropriate, although I do not personally get involved in those proceedings.

Disposition of small estate without probate will appropriately enhance the ability to deal with estates and insurance policies where probate is otherwise not required or where these procedures can accelerate action. A continuing practical problem remains where property, outside probate jurisdiction, is required to adequately cover debts, taxes or expenses associated with the probate. Nevertheless, I believe this procedure is an improvement to the current authority for non-probate administration. I hope these matters will all be submitted to the legislature and implemented.

Very truly yours,



Paul H. Roskoph

-7-

EXHIBIT 7
Law Offices of
Michael J. Anderson, Inc.
77 Cadillac Drive, Suite 260
Sacramento, California 95825
(916) 921-6921
FAX (916) 921-9697

Michael J. Anderson

CA LAW REV. COMM'Y

MAY 15 1990

RECEIVED

May 11, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

To whom it may concern:

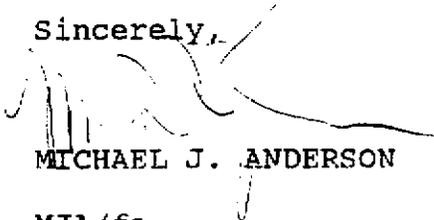
I have no comment regarding the Compensation of Counsel in Guardianship and Conservatorship Proceedings. I would be in favor of it.

In respect to recognition of Trustees' Powers, I am in favor of it. I think it is an extremely good provision to have. I would also recommend broadening the expansion of this concept into the area of Durable Power of Attorney. Banks many times refuse to honor such documents.

I have no comment on the Disposition of Small Estate Without Probate. I am in favor of the suggested changes.

Thank you very much.

Sincerely,



MICHAEL J. ANDERSON

MJA/fa

FRANK M. SWIRLES
LAW CORPORATION

MAY 21 1990

RECEIVED

May 17, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

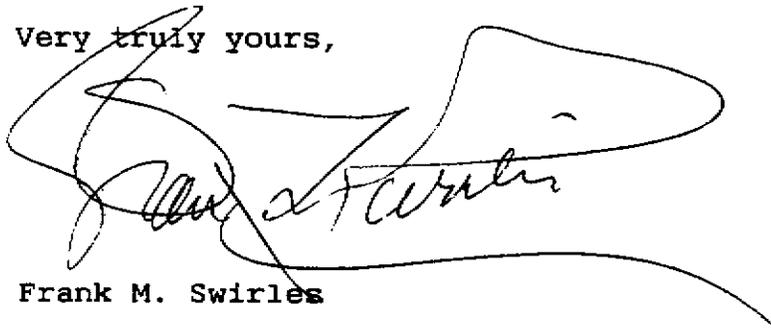
Re: Tentative Recommendations on

Disposition of Small Estates without Probate
Recognition of Trustees' Powers
and
Compensation of Counsel in Guardianship and
Conservatorship Proceedings

Gentlemen:

This is to advise that I have reviewed the subject and find them to be satisfactory. I am particularly pleased with the Recognition of Trustees' Powers recommendations.

Very truly yours,



Frank M. Swirles

P.O. BOX 1490
RANCHO SANTA FE, CALIFORNIA 92067
(714) 766-0000

CA LAW REV. COMMISSION

MAY 30 1990

RECEIVED

HENRY ANGERBAUER, CPA
4401 WILLOW GLEN CT.
CONCORD, CA 94521

5/26/90

California Law Revision Commission

I have read your clarifying and technical revisions in affidavit procedure for the collection of personal property of a small estate. I agree with your recommendations and conclusions and suggest you propose these recommendations to the legislature to be implemented into law. Thank you for permitting me to make my views known. Best personal regards to all of you at the Commission and keep up the good work. (cc) we have a new probate code

Sincerely
Henry A

EXHIBIT 10

Study L-1030

CALIF. REV. COMMISSION

LAW OFFICES OF
VAUGHAN, PAUL & LYONS
1418 MILLS TOWER
220 BUSH STREET
SAN FRANCISCO 94104
(415) 392-1423

MAY 14 1990

RECEIVED

FAX: (415) 392-2308

May 11, 1990

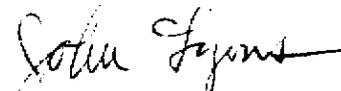
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

RE: Tentative Recommendation
relating to Disposition of Small
Estate Without Probate - March 1990

Gentlemen:

The proposed extensions of the affidavit
procedure appear to me to be useful; the proposed new
Section 13005 embracing insurance proceeds should be
particularly helpful.

Very truly yours,



John G. Lyons

JGL:car



CA LAW REV. COMM'N

MAY 10 1990

RECEIVED

May 8, 1990

OUR FILE NUMBER

P74.2-11

Attorneys at Law

601 Montgomery Street
Suite 900
San Francisco, CA 94111

415/788-8855
Fax: 415/397-1925
Cable Address BAM

Walnut Creek Office:
500 Ygnacio Valley Road
Suite 370
Walnut Creek, CA 94596

415/256-8200
Fax: 415/945-8932

JAMES R. BANCROFT
OF COUNSEL

JAMES H. McALISTER
LUTHER J. AVERY
ALAN D. BONAPART
NORMAN A. ZILBER
EDMOND G. THIEDR
ROBERT L. DUNN
JAMES WISNER
SANDRA J. SHAPIRO
GEORGE R. DIRKES
BOYD A. BLACKBURN, JR.
DENNIS O. LEUER
ROBERT L. MILLER
JOHN S. McCLINTIC
ARNOLD S. ROSENBERG
JOHN R. BANCROFT
REBECCA A. THOMPSON
LEWIS WARREN
JOHN L. KOENIG
M. KIMBALL HETTENA
RONALD S. KRAVITZ
FORREST E. FANG
HELEN OLIVE MILOWE
LEAH R. WEINGR
MICHAEL G. SCHINNER
DAVID R. MEDLIN
LEONARD W. ROTHSCHILD, JR.

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Tentative Recommendations:
Disposition of Small Estate Without Probate;
Compensation of Counsel in Guardianship and
Conservatorship Proceedings;
Recognition of Trustees' Powers

I support all three of the Tentative Recommendations,
dated March 1990.

The following comments refer only to the proposed
addition of Probate Code Section 18105 (Recognition
of Trustees' Powers):

1. You have invited comment on the question of whether or not "in the experience of those commenting on this tentative recommendation, this problem is a significant one that merits a legislative solution."
2. In my practice I almost never rely upon statutory powers. Hence, it is my experience, the legislative solution would not have been useful in the past.
3. The legislative proposal could encourage me and other drafters of documents to make greater use of the statutory powers in order to take advantage of the enforcement mechanism provided for in proposed Section 18105.
4. There is an analogy, I believe, to your recently proposed measure for adoption of the Uniform Statutory Power of Attorney Act. In that Act there is somewhat of an enforcement mechanism (one that is easily avoided by knowledgeable financial institutions). My current thinking is that I will revise my forms of durable power of attorney to use the statutory form, with

May 8, 1990
Page 2

additions, in order to provide my clients with
the opportunity to use the enforcement mechanism.
Adoption of proposed Section 18105 might cause
some of us to do the same with trust instruments.

Thank you.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Alan D. Bonapart", with a small star-like flourish at the end of the signature.

Alan D. Bonapart

ADB:ah

EXHIBIT 12
LAW OFFICES

JOSEPH E. TINNEY .

114 SANSOME STREET
SUITE 1205
SAN FRANCISCO, CALIFORNIA 94104
TEL. 781-5010 FAX 956-3635

CA LAW REV. COMM'n

MAY 08 1990

RECEIVED

May 7, 1990

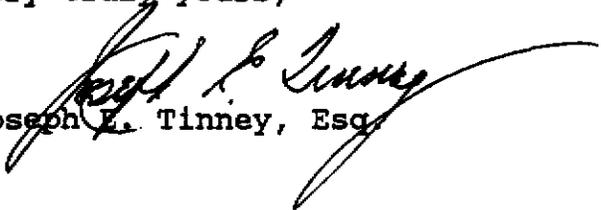
California Law Review Commission
4000 Middlefield Road, Suite D2
Palo Alto, CA 94303-4739

To the Commission,

The undersigned respectfully recommends approval of your tentative recommendation of:

- (1) Disposition of Small Estate without Probate (March 1990).
- (2) Recognition of Trustee's Power.
- (3) Compensation of Counsel in Guardianship and Conservatorship Proceedings.

Very truly yours,


Joseph E. Tinney, Esq.

JET/fo

EXHIBIT 13
LAW OFFICES OF
THOMAS R. THURMOND
ATTORNEY AT LAW
419 MASON STREET, SUITE 118
VACAVILLE, CALIFORNIA 95688
(707) 448-4013

CALIF. LAW REV. COMMISSION
MAY 08 1990
RECEIVED

Thomas R. Thurmond
Truman H. Vance

May 7, 1990

California Law Review Commission
4000 Middlefield Road, Ste. D-2
Palo Alto, CA 94303-4739

Re: Tentative Recommendations

Recognition of trustees' powers

I have encountered very few problems involving the recognition of trustees' powers by third parties. The only area of occasional difficulty that I have seen involves some securities transfer agents, mainly on the east coast. Even in those cases I have been able to secure cooperation by advising the transfer agent's legal counsel of the appropriate California statutes. Therefore I am not at all convinced that additional legislation is needed in this area. However, if the consensus of practitioners is that such legislation is desirable, the tentative recommendations appear to be acceptable.

Compensation of counsel in guardianship and conservatorship proceedings

This recommendation clarifies an area that sometimes can cause confusion for clients and/or courts. I believe the recommended changes are helpful in clarifying the law.

Disposition of small estate without probate

I endorse these recommendations which continue the enactment of legislation designed to help dispose of small estate with minimal legal cost to the heirs and beneficiaries.

Thank you for allowing me to comment on these recommendations.

Yours very truly,



Thomas R. Thurmond
Attorney at Law

TT/mat

JUN 15 1990

R E C E I V E D

Post Office Box 1379

Santa Ana, California 92702

June 13, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Ladies and Gentlemen:

Thank you for sending me your tentative recommendations relating to disposition of small estates without probate and to compensation of counsel in guardianships and conservatorships.

Although I am a Deputy County Counsel for the County of Orange, as before, the opinions expressed here are my individual views, and I do not write as a representative of the County of Orange, the Orange County Counsel, or the Orange County Public Administrator/Public Guardian.

I believe the tentative recommendations relating to disposition of small estates without probate in the main are very well taken. I remain a little concerned about the interplay of the 13101 affidavit procedure and Section 2631, regarding the powers of a guardian or conservator after the death of the ward or conservatee. In a small insolvent estate, the guardian or conservator can obtain an order under 2631(b) authorizing him to withdraw money of the decedent in an account in a financial institution and to collect a debt, claim or insurance proceeds owed to the decedent or the decedent's estate. These funds can then be used to pay unpaid expenses of the guardianship or conservatorship. However, the increasing authority of a 13101 affiant makes it more possible that such affiant will collect the proceeds first, making them not readily available to pay those expenses.

I do not know if this has caused a problem in the past; perhaps the 40-days-from-death wait before the affidavit can be used generally prevents problems from arising. But there are times when a conservator may not be able within 40 days to both determine if 2631(b) authority is needed and then to obtain such. If you perceive a problem, perhaps the affidavit should include an averment that the decedent either did not have a guardian or conservator of his estate, or that such guardian or conservator has consented in writing to the transfer. Or perhaps some other amendment, such as narrowing the definition of the "successor of the decedent", would be helpful.

California Law Revision Commission
June 13, 1990
Page Two

I believe the tentative recommendation relating to compensation of counsel is very well taken, and I support it wholeheartedly.

Very truly yours,



Howard Serbin
Deputy County Counsel

HS:mm

cc: William A. Baker, Orange County Public Administrator/
Public Guardian Guardian
Carol Gandy, Assistant Public Administrator/
Public Guardian
Dwight Tipping, Supervising Deputy Public Administrator

Edward M. Phelps
Deborah Ballins Schwarz
Ruth A. Phelps
Of Counsel
Barbara E. Dunn

Phelps, Schwarz & Phelps

Attorneys at Law
215 North Marengo Avenue
Second Floor
Pasadena, California 91101

(818) 795-8844
Facsimile: (818) 795-9586

July 19, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

CA LAW REV. COMM'N

JUL 23 1990

R E C E I V E N

Re: Tentative Recommendation Relating
To Disposition of Small Estates Without
Probate

Dear Sir/Madam:

I apologize for the delay in sending you my comments on this section.

I have read this recommendation and approve it. I think the expansion
of the rules regarding small estates is good.

PHELPS, SCHWARZ & PHELPS

By: *Ruth A. Phelps*
Ruth A. Phelps

RAP:sp

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

Disposition of Small Estate Without Probate

March 1990

This tentative recommendation is being distributed so interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Comments sent to the Commission are a public record, and will be considered at a public meeting of the Commission. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe it should be revised.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN JUNE 15, 1990.

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, Suite D-2
Palo Alto, California 94303-4739

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

CALIFORNIA LAW REVISION COMMISSION

4000 MIDDLEFIELD ROAD, SUITE D-2
PALO ALTO, CA 94303-4739
(415) 494-1335

EDWIN K. MARZEC
CHAIRPERSON
ROGER ARNEBERGH
VICE CHAIRPERSON
BION M. GREGORY
ASSEMBLYMAN ELMU M. HARRIS
SENATOR BILL LOCKYER
ARTHUR K. MARSHALL
FORREST A. PLANT
ANN E. STODDEN

Letter of Transmittal

The recommended legislation would make the following clarifying or technical revisions in the affidavit procedure for the collection of personal property of a small estate (Probate Code §§ 13000-13116):

(1) The affidavit procedure may be used to substitute the decedent's successor for the decedent in pending litigation concerning property that could have been collected by affidavit.

(2) The affidavit procedure may be used to collect life insurance proceeds and other property passing to the decedent's estate on the decedent's death.

(3) The affidavit procedure may be used, notwithstanding that there are or have been probate proceedings for the decedent's estate, with the consent of the personal representative.

The recommended legislation permits the trustee of a trust created by the decedent's will to act on behalf of the trust in summary proceedings for a small estate.

The recommended legislation also would permit personal property to be collected in a proceeding to obtain a court order determining succession to real property of a small estate (Probate Code §§ 13150-13157).

This recommendation is made pursuant to Resolution Chapter 37 of the Statutes of 1980.

RECOMMENDATION

The Probate Code provides simple and efficient procedures for collection or transfer of property of a small estate without probate.¹ This recommendation proposes revisions in these procedures.

Affidavit Procedure for Substitution of Parties

An affidavit procedure may be used by the successor of the decedent² to obtain payment, delivery, or transfer of personal property of the decedent.³ The successor presents an affidavit (or declaration) to the holder of the property or the person who owes a debt to the decedent. The person to whom the affidavit is presented is discharged from liability if the person transfers the property or pays the debt to the person presenting the affidavit.⁴ If the person refuses to transfer the property or pay the debt, the successor may bring an action to enforce transfer or payment.⁵

The affidavit procedure does not cover the situation where the decedent has brought an action to enforce a right to payment or possession of property and dies while the action is pending. If the estate qualifies for use of the affidavit procedure, the recommended legislation permits the

1. See Prob. Code §§ 13000-13209. Summary procedures may be used in estates having a gross value not exceeding \$60,000. The following are excluded in determining whether the estate value is \$60,000 or less: joint tenancy property; property in which the decedent held a life or other interest terminable on decedent's death; property passing to decedent's surviving spouse; a multiple-party account in a financial institution; a vehicle registered or titled under the Vehicle Code; a vessel numbered under the Vehicle Code; a manufactured home, mobilehome, commercial coach, truck camper, or floating home registered under the Health and Safety Code; amounts due to decedent for service in the armed forces; and not more than \$5,000 in salary for personal services from employment. Prob. Code § 13050.

2. "Successor of the decedent" is defined in Probate Code Section 13006 to mean those who would take under decedent's will if there is a will, or by the law of intestate succession if there is no will.

3. Prob. Code §§ 13100-13116.

4. Prob. Code § 13106.

5. Prob. Code § 13105(b).

decedent's successor to use the affidavit procedure to be substituted as a party in place of the decedent in the pending action or proceeding. To be substituted as a party, the successor must make a motion under Section 385 of the Code of Civil Procedure and file the small estate affidavit with the court when the motion is made.

Collection of Life Insurance Proceeds by Affidavit

The affidavit procedure may be used to collect "money due the decedent."⁶ It is not clear that "money due the decedent" includes property that becomes part of the decedent's estate on the decedent's death, such as life insurance proceeds payable to the estate, or property that reverts to the estate because a named beneficiary failed to survive the decedent or disclaimed the property. The recommended legislation makes clear that the affidavit procedure may be used to collect property that becomes part of the decedent's estate on the decedent's death.⁷

Summary Collection of Decedent's Property During or After Probate

A successor of a decedent may use a summary small estate procedure in several situations:

(1) If the gross value of the decedent's property in this state does not exceed \$60,000,⁸ personal property may be collected or transferred by providing the holder of the property with an affidavit or declaration showing the entitlement of the person seeking the property.⁹

6. Prob. Code § 13100.

7. The recommended legislation also makes clear that such property is included in determining whether the decedent's estate is within the \$60,000 limit for a small estate.

8. See supra note 1.

9. Prob. Code §§ 13100-13116.

(2) If the gross value of the decedent's property in this state does not exceed \$60,000,¹⁰ a court order may be obtained determining succession to the decedent's real property.¹¹

(3) If the gross value of the decedent's real property in this state does not exceed \$10,000, a marketable title¹² to real property may be obtained by filing with the court an affidavit that the person is the successor of the decedent to the property, and by recording a certified copy of the affidavit.¹³

None of these procedures may be used if proceedings for administration of the decedent's estate are pending or have been conducted in this state.¹⁴

An estate may be administered for a limited purpose, without full administration being contemplated. For example, a special administrator may be appointed to do a particular act,¹⁵ such as to take possession of property to protect it, or to exercise an option to purchase property. Or a "dry probate" may be conducted to establish terms of a testamentary trust funded by life insurance, to determine whether decedent exercised a testamentary power of appointment, to facilitate ancillary administration in another state, to enter decedent's safe deposit box, or to handle tax controversies that arose during decedent's lifetime.

The Commission recommends that a person entitled to property of the decedent be permitted to use the summary procedures, despite the pendency of proceedings for administration of the estate, if the personal representative consents in writing. If it later appears that the property is needed in the estate proceeding, the personal representative

10. See *supra* note 1.

11. Prob. Code §§ 13150-13157.

12. See Prob. Code § 13203 (good faith purchaser or lessee from, or lender to, the affiant is protected).

13. Prob. Code §§ 13200-13209.

14. Prob. Code §§ 13108, 13150, 13200.

15. Prob. Code § 8540.

may request that the property be restored to the estate, and the person who used the summary procedure is required to restore the property to the estate.¹⁶

Including Personal Property in Court Proceeding for Real Property

If the gross value of decedent's property in California is between \$10,000 and \$60,000,¹⁷ the decedent's personal property may be collected by affidavit,¹⁸ while a petition and court order are required to obtain marketable title to the decedent's real property.¹⁹ If the estate has both real and personal property, the court should have authority in the real property proceeding also to order the payment or transfer of personal property. This would permit the decedent's successor to obtain a court order covering both real and personal property in a single proceeding, rather than requiring a court proceeding to determine succession to real property and a separate affidavit procedure for the transfer or payment of personal property.²⁰

16. This would be consistent with the provision of existing law which permits the personal representative to leave real or tangible personal property in possession of the person presumptively entitled to it, or to surrender the property to that person, unless or until, in the judgment of the personal representative, the property is needed for purposes of administration of the estate. Prob. Code § 9650.

17. See *supra* note 1.

18. Prob. Code § 13101.

19. See Prob. Code §§ 13151, 13154.

20. When the Commission recommended the court procedure for real property, personal property was intentionally excluded from the real property proceeding. The Commission was concerned that the holder of the decedent's personal property, when presented with an affidavit under Sections 13100-13116, might use the availability of a court remedy to insist on a court order before releasing the personal property. The recommended legislation includes a provision that makes clear that the availability of the court proceeding does not excuse the holder of the decedent's personal property from complying with the duty to transfer or pay personal property pursuant to the affidavit procedure.

It seems unnecessary to authorize a summary court proceeding for collection of personal property when there is no real property in the estate. The affidavit procedure is simple and expeditious, and the statute provides sanctions against a holder of the decedent's personal property who unreasonably refuses to turn it over to the affiant. Prob. Code § 13105.

Use of Summary Proceeding by Trustee of Testamentary Trust

Existing law precludes use of the summary proceedings for a small estate by the trustee of a trust created by the decedent's will.²¹ The recommended legislation eliminates this restriction; the trustee may use the summary proceedings, whether or not proceedings for the administration of the estate are or will be conducted in this state.²² No longer will there be a need to probate a small estate merely because a trust rather than an individual is the successor of the decedent.

PROPOSED LEGISLATION

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

An act to amend Sections 573, 13004, 13006, 13051, 13101, 13108, 13111, 13150, 13151, 13152, 13154, 13155, 13200, 13206, and 13207 of, and to add Sections 13005, 13107.5, 13158, and 13210 to, the Probate Code, relating to decedents' estates.

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

Probate Code § 573 (amended). Survival of actions

SECTION 1. Section 573 of the Probate Code is amended to read:

573. (a) Except as provided in this section, no cause of action is lost by reason of the death of any person, but may be maintained by or against the person's personal representative.

(b) In an action brought under this section against a personal representative, all damages may be awarded which might have been recovered against the decedent had the decedent lived except damages awardable under Section 3294 of the

21. Prob. Code §§ 13006(a), 13051.

22. If a proceeding for the administration of the decedent's estate is pending in California, the consent in writing of the decedent's personal representative is required before a summary small estate procedure may be used.

Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant.

(c) Where a person having a cause of action dies before judgment, the damages recoverable by his or her personal representative are limited to the loss or damage the decedent sustained or incurred prior to death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived but not including any damages for pain, suffering, or disfigurement.

(d) This section applies where a loss or damage occurs simultaneously with or after the death of a person who would have been liable for the loss or damage if his or her death had not preceded or occurred simultaneously with the loss or damage.

(e) Nothing in this section shall be construed as affecting the assignability of causes of action.

(f) Nothing in this section limits the right of the successor of the decedent (as defined in Section 13006) to commence or continue an action to have property that is described in an affidavit or declaration executed pursuant to Chapter 3 (commencing with Section 13100) of Part 1 of Division 8 paid, delivered, or transferred to the successor of the decedent.

Comment. Subdivision (f) is added to Section 573 to recognize situations where the successor of the decedent, rather than the personal representative, may commence or continue an action. See Sections 13105 (action for refusal to pay or transfer property to successor pursuant to affidavit), 13107.5 (substitution of parties without probate).

Probate Code § 13004 (amended). Particular item of property

SEC. 2. Section 13004 of the Probate Code is amended to read:

13004. (a) "Particular item of property" means:
~~, respectively, particular~~

(1) *Particular* personal property of the decedent which is sought to be collected, received, or transferred by the

successor of the decedent under Chapter 3 (commencing with Section 13100) . ~~or particular~~

(2) *Particular real property of the decedent , or particular real and personal property of the decedent*, for which the successor of the decedent seeks a court order determining succession under Chapter 4 (commencing with Section 13150). ~~or~~

(3) *Particular real property of the decedent* with respect to which the successor of the decedent files an affidavit of succession under Chapter 5 (commencing with Section 13200).

(b) Subject to ~~this section subdivision (a)~~, "particular item of property" includes all interests specified in Section 62.

Comment. Section 13004 is amended to conform to the revision of Chapter 4 (commencing with Section 13150) which makes that chapter applicable to personal property of the decedent under some circumstances.

Probate Code § 13005 (added). Property of the decedent

SEC. 3. Section 13005 is added to the Probate Code, to read:

13005. "Property of the decedent", "decedent's property", "money due the decedent", and similar phrases, include property that becomes part of the decedent's estate on the decedent's death, whether by designation of the estate as beneficiary under an insurance policy on the decedent's life or under the decedent's retirement plan, or otherwise.

Comment. Section 13005 makes clear that the affidavit procedure under Chapter 3 (commencing with Section 13100) may be used by the successor of the decedent to collect insurance on the decedent's life payable to the estate of the decedent, and other property that becomes part of the decedent's estate on the decedent's death. Property that becomes part of the decedent's estate on the decedent's death also is included in determining whether the decedent's real and personal property in this state exceeds \$60,000 for the purpose of Section 13100.

Property may become part of the decedent's estate from causes other than a designation of the estate as beneficiary, including failure of the primary and secondary beneficiaries of the decedent's life insurance or

retirement plan to survive the decedent, and disclaimer of insurance or retirement benefits by the beneficiary.

Probate Code § 13006 (amended). Successor of the decedent

SEC. 4. Section 13006 of the Probate Code is amended to read:

13006. "Successor of the decedent" means:

(a) If the decedent died leaving a will, the sole beneficiary or all of the beneficiaries who succeeded to a particular item of property of the decedent under the decedent's will. For the purposes of this part, the trustee ~~of a trust created during the decedent's lifetime~~ is a beneficiary under the decedent's will if the trust succeeds to the particular item of property under the decedent's will.

(b) If the decedent died without a will, the sole person or all of the persons who succeeded to the particular item of property of the decedent under Sections 6401 or 6402 or, if the law of a sister state or foreign nation governs succession to the particular item of property, under the law of the sister state or foreign nation.

Comment. Section 13006 is amended to delete the language which precluded the trustee of a testamentary trust from using the procedures under this part. This deletion allows the trustee of a testamentary trust created in the decedent's will to act on behalf of the trust. This permits the trustee to use a small estate summary procedure where no proceeding is being or has been conducted in California for administration of the decedent's estate or where the decedent's personal representative has consented to use of the procedure. See Sections 13101(a)(4), 13108(a)(2), 13150(b), 13200(a)(7).

Probate Code § 13051 (amended). Guardians, conservators, trustees, custodians, sister state personal representatives

SEC. 5. Section 13051 of the Probate Code is amended to read:

13051. For the purposes of this part:

(a) A guardian or conservator of the estate of a person entitled to any of the decedent's property may act on behalf of the person without authorization or approval of the court in which the guardianship or conservatorship proceeding is pending.

(b) A trustee of a trust ~~created during the decedent's lifetime~~ may act on behalf of the trust.

(c) If the decedent's will nominates a custodian to receive a devise to a beneficiary under the Uniform Gifts to Minors Act or the Uniform Transfer to Minors Act of any state and the nomination has not been revoked, the custodian may act on behalf of the beneficiary until such time as the custodianship terminates.

(d) A sister state personal representative may act on behalf of the beneficiaries as provided in Chapter 3 (commencing with Section 12570) of Part 13 of Division 7.

Comment. Subdivision (b) of Section 13051 is amended to eliminate the restriction that the trust must be created during the decedent's lifetime. This deletion allows the trustee of a testamentary trust created in the decedent's will to act on behalf of the trust. This permits the trustee to use a small estate summary procedure where no proceeding is being or has been conducted in California for administration of the decedent's estate or where the decedent's personal representative has consented to use of the procedure. See Sections 13101(a)(4), 13108(a)(2), 13150(b), 13200(a)(7). See also Section 13006.

Probate Code § 13101 (amended). Furnishing affidavit or declaration

SEC. 6. Section 13101 of the Probate Code is amended to read:

13101. (a) To collect money, receive tangible personal property, or have evidences of a debt, obligation, interest, right, security, or chose in action transferred under this chapter, an affidavit or a declaration under penalty of perjury under the laws of this state shall be furnished to the holder of the decedent's property stating all of the following:

- (1) The decedent's name.
- (2) The date and place of the decedent's death.
- (3) "At least 40 days have elapsed since the death of the decedent, as shown in a certified copy of the decedent's death certificate attached to this affidavit or declaration."
- (4) *Either of the following, as appropriate:*
 - (A) "No proceeding is now being or has been conducted in California for administration of the decedent's estate."
 - (B) *"The decedent's personal representative has consented in writing to the payment, transfer, or delivery to the affiant or declarant of the property described in the affidavit or declaration."*
- (5) "The gross value of the decedent's real and personal property in California, excluding the property described in Section 13050 of the California Probate Code, does not exceed sixty thousand dollars (\$60,000)."
- (6) A description of the property of the decedent that is to be paid, transferred, or delivered to the affiant or declarant.
- (7) The name of the successor of the decedent (as defined in Section 13006 of the California Probate Code) to the described property.
- (8) *Either of the following, as appropriate:*
 - (A) "The affiant or declarant is the successor of the decedent (as defined in Section 13006 of the California Probate Code) to the decedent's interest in the described property."
 - (B) "The affiant or declarant is authorized under Section 13051 of the California Probate Code to act on behalf of the successor of the decedent (as defined in Section 13006 of the California Probate Code) with respect to the decedent's interest in the described property."
- (9) "No other person has a right to the interest of the decedent in the described property."

(10) "The affiant or declarant requests that the described property be paid, delivered, or transferred to the affiant or declarant."

(11) "The affiant or declarant affirms or declares under penalty of perjury under the laws of the State of California that the foregoing is true and correct."

(b) Where more than one person executes the affidavit or declaration under this section, the statements required by subdivision (a) shall be modified as appropriate to reflect that fact.

(c) If the particular item of property to be transferred under this chapter is a debt or other obligation secured by a lien on real property and the instrument creating the lien has been recorded in the office of the county recorder of the county where the real property is located, the affidavit or declaration shall satisfy the requirements both of this section and Section 13106.5.

(d) A certified copy of the decedent's death certificate shall be attached to the affidavit or declaration.

(e) If the person or persons executing the affidavit or declaration claim under the decedent's will, a copy of the will shall be attached to the affidavit or declaration.

(f) If the decedent's personal representative has consented to the payment, transfer, or delivery of the described property to the affiant or declarant, a copy of the consent shall be attached to the affidavit or declaration.

Comment. Subdivision (e) is added to Section 13101 to require that a copy of the decedent's will be attached to the affidavit or declaration if the person or persons executing the affidavit or declaration claim under the decedent's will. This makes Section 13101 consistent with Section 13200.

Subdivision (a)(4) is revised and subdivision (f) is added to reflect the new authorization for the decedent's personal representative to consent to use of the affidavit procedure, notwithstanding that an estate proceeding is pending or has been conducted in this state. See Section 13108(a)(2).

Probate Code § 13107.5 (added). Substitution of parties without probate

SEC. 7. Section 13107.5 is added to the Probate Code, to read:

13107.5. Where the money or property claimed in an affidavit or declaration executed under this chapter is the subject of a pending action or proceeding in which the decedent was a party, the successor of the decedent may, without procuring letters of administration or awaiting probate of the will, seek to be substituted as a party in place of the decedent by motion under Section 385 of the Code of Civil Procedure. The successor of the decedent shall file the affidavit or declaration with the court when the motion is made. For the purpose of Section 385 of the Code of Civil Procedure, a successor of the decedent who complies with this chapter shall be considered as a successor in interest of the decedent.

Comment. Section 13107.5 is a new provision permitting the successor of the decedent (as defined in Section 13006) to be substituted for the decedent in an action or proceeding involving the money or property claimed by the successor that was pending when the decedent died. The right to be substituted for the decedent under this section exists only where the value of the estate, as determined pursuant to Section 13050, does not exceed \$60,000. This right is consistent with the right of the successor under Section 13105(b) to bring an action to recover money or property that the holder refuses to pay or deliver to the successor.

The decedent's surviving spouse may use the procedure provided by this section if the surviving spouse is the successor in interest and the value of the estate, as determined pursuant to Section 13050, does not exceed \$60,000. As provided in Section 13050(a)(1), the value of property passing to the surviving spouse pursuant to Section 13500 is excluded in determining the value of the estate.

Probate Code § 13108 (amended). Limitation on use of affidavit procedure

SEC. 8. Section 13108 of the Probate Code is amended to read:

13108. (a) The procedure provided by this chapter may be used only if *no one of the following requirements is satisfied*:

(1) *No proceeding for the administration of the decedent's estate is pending or has been conducted in this state.*

(2) *The decedent's personal representative consents in writing to the payment, transfer, or delivery of the property described in the affidavit or declaration pursuant to this chapter.*

(b) Payment, delivery, or transfer of a decedent's property pursuant to this chapter does not preclude later proceedings for administration of the decedent's estate.

Comment. Subdivision (a)(2) is added to Section 13108 to permit use of the procedure provided by this chapter, notwithstanding that an estate proceeding is pending or has been conducted in this state.

Probate Code § 13111 (amended). Restitution if estate proceeding commenced or on request of personal representative

SEC. 9. Section 13111 of the Probate Code is amended to read:

13111. (a) Subject to subdivisions (b), (c), (d), and (e), if proceedings for the administration of the decedent's estate are commenced in this state, *or if the decedent's personal representative has consented to the payment, transfer, or delivery of the decedent's property under this chapter and the personal representative later requests that the property be restored to the estate*, each person to whom payment, delivery, or transfer of the decedent's property is made under this chapter is liable for:

(1) The restitution of the property to the estate if the person still has the property, together with the net income the person received from the property.

(2) The restitution to the estate of the fair market value of the property if the person no longer has the property, together with (A) the net income the person received from that

property and (B) interest on the fair market value of the property from the date of disposition at the rate payable on a money judgment. For the purposes of this subdivision, the "fair market value of the property" is the fair market value, valued as of the time of the disposition of the property, of the property paid, delivered, or transferred to the person under this chapter, excluding any liens and encumbrances on the property at that time.

(b) Subject to subdivision (c) and subject to any additional liability the person has under Sections 13109 to 13112, inclusive, if the person fraudulently secured the payment, delivery, or transfer of the decedent's property under this chapter, the person is liable under this section for restitution to the decedent's estate of three times the fair market value of the property. For the purposes of this subdivision, the "fair market value of the property" is the fair market value, valued as of the time the person liable under this subdivision presents the affidavit or declaration under this chapter, of the property paid, delivered, or transferred to the person under this chapter, excluding the amount of any liens and encumbrances on the property at that time.

(c) The property and amount required to be restored to the estate under this section shall be reduced by any property or amount paid by the person to satisfy a liability under Section 13109 or 13110.

(d) An action to enforce the liability under this section may be brought only by the personal representative of the estate of the decedent. In an action to enforce the liability under this section, the court's judgment may enforce the liability only to the extent necessary to protect the interests of the heirs, devisees, and creditors of the decedent.

(e) An action to enforce the liability under this section is forever barred three years after presentation of the affidavit or declaration under this chapter to the holder of the decedent's property, or three years after the discovery of the fraud,

whichever is later. The three-year period specified in this subdivision is not tolled for any reason.

(f) In the case of a nondomiciliary decedent, restitution under this section shall be made to the estate in an ancillary administration proceeding.

Comment. Section 13111 is amended to reflect the authorization for the decedent's personal representative to consent to summary payment, transfer, or delivery of the decedent's property, notwithstanding that an estate proceeding is pending or has been conducted in this state. See Section 13108.

Probate Code § 13150 (amended). No pending probate proceeding

SEC. 10. Section 13150 of the Probate Code is amended to read:

13150. The procedure provided by this chapter may be used only if ~~no~~ *one of the following requirements is satisfied:*

(a) *No proceeding is being or has been conducted in this state for administration of the decedent's estate.*

(b) *The decedent's personal representative consents in writing to use of the procedure provided by this chapter to determine that real property of the decedent is property passing to the petitioners.*

Comment. Subdivision (b) is added to Section 13150 to permit the procedure provided by this chapter to be used if the decedent's personal representative consents, notwithstanding that an estate proceeding is pending or has been conducted in this state.

Probate Code § 13151 (amended). Petition for order determining succession to real property

SEC. 11. Section 13151 of the Probate Code is amended to read:

13151. Exclusive of the property described in Section 13050, if a decedent dies leaving real property in this state and the gross value of the decedent's real and personal property in this state does not exceed sixty thousand dollars (\$60,000) and 40 days have elapsed since the death of the decedent, the successor of the decedent to an interest in a particular item of

property that is real property, without procuring letters of administration or awaiting the probate of the will, may file a petition in the superior court of the county in which the estate of the decedent may be administered requesting a court order determining that the petitioner has succeeded to that real property ~~and that administration of the decedent's estate is unnecessary~~. *A petition under this chapter may include an additional request that the court make an order determining that the petitioner has succeeded to personal property described in the petition.*

Comment. Section 13151 is amended to delete the requirement that the petition request an order determining that administration of the decedent's estate is unnecessary. This requirement is no longer appropriate in view of the new authorization for the decedent's personal representative to consent to a court order determining succession to decedent's property pursuant to this chapter, notwithstanding that an estate proceeding is pending or has been conducted in this state. See Section 13150.

The last sentence is added to Section 13151 to permit a petition under this chapter to include a request that the court make an order determining that the petitioner has succeeded to personal property of the decedent. Such an order may be made only if the petition requests an order determining that the petitioner has succeeded to real property described in the petition. A petition requesting an order concerning personal property only is not permitted under this chapter. Where only personal property is involved, the affidavit procedure under Chapter 3 (commencing with Section 13100) is the appropriate summary procedure to use.

Probate Code § 13152 (amended). Contents of petition; inventory and appraisalment

SEC. 12. Section 13152 of the Probate Code is amended to read:

13152. (a) The petition shall be verified by each petitioner, shall contain a request that the court make an order under this chapter determining that the ~~particular item of~~ property described in the petition is property passing to the petitioner ~~and that no administration of the decedent's estate is necessary~~, and shall state all of the following:

(1) The facts necessary to determine that the petition is filed in the proper county.

(2) The gross value of the decedent's real and personal property in California, excluding the property described in Section 13050, as shown by the inventory and appraisal attached to the petition, does not exceed sixty thousand dollars (\$60,000).

(3) A description of the particular item of *real* property in this state which the petitioner alleges is property of the decedent passing to the petitioner, *and a description of the personal property which the petitioner alleges is property of the decedent passing to the petitioner if the requested order also is to include a determination that the described personal property is property passing to the petitioner.*

(4) The facts upon which the petitioner bases the allegation that the described *real* property is property passing to the petitioner.

(5) *Either of the following, as appropriate:*

(A) A statement that no proceeding is being or has been conducted in this state for administration of the decedent's estate.

(B) *A statement that the decedent's personal representative has consented in writing to use of the procedure provided by this chapter.*

(6) Whether estate proceedings for the decedent have been commenced in any other jurisdiction and, if so, where those proceedings are pending or were conducted.

(7) The names, addresses, relationships, and ages of the heirs and devisees of the decedent, the names and addresses of all persons named as executors of the will of the decedent, and, if the petitioner is the trustee of a trust that is a devisee under the will of the decedent, the names and addresses of all persons interested in the trust, as determined in cases of future interests pursuant to paragraph (1), (2), or (3) of subdivision (a) of Section 15804, so far as known to any petitioner.

(8) The name and address of each person serving as guardian or conservator of the estate of the decedent at the time of the decedent's death, so far as known to any petitioner.

(b) There shall be attached to the petition an inventory and appraisal in the form set forth in Section 8802 of the decedent's real and personal property in this state, excluding the property described in Section 13050. The appraisal shall be made by a probate referee selected by the petitioner from those probate referees appointed by the Controller under Section 400 to appraise property in the county where the real property is located. The appraisal shall be made as set forth in Part 3 (commencing with Section 8800) of Division 7. The petitioner may appraise the assets which a personal representative could appraise under Section 8901.

(c) If the petitioner bases his or her claim to the described ~~particular item of~~ property upon the will of the decedent, a copy of the will shall be attached to the petition.

(d) If the decedent's personal representative has consented in writing to use of the procedure provided by this chapter, a copy of the consent shall be attached to the petition.

Comment. The introductory clause of Section 13152 is amended to delete the requirement that the petition request an order determining that administration of the decedent's estate is unnecessary. This requirement is no longer appropriate in view of the new authorization for the decedent's personal representative to consent to a court order determining succession to decedent's property pursuant to this chapter, notwithstanding that an estate proceeding is pending or has been conducted in this state. See Section 13150. Subdivision (d) is added to implement the new authorization. See also the Comment to Section 13151.

Section 13152 is also revised to reflect the fact that a petition under this chapter may include a request that the court make an order determining that the petitioner has succeeded to personal property of the decedent. See the Comment to Section 13151.

Probate Code § 13154 (amended). Court order

SEC. 13. Section 13154 of the Probate Code is amended to read:

13154. (a) If the court makes the determinations required under subdivision (b), the court shall issue an order determining (1) that real property, to be described in the order, of the decedent is property passing to the petitioners and the specific property interest of each petitioner in the described property and (2) ~~that no administration of the decedent's estate is necessary~~ *if the petition so requests, that personal property, to be described in the order, of the decedent is property passing to the petitioners and the specific property interest of each petitioner in the described property.*

(b) The court may make an order under this section only if the court makes all of the following determinations:

(1) The gross value of the decedent's real and personal property in this state, excluding the property described in Section 13150, does not exceed sixty thousand dollars (\$60,000).

(2) Not less than 40 days have elapsed since the death of the decedent.

(3) *Whichever of the following is appropriate:*

(A) No proceeding is being or has been conducted in this state for administration of the decedent's estate.

(B) *The decedent's personal representative has consented in writing to use of the procedure provided by this chapter.*

(4) The ~~real~~ property described in the order is property of the decedent passing to the petitioner.

(c) If the petition has attached an inventory and appraisement that satisfies the requirements of subdivision (b) of Section 13152, the determination required by paragraph (1) of subdivision (b) of this section shall be made on the basis of the verified petition and the attached inventory and appraisement, unless evidence is offered by a person opposing the petition that the gross value of the decedent's real and personal property in this state, excluding the property described in Section 13150, exceeds sixty thousand dollars (\$60,000).

Comment. Section 13154 is amended to delete from subdivision (a) the requirement that the order include a determination that no administration of the decedent's estate is necessary and to revise subdivision (b)(3) to recognize the new authorization for the decedent's personal representative to consent to a court order determining succession to decedent's property pursuant to this chapter, notwithstanding that an estate proceeding is pending or has been conducted in this state. See Section 13150. See also the Comment to Section 13151.

Section 13154 also is amended to recognize that the court in a proceeding under this chapter may, if requested, include in its order a determination that the decedent's personal property is property passing to petitioners. See the Comment to Section 13151.

Probate Code § 13155 (amended). Conclusiveness of order

SEC. 14. Section 13155 of the Probate Code is amended to read:

13155. Upon becoming final, an order under this chapter determining that ~~real~~ property is property passing to the petitioner is conclusive on all persons, whether or not they are in being.

Comment. Section 13155 is amended to reflect the expansion of the court's authority to include personal property in its order. See Section 13154.

Probate Code § 13158 (added). No effect on affidavit procedure for personal property

SEC. 15. Section 13158 is added to the Probate Code, to read:

13158. Nothing in this chapter excuses compliance with Chapter 3 (commencing with Section 13100) by the holder of the decedent's personal property if an affidavit or declaration is furnished as provided in that chapter.

Comment. Section 13158 is added to ensure that the holder of decedent's personal property will not insist that the person seeking to collect the property by affidavit or declaration instead use the court procedure in this chapter. See Sections 13105, 13154. For the penalty for refusing to transfer the decedent's personal property to the person executing the affidavit or declaration, see Section 13105.

Probate Code § 13200 (amended). Filing affidavit in superior court; inventory and appraisal

SEC. 16. Section 13200 of the Probate Code is amended to read:

13200. (a) No sooner than six months from the death of a decedent, a person or persons claiming as successor of the decedent to a particular item of property that is real property may file in the superior court in the county in which the decedent was domiciled at the time of death, or if the decedent was not domiciled in this state at the time of death, then in any county in which real property of the decedent is located, an affidavit in the form prescribed by the Judicial Council pursuant to Section 13209 stating all of the following:

- (1) The name of the decedent.
- (2) The date and place of the decedent's death.
- (3) A legal description of the real property and the interest of the decedent therein.
- (4) The name and address of each person serving as guardian or conservator of the estate of the decedent at the time of the decedent's death, so far as known to the affiant.
- (5) "The gross value of all real property in the decedent's estate located in California, as shown by the inventory and appraisal attached to this affidavit, excluding the real property described in Section 13050 of the California Probate Code, does not exceed ten thousand dollars (\$10,000)."
- (6) "At least six months have elapsed since the death of the decedent as shown in a certified copy of decedent's death certificate attached to this affidavit."
- (7) *Either of the following, as appropriate:*
 - (A) "No proceeding is now being or has been conducted in California for administration of the decedent's estate."
 - (B) "The decedent's personal representative has consented in writing to use of the procedure provided by this chapter."
- (8) "Funeral expenses, expenses of last illness, and all unsecured debts of the decedent have been paid."

(9) "The affiant is the successor of the decedent (as defined in Section 13006 of the Probate Code) and to the decedent's interest in the described property, and no other person has a superior right to the interest of the decedent in the described property."

(10) "The affiant declares under penalty of perjury under the law of the State of California that the foregoing is true and correct."

(b) For each person executing the affidavit, the affidavit shall contain a notary public's certificate of acknowledgment identifying the person.

(c) There shall be attached to the affidavit an inventory and appraisal of the decedent's real property in this state, excluding the real property described in Section 13050. The form, content, and manner of making the inventory and appraisal of the real property shall be as set forth in Part 3 (commencing with Section 8800) of Division 7. The appraisal shall be made by a probate referee selected by the affiant from those probate referees appointed by the Controller under Section 400 to appraise property in the county where the real property is located.

(d) If the person or persons executing the affidavit claim under the decedent's will, a copy of the will shall be attached to the affidavit.

(e) A certified copy of the decedent's death certificate shall be attached to the affidavit. *If the decedent's personal representative has consented in writing to use of the procedure provided by this chapter, a copy of the consent shall be attached to the affidavit.*

(f) The affiant shall personally serve or mail, postage prepaid, a copy of the affidavit and attachments to any person identified in paragraph (4) of subdivision (a).

Comment. Section 13200 is amended to recognize that the decedent's personal representative may consent to use of the procedure provided by this chapter, notwithstanding that an estate proceeding is pending or has been conducted in this state. See Section 13210.

Probate Code § 13206 (amended). Restitution if estate proceeding commenced or on request of personal representative

SEC. 17. Section 13206 of the Probate Code is amended to read:

13206. (a) Subject to subdivisions (b), (c), (d), and (e), if proceedings for the administration of the decedent's estate are commenced, *or if the decedent's personal representative has consented to use of the procedure provided by this chapter and the personal representative later requests that the property be restored to the estate*, each person who is designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 is liable for:

(1) The restitution to the decedent's estate of the property the person took under the certified copy of the affidavit if the person still has the property, together with the net income the person received from the property.

(2) The restitution to the decedent's estate of the fair market value of the 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) interest from the date of disposition at the rate payable on a money judgment on the fair market value of the property. For purposes of this paragraph, the "fair market value of the property" is the fair market value, valued as of the time of the disposition of the property, of the property the person took under the certified copy of the affidavit, excluding the amount of any liens and encumbrances on the property at the time the certified copy of the affidavit was issued.

(b) Subject to subdivision (d), if the person fraudulently executed or filed the affidavit under this chapter, the person is liable under this section for restitution to the decedent's estate of three times the fair market value of the property. For the purposes of this subdivision, the "fair market value of the property" is the fair market value, valued as of the time the

certified copy of the affidavit was issued, of the property the person took under the certified copy of the affidavit, excluding the amount of any liens and encumbrances on the property at that time.

(c) Subject to subdivision (d), if proceedings for the administration of the decedent's estate are commenced and a person designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 made a significant improvement to the property taken by the person under the certified copy of the affidavit in the good faith belief that the person was the successor of the decedent to that property, the person is liable for whichever of the following the decedent's estate elects:

(1) The restitution of the property, as improved, to the estate of the decedent upon the condition that the estate reimburse the person making restitution for (A) the amount by which the improvement increases the fair market value of the property restored, valued as of the time of restitution, and (B) the amount paid by the person for principal and interest on any liens or encumbrances that were on the property at the time the certified copy of the affidavit was issued.

(2) The restoration to the decedent's estate of the fair market value of the property, valued as of the time of the issuance of the certified copy of the affidavit under Section 13202, excluding the amount of any liens and encumbrances on the property at that time, together with interest on the net amount at the rate payable on a money judgment running from the date of the issuance of the certified copy of the affidavit.

(d) The property and amount required to be restored to the estate under this section shall be reduced by any property or amount paid by the person to satisfy a liability under Section 13204 or 13205.

(e) An action to enforce the liability under this section may be brought only by the personal representative of the estate of the decedent. In an action to enforce the liability under this

section, the court's judgment may enforce the liability only to the extent necessary to protect the interests of the heirs, devisees, and creditors of the decedent.

(f) An action to enforce the liability under this section is forever barred three years after the certified copy of the affidavit is issued under Section 13202, or three years after the discovery of the fraud, whichever is later. The three-year period specified in this subdivision is not tolled for any reason.

Comment. Section 13206 is amended to reflect the authorization for the decedent's personal representative to consent to use of the procedure provided by this chapter, notwithstanding that an estate proceeding is pending or has been conducted in this state. See Section 13210.

Probate Code § 13207 (amended). Limitation on liability under Sections 13204 and 13205

SEC. 18. Section 13207 of the Probate Code is amended to read:

13207. (a) A person designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 is not liable under Section 13204 or 13205 if proceedings for the administration of the decedent's estate are commenced, *or if the decedent's personal representative has consented to use of the procedure provided by this chapter and the personal representative later requests that the property be restored to the estate, and the person satisfies the requirements of Section 13206.*

(b) Except as provided in subdivision (b) of Section 13205, the aggregate of the personal liability of a person under Sections 13204 and 13205 shall not exceed the fair market value at the time of the issuance of the certified copy of the affidavit under Section 13202 of the decedent's property received by that person under this chapter, less the amount of any liens and encumbrances on the property at that time, together with the net income the person received from the property and, if the property has been disposed of, interest on

the fair market value of the property from the date of disposition at the rate payable on a money judgment. For the purpose of this subdivision, "fair market value of the property" has the same meaning as defined in paragraph (2) of subdivision (a) of Section 13206.

Comment. Section 13207 is amended to reflect the new authorization for the decedent's personal representative to consent to use of the procedure provided by this chapter, notwithstanding that an estate proceeding is pending or has been conducted in this state. See Section 13210.

Probate Code § 13210 (added). Limitation on use of procedure provided by this chapter

SEC. 19. Section 13210 is added to the Probate Code, to read:

13210. The procedure provided by this chapter may be used only if one of the following requirements is satisfied:

(a) No proceeding for the administration of the decedent's estate is pending or has been conducted in this state.

(b) The decedent's personal representative consents in writing to use of the procedure provided by this chapter.

Comment. Section 13210 is a new provision. It expands the authorization to use the procedure provided by this chapter to cover the case where the decedent's personal representative consents to use of the procedure, notwithstanding that an estate proceeding is pending or has been conducted in this state. See also Section 13108 (summary collection of personal property).