

STATE OF CALIFORNIA

California Law Revision Commission

TENTATIVE RECOMMENDATION

relating to

PROBATE LAW AND PROCEDURE

RIGHT OF SURVIVING SPOUSE TO DISPOSE OF COMMUNITY PROPERTY

January 1990

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN March 31, 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
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Tentative Recommendation
relating to
RIGHT OF SURVIVING SPOUSE TO DISPOSE OF COMMUNITY PROPERTY

When a married person dies leaving the person's one-half interest in community property and quasi-community property to the surviving spouse, the surviving spouse takes the decedent's share free of the necessity of probate administration.¹ The Law Revision Commission recommends changes in the statute governing this matter to fill two gaps in it that have come to the attention of the Commission.

Right of Surviving Spouse to Dispose of Real Property

The statute gives the surviving spouse the right to deal with and dispose of community real property if there is no notice of an adverse interest recorded within 40 days after the decedent's death.² Thus if the decedent leaves the decedent's share of the community property to a beneficiary other than the surviving spouse, the beneficiary has 40 days within which to record the notice, failure of which enables the surviving spouse freely to dispose of the property.³

Presumably, if the beneficiary fails to record the notice and the surviving spouse disposes of the property, the beneficiary would have a right to recover the value of the beneficiary's interest in the

1. Prob. Code §§ 13500-13660.

2. Prob. Code § 13540.

3. Although the 40-day recording statute is not the main subject of the present recommendation, the Commission also recommends the addition of clarifying language to remedy two technical defects in that statute:

(1) A notice recorded by a beneficiary after expiration of the 40-day period should still be effective if the surviving spouse has not yet disposed of the property.

(2) Recordation of the notice should not be privileged if done for the purpose of slandering the surviving spouse's title.

property from the surviving spouse.⁴ The Comment to Probate Code Section 13540 states that the beneficiary may obtain a judgment to enforce the beneficiary's rights against the surviving spouse,⁵ but this is nowhere expressly stated in the statute.

The omission of clear statutory provisions governing the matter is inadvertent. The Commission recommends that express provisions be added to the statute to govern the liability of the surviving spouse to a beneficiary.⁶

Right of Surviving Spouse to Dispose of Securities

Whereas the surviving spouse may freely dispose of community real property if 40 days has elapsed after the decedent's death and no notice has been recorded, the rule does not extend to personal property. Thus a potential transferee of personal property may be unwilling to enter into a transaction for fear that the surviving

4. Cf. *Knego v. Grover*, 208 Cal. App. 2d 134, 147-48, 25 Cal. Rptr. 158 (1962).

5. See Comment to Prob. Code § 13540 in *Recommendation Proposing New Probate Code*, 20 Cal. L. Revision Comm'n Reports 1001, 1846 (1990):

Subdivision (b) makes clear that this section does not affect or limit the liability of a surviving spouse under Sections 13550-13553. Although Section 13540 may preclude a devisee or creditor from enforcing his or her rights against a grantee, purchaser, encumbrancer, or lessee or against the property interest transferred to the grantee, purchaser, encumbrancer, or lessee, the section does not relieve the surviving spouse of any liability under Sections 13550-13553. If the surviving spouse is liable under those sections and the devisee or creditor obtains a judgment against the surviving spouse, the judgment may be enforced against any property of the surviving spouse (including the proceeds of the disposition described in Section 13540) that is subject to the enforcement of a judgment.

Sections 13550-13553, referred to in the Comment, relate only to the decedent's debts and not to rights of the decedent's devisees.

6. The recommended provisions are drawn from comparable provisions in Probate Code Sections 13205-13208 governing liability to a beneficiary of a person who takes a small estate by affidavit.

spouse may not have full power to dispose of the property due to a possible devise of the decedent's share to a beneficiary other than the surviving spouse. A person who wants to be secure in accepting a transfer of personal property may refuse to consummate the transaction until the surviving spouse obtains a court order confirming the surviving spouse's ownership of the property.⁷

As a practical matter, this is only a problem for transfer of personal property of a type whose title is evidenced by documentation, such as securities. Most tangible personal property is untitled and of relatively low value, and its transferability by the possessor is not ordinarily questioned.

The ability of the surviving spouse to transfer securities is critical, since securities may fluctuate rapidly in value. Moreover, the market system for securities depends on the assurance to a purchaser that a transaction made by the registered owner passes good title to the purchaser notwithstanding an undisclosed cloud on the title of the registered owner.

Statutes governing the usual securities transfer enable the person in whose name securities are registered to dispose of the securities in the ordinary course of business without impediment.⁸ These provisions should not be compromised by the possibility that the securities are community property or quasi-community property and that the spouse of the registered owner has died and has made an undisclosed devise of the spouse's community property interest to a person other than the

7. See Prob. Code §§ 13650-13660 (determination or confirmation of property passing or belonging to surviving spouse).

8. A certificated security is a negotiable instrument under Commercial Code Section 8105. Corporations Code Section 420 immunizes a corporation and its transfer agent and registrar for executing a securities transfer properly indorsed by the person to whom the securities are registered, even if the registration shows the securities are held as community property. Commercial Code Section 8302 provides that the transferee takes a security free of any adverse claim if the transferee is a bona fide purchaser for value in good faith and without notice of any adverse claim.

surviving spouse. A purchaser should be able to take a transfer of securities from the registered owner free of the need to make inquiry concerning the community character of the securities, the death of the owner's spouse, and the contents of the decedent's will, if any. Any other rule could compromise every securities transfer by a natural person, since a prudent transferee would require assurance of the marital status of the transferor, the health of the transferor's spouse, and the like.

For these reasons the Law Revision Commission recommends that the statute make clear that the death of the spouse of a registered owner of securities does not affect the ability of the registered owner to pass good title. The laws governing the security of such transactions should apply with equal force before or after the death of the registered owner's spouse.

The Commission's recommendations would be implemented by enactment of the following measure.

An act to amend Sections 13207, 13540, and 13541 of, and to amend the heading of Chapter 2 (commencing with Section 13540) of Part 2 of Division 8 of, to add Section 13545 to, and to add Chapter 3.5 (commencing with Section 13560) to Part 2 of Division 8 of, the Probate Code, relating to disposition of property after death.

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

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

SECTION 1. 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 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 sum of the following:

(1) 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~~ .

(2) The net income the person received from the property and, ~~if~~ .

(3) 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 purposes of this ~~subdivision~~ paragraph , "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 make a technical, nonsubstantive clarification.

Prob. Code § 13540-13542 (chapter heading). Right of surviving spouse to dispose of property

SEC. 2. The heading of Chapter 2 (commencing with Section 13540) of Part 2 of Division 8 of the Probate Code is amended to read:

CHAPTER 2. RIGHT OF SURVIVING SPOUSE TO DISPOSE OF REAL PROPERTY

Comment. The heading of Chapter 2 (commencing with Section 13540) is amended to reflect the expansion of the chapter to include Section 13545 (right of surviving spouse to dispose of securities).

Prob. Code § 13540 (amended). Right of surviving spouse to dispose of real property

SEC. 3. Section 13540 of the Probate Code is amended to read:

13540. (a) Except as provided in Section 13541, after 40 days from the death of a spouse, the surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse has full power to sell, lease, mortgage, or otherwise deal with and dispose of the community or quasi-community real property, and the right, title, and interest of any grantee, purchaser, encumbrancer, or lessee shall be free of rights of devisees or creditors of the deceased spouse to the same extent as if the property had been owned as the separate property of the surviving spouse.

(b) Nothing in this section affects or limits the liability of the surviving spouse under Sections 13550 to 13553, inclusive, and Chapter 3.5 (commencing with Section 13560).

Comment. Subdivision (b) of Section 13540 is amended to include a cross-reference to Sections 13560 to 13564 (liability for property of deceased spouse).

Prob. Code § 13541 (amended). Recording notice of interest in property

SEC. 4. Section 13541 of the Probate Code is amended to read:

13541. (a) Section 13540 does not apply ~~if, within 40 days from the death of the spouse,~~ after a notice that satisfies the requirements of this section is recorded in the office of the county recorder of the county in which real property is located.

(b) The notice shall contain all of the following:

(1) A description of the property in which an interest is claimed.

(2) A statement that an interest in the property is claimed by a named person under the will of the deceased spouse.

(3) The name or names of the owner or owners of the record title to the property.

(c) There shall be endorsed on the notice instructions that it shall be indexed by the recorder in the name or names of the owner or owners of record title to the property, as grantor or grantors, and in the name of the person claiming an interest in the property, as grantee.

(d) A person shall not record a notice under this section for the purpose of slandering title to the property. If the court in an action or proceeding relating to the rights of the parties determines that a person recorded a notice under this section for the purpose of slandering title, the court shall award against the person the cost of the action or proceeding, including a reasonable attorney's fee, and the damages caused by the recording.

Comment. Subdivision (a) of Section 13541 is amended to make clear that the right provided in Section 13540 does not apply after a notice under this section is recorded, whether before or after expiration of the 40-day waiting period provided in Section 13540.

Subdivision (d) is comparable to Civil Code Section 880.360 (marketable record title), and makes clear that recordation of notice under this section is not privileged. Subdivision (d) does not affect the elements of the cause of action for slander of title and codifies the measure of recovery for slander of title, with the addition of reasonable attorney's fees. See 5 B. Witkin, Summary of California Law, Torts § 572 (9th ed. 1988).

Prob. Code § 13545 (added). Right of surviving spouse to dispose of securities

SEC. 5. Section 13545 is added to the Probate Code, to read:

13545. (a) After the death of a spouse, the surviving spouse, or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse has full power to sell, assign, pledge, or otherwise deal with and dispose of community or quasi-community property securities registered in the name of the surviving spouse alone, and the right, title, and interest of any purchaser, assignee, encumbrancer, or other transferee shall be free of the rights of devisees or creditors of the deceased spouse to the same extent as if the deceased spouse had not died.

(b) Nothing in this section affects or limits the liability of a surviving spouse under Sections 13550 to 13553, inclusive, and Chapter 3.5 (commencing with Section 13560).

Comment. Section 13545 is drawn from Section 13540 (right of surviving spouse to dispose of real property).

Subdivision (a) makes clear that the right of a surviving spouse to deal with community and quasi-community property securities is not affected by the death of the other spouse. Thus, the fact that there may be a person having a superior right by testate succession to the decedent's share of securities does not impair the ability of the surviving spouse in whose name the securities are registered to make binding transactions affecting the securities just as if the deceased spouse had not died. See, e.g., Corp. Code § 420 (immunity of corporation and agents for executing properly indorsed securities transfer, including community property securities); Comm. Code § 8302 (bona fide purchaser for value in good faith and without notice of adverse claim takes security free of adverse claim).

Subdivision (b) makes clear that this section does not affect or limit the liability of the surviving spouse under Sections 13550-13553 (liability for debts of deceased spouse) and 13560-13564 (liability for property of deceased spouse). Although Section 13545 may preclude a devisee or creditor from enforcing his or her rights against a purchaser, assignee, encumbrancer, or other transferee or against the property interest transferred to the purchaser, assignee, encumbrancer, or other transferee, the section does not relieve the surviving spouse of any liability under Sections 13550-13553 and 13560-13564. If the surviving spouse is liable under those sections and the devisee or creditor obtains a judgment against the surviving spouse, the judgment may be enforced against any property of the surviving spouse (including the proceeds of the disposition described in Section 13545) that is subject to the enforcement of a judgment.

Prob. Code §§ 13560-13564 (added). Liability for decedent's property

SEC. 6. Chapter 3.5 (commencing with Section 13560) is added to Part 2 of Division 8 of the Probate Code, to read:

CHAPTER 3.5. LIABILITY FOR DECEDENT'S PROPERTY

§ 13560. "Decedent's property" defined

13560. For the purposes of this chapter, "decedent's property" means the one-half of the community property that belongs to the decedent under Section 100 and the one-half of the quasi-community property that belongs to the decedent under Section 101.

Comment. Section 13560 is included for drafting convenience.

§ 13561. Liability to person having superior right

13561. (a) If the decedent's property is in the possession or control of the surviving spouse at the time of the decedent's death, the surviving spouse is personally liable to the extent provided in Section 13563 to any person having a superior right by testate succession from the decedent.

(b) An action to impose liability under this section is forever barred three years after the death of the decedent. The three-year period specified in this subdivision is not tolled for any reason.

Comment. Section 13561 is drawn from subdivisions (a) and (c) of Section 13205 (affidavit procedure for real property of small value).

§ 13562. Restitution if estate proceeding commenced

13562. (a) Subject to subdivisions (b), (c), and (d), if proceedings for the administration of the decedent's estate are commenced, the surviving spouse is liable for:

(1) The restitution to the decedent's estate of the decedent's property if the surviving spouse still has the decedent's property, together with (A) the net income the surviving spouse received from the decedent's property and (B) if the surviving spouse encumbered the decedent's property after the date of death, the amount necessary to satisfy the balance of the encumbrance as of the date the decedent's property is restored to the estate.

(2) The restitution to the decedent's estate of the fair market value of the decedent's property if the surviving spouse no longer has the decedent's property, together with (A) the net income the surviving spouse received from the decedent's 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 decedent's property. For the purposes of this paragraph, the "fair market value of the decedent's property" is the fair market value of the decedent's property, valued as of the time of the disposition of the decedent's property, excluding the amount of any liens and encumbrances on the decedent's property at the time of the decedent's death.

(b) Subject to subdivision (c), if proceedings for the administration of the decedent's estate are commenced and the surviving spouse made a significant improvement to the decedent's property in the good faith belief that the surviving spouse was the successor of the decedent to the decedent's property, the surviving spouse is liable for whichever of the following the decedent's estate elects:

(1) The restitution of the decedent's property, as improved, to the estate of the decedent upon the condition that the estate reimburse the surviving spouse for (A) the amount by which the improvement increases the fair market value of the decedent's property restored, valued as of the time of restitution, and (B) the amount paid by the surviving spouse for principal and interest on any liens or encumbrances that were on the decedent's property at the time of the decedent's death.

(2) The restoration to the decedent's estate of the fair market value of the decedent's property, valued as of the time of the decedent's death, excluding the amount of any liens and encumbrances on the decedent's 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 decedent's death.

(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 surviving spouse to satisfy a liability under Chapter 3 (commencing with Section 13550).

(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 the death of the decedent. The three-year period specified in this subdivision is not tolled for any reason.

Comment. Section 13562 is drawn from Section 13206 (affidavit procedure for real property of small value).

Under subdivision (a)(1), if the surviving spouse encumbered the property after the decedent's death, the surviving spouse is liable for the amount necessary to satisfy the balance of the encumbrance on the decedent's one-half interest as of the date the property is restored to the estate. This amount is in addition to the property and the net income the surviving spouse received from the property.

Restitution of property to the estate where the spouse still has the property may necessitate partition if the parties are unable to agree on possession or other matters. See Section 9823 (partition actions).

§ 13563. Limitation on liability under Section 13561

13563. (a) The surviving spouse is not liable under Section 13561 if proceedings for the administration of the decedent's estate are commenced and the surviving spouse satisfies the requirements of Section 13562.

(b) The aggregate of the personal liability of the surviving spouse under Section 13561 shall not exceed the sum of the following:

(1) The fair market value at the time of the decedent's death, less the amount of any liens and encumbrances on the decedent's property at that time, of the portion of the decedent's property that passes to any person having a superior right by testate succession from the decedent.

(2) The net income the surviving spouse received from the portion of the decedent's property that passes to any person having a superior right by testate succession from the decedent.

(3) If the decedent's property has been disposed of, interest on the fair market value of the portion of the decedent's property that passes to any person having a superior right by testate succession from the decedent from the date of disposition at the rate payable on a money judgment. For the purposes of this paragraph, "fair market value" is fair market value, valued as of the time of the disposition of the decedent's property, excluding the amount of any liens and encumbrances on the decedent's property at the time of the decedent's death.

Comment. Section 13563 is drawn from Section 13207 (affidavit procedure for real property of small value).

§ 13564. Other remedies not affected

13564. The remedies available under Sections 13561 to 13563, inclusive, are in addition to any remedies available by reason of any fraud or intentional wrongdoing.

Comment. Section 13564 is drawn from Section 13208 (affidavit procedure for real property of small value). This section makes clear that the remedies provided in this chapter for the decedent's estate and persons having a superior right to the property by testate succession do not limit any other remedies that are available by reason of fraud or intentional wrongdoing.