

STATE OF CALIFORNIA

California Law Revision Commission

TENTATIVE RECOMMENDATION

relating to

TRANSFER BY CONSERVATOR TO TRUST
OF UNINTENTIONALLY OMITTED PROPERTY

September 1991

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. Comments sent to the Commission will be a public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation it 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 October 18, 1991.

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
TRANSFER BY CONSERVATOR TO TRUST
OF UNINTENTIONALLY OMITTED PROPERTY

Under the substituted judgment provisions of the Probate Code,¹ the court in a conservatorship proceeding may authorize or require the conservator to take various actions relating to the conservatee's estate plan, including creating revocable or irrevocable trusts for the benefit of the conservatee or others.² The trust may be funded with property of the conservatorship estate and may contain testamentary provisions.³

Property of the conservatee may be discovered at the conservatee's death that should have been included in the trust, but was inadvertently omitted. Authority should be included in the substituted judgment provisions to permit the court to authorize or require the conservator to transfer to the trust later-discovered property⁴ that was unintentionally omitted from the trust.⁵

1. Prob. Code §§ 2580-2586.

2. Prob. Code § 2580.

3. W. Johnstone & S. House, California Conservatorships and Guardianships § 13.3 (Cal. Cont. Ed. Bar 1990).

4. If property is discovered after the death of the conservatee, the conservator continues to have control of conservatorship assets pending delivery to the conservatee's personal representative "or other disposition according to law." Prob. Code § 2467. See also Prob. Code § 2630 (continuing jurisdiction of court).

5. The Commission is informed that this problem is sometimes dealt with under existing law by obtaining a court order under Probate Code Sections 9860-9868 relating to conveyance or transfer of property claimed to belong to decedent or other person. By adding to the substituted judgment provisions express authority for the court to authorize or require the conservator to transfer later-discovered property to the trust, any doubt about the statutory authority for this practice will be eliminated.

PROPOSED LEGISLATION

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

Probate Code § 2580 (amended). Petition to authorize proposed action

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

(1) Benefiting the conservatee or the estate.

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

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

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

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

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

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

(4) Entering into contracts.

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

(6) Transferring to a trust created by the conservator or conservatee any property unintentionally omitted from the trust.

~~(6)~~ (7) Exercising options of the conservatee to purchase or exchange securities or other property.

~~(7)~~ (8) Exercising the rights of the conservatee to elect benefit or payment options, to terminate, to change beneficiaries or ownership, to assign rights, to borrow, or to receive cash value in return for a

surrender of rights under any of the following:

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

(ii) Annuity policies, plans, or benefits.

(iii) Mutual fund and other dividend investment plans.

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

~~(8)~~ (9) Exercising the right of the conservatee to elect to take under or against a will.

~~(9)~~ (10) Exercising the right of the conservatee to disclaim any interest that may be disclaimed under Part 8 (commencing with Section 260) of Division 2.

~~(10)~~ (11) Exercising the right of the conservatee (i) to revoke a revocable trust or (ii) to surrender the right to revoke a revocable trust, but the court shall not authorize or require the conservator to exercise the right to revoke a revocable trust if the instrument governing the trust (i) evidences an intent to reserve the right of revocation exclusively to the conservatee, (ii) provides expressly that a conservator may not revoke the trust, or (iii) otherwise evidences an intent that would be inconsistent with authorizing or requiring the conservator to exercise the right to revoke the trust.

~~(11)~~ (12) Making an election referred to in Section 13502 or an election and agreement referred to in Section 13503.

Comment. Section 2580 is amended to add paragraph (6) to subdivision (b).

If property is discovered after the conservatee's death that has been unintentionally omitted from a trust created by the conservator or conservatee, the conservator has control of the property pending its disposition according to law. Prob. Code § 2467. See also Prob. Code § 2630 (continuing jurisdiction of court).