

Memorandum 85-63

Subject: Study L-1029 - Probate Code (Distribution and Discharge--
draft statute)

Attached to this memorandum are redrafted provisions relating to distribution and discharge in probate proceedings. Exhibits 1 and 2. Also attached are Comments indicating the disposition of existing law in the redraft. Exhibit 3. This memorandum raises a number of policy issues involved in the redraft.

§ 8701. Notice of hearing

Both the State Bar and the Los Angeles County Bar observe that it is anomalous to give the State Controller 30 days notice of a petition for distribution of the estate when everyone else gets 10 days notice. The staff draft conforms the State Controller notice to general provisions on the subject.

We have also received comments to the effect that the special notice provisions relating to a petition for distribution conflict with the general notice provisions of Section 1200.5 that also purport to govern the same subject. We will resolve this conflict when we review notice provisions generally.

§ 8703. Hearing and order

The staff has omitted from the draft the text of Section 1024--"Before any decree of distribution is made, all personal property taxes due and payable by the estate shall be paid." The State Bar points out that the section is unnecessary since it is not the function of the probate court to enforce collection of personal property taxes and all debts must be paid before final distribution anyway. The Los Angeles County Bar agrees, noting that payment of taxes is an obligation of the personal representative but should not be required by a specific code section. Also, deletion of the section will simplify accountings, which now require an allegation that the personal property taxes have been paid.

§ 8704. Distribution to person other than heir or devisee

Section 8704 continues an existing provision that permits the court to make adjustments in the distribution of property to an assignee or transferee. The purpose of this section is to limit rapacious heir hunters. One basis for exercise of the court's discretion is that it finds the compensation paid by the heir or devisee to be "grossly unreasonable." The State Bar questions whether "grossly" should be deleted, leaving the standard one of reasonableness.

The staff has not made this change in the draft. It seems to us that this is an extraordinary power to be exercised by the court, and should be limited to extraordinary cases. Moreover, the "grossly unreasonable" standard has been the law since 1941 and there is a substantial body of case law construing this standard.

§ 8705. Conclusiveness of order and distribution

The Los Angeles County Bar is concerned that a decree of distribution, after it becomes final, is conclusive--"In some instances a decree of distribution may be incorrect due to typographical errors or the accidental omission of a beneficiary."

This problem is already covered by existing law. Probate Code Section 1233 adopts the rules of procedure of the Code of Civil Procedure. Code of Civil Procedure Section 473 permits the court to correct clerical errors in its orders as entered, and this includes such matters as mistake in the name of a party, omission of a party's name, mistaken term or phrase, mistake in description of property, mistake in amount, items, or extent of judgment entered. See 4 B. Witkin, California Procedure, Judgment §§ 64-79 (2d ed. 1971).

§ 8720. Time for petition

Existing Section 1000 permits preliminary distribution in two instances:

- (1) Two months have elapsed since issuance of letters and a bond is given.
- (2) The time for making claims has expired and all uncontested claims are paid or secured, either with or without a bond as determined by the court.

Both the State Bar and the Los Angeles County Bar agree that this scheme should be replaced with a single provision for distribution at any time after issuance of letters, with or without a bond as the court determines. The staff has drafted Section 8720 accordingly.

§ 8721. Notice of hearing not required in certain cases

We have added this section to allow an ex parte order for distribution of personal belongings, as suggested by the State Bar. The items permitted to be distributed in this fashion are the same as the surviving spouse and minor children would be entitled to possess immediately upon the decedent's death. Because these items are all exempt from enforcement of a money judgment, notice to creditors is not an issue here.

§ 8723. Distribution under Independent Administration of Estates Act

Section 8723 implements suggestions of the State Bar and the Los Angeles County Bar Associations by eliminating the limitation on distribution of more than 50% of the net value of the estate. The Commission should also consider whether the requirement of a court order under Independent Administration should be eliminated in favor of the standard advice of proposed action.

§ 8724. Costs of proceeding

Existing law requires the costs of a proceeding for preliminary distribution to be borne by the petitioner (or the estate if the petitioner is the personal representative). In the case of two or more petitioners, the costs must be "apportioned" among them, presumably on the basis of the value of the property distributed.

Both the State Bar and the Los Angeles County Bar express concern about imposing the costs on the petitioner. The State Bar suggests that costs be imposed on the estate if the personal representative is negligent" in making distribution. The Los Angeles County Bar would give the court discretion in charging costs to the estate or recipients.

The staff prefers the Los Angeles County approach, and has incorporated it in the draft. We have added a comment along the lines suggested by the State Bar to the effect that one of the factors the court might consider in the exercise of its discretion is the negligence of the personal representative.

§ 8741. Accountability until final distribution

Existing Section 1020.5 provides for a supplementary account by the personal representative at the time of making final distribution. The State Bar points out that the section is confusing, is seldom observed, and might well be deleted. "A statement that the executor or administrator is accountable for transactions after the end of its formal court accounting until such time as distribution is made to the beneficiaries would suffice." The Los Angeles County Bar Association agrees with this position. The staff has incorporated this suggestion in the draft as Section 8741.

§ 8801. Notice of hearing

Existing law requires that notice of a hearing to determine heirship be given to "all legatees and devisees" whether or not their interests are affected by the petition to determine heirship, and to "all known heirs" even if there is a will and the heirs have no interest. The State Bar suggests that notice should be limited to the persons affected.

The Los Angeles County Bar disagrees. They believe that a petition for determination of heirship can affect persons in subtle ways (i.e., interpretation of a tax clause) and a lesser notice provision may be a trap if the practitioner has not carefully thought out the impact of the petition. Also, a responsive statement of interest could conceivably affect different persons than the original petition.

§ 8804. Hearing

Existing law provides for a jury trial of facts in a court proceeding for determination of heirship. Consistent with the staff's bias against jury trial in this area, we have omitted the jury trial provision from the draft.

Existing law also provides some unique evidentiary and procedural rules in a determination of heirship proceeding:

Any depositions taken in accord with [the Code of Civil Procedure] shall be admissible in evidence. Any claimant entering or reentering such proceedings shall be bound by evidence introduced and depositions taken prior to his entry into the proceeding or during his absence therefrom, except that he may in the discretion of the court have the right to examine any witness further if it be possible to do so.

The staff sees no need for special procedural rules here; the general rules of civil procedure should be adequate. Accordingly we have omitted the special rules from the draft.

§§ 8820-8824. Deceased distributee

Suppose an heir or devisee of the decedent survives the decedent but dies before the estate is distributed. Must a probate be commenced for the heir or devisee if the only purpose of the probate is to create an entity to receive the property and then pass it on?

Existing Probate Code Section 1023 takes the approach that the property must be distributed to the personal representative or the estate of the deceased heir. Section 1022 creates a limited exception to this general rule--the share of an heir or devisee who dies during administration may be paid directly to the heirs of the deceased heir or devisee without administration if the deceased heir or devisee is an unmarried minor who is issue of the decedent and who dies intestate. The purpose of this rather narrow exception to the general rule is not clear. If the minor's estate is large enough to probate apart from the inheritance, should the inheritance alone be excluded from probate? If the property passes without probate, what protections are there for creditors (if any) of the minor? The State Bar and the Los Angeles County Bar raise questions about the meaning and basis for this provision as well.

An alternate approach is to deal comprehensively with the situation where an heir or devisee dies during administration and creation of a second probate estate appears wasteful. The State Bar has forwarded us a proposal by someone (identified only by the initials BDF) to distribute the share of the deceased heir or devisee directly to his or her heirs or devisees when no petition for appointment of a personal representative is filed for the deceased heir or devisee. The staff has reworked this proposal somewhat for Commission review as Sections 8820-8824.

Evidently BDF has pursued this proposal at some time in the past with the State Bar, without success. BDF argues "I think it is ridiculous to institute a full-fledged probate proceeding just to vest

the title in a beneficiary who died during the course of the first probate proceeding. I understand that the objection was based upon the alleged unfairness to creditors; but since this would be an exceptional proceeding, it would be even more exceptional for any creditor of the deceased's beneficiary to be adversely affected." The staff also notes that the draft includes creditor protection. See Section 8224 (debts of deceased distributee).

This approach has a number of other problems as well. How is the court to determine who the heirs and devisees of the deceased distributee are? Is a special proceeding necessary? Who will pay the estate tax, or should there be an estate tax in the case of a deceased distributee? Isn't this procedure really designed for a small estate, and aren't the existing simplified small estate procedures sufficient? The Commission should weigh these considerations and others in determining whether a direct distribution scheme such as the one set out is desirable.

§ 8821. Distribution despite death of distributee

Subdivision (b) of this section refers to a requirement in a will that the devisee survive distribution. Both the State Bar and the Los Angeles County Bar note problems where there is such a requirement in a will, since delays in distribution may defeat the inheritance. They suggest that the statute impose a reasonable time limit, which if the devisee survives, will be deemed to vest the devisee's share. The State Bar proposes six months after the decedent's death, this being the time recognized under the Internal Revenue Code for vesting of a valid marital deduction. The Los Angeles County Bar suggests either six months or the statutory time limits in the Probate Code for closing an estate (one year if no federal estate tax return required, 18 months if federal estate tax return required). Does the Commission wish to pursue these suggestions?

§ 8841. Sale of personal property and deposit of proceeds

Under existing law, the personal representative may have property sold and the proceeds deposited in the county treasury if the property remains in his or her hands unclaimed for a year. The Los Angeles

County Bar suggests that the personal representative should be able to take advantage of this procedure at any time after final accounting. The staff has incorporated this suggestion.

Until the sale and deposit is thus made, the personal representative must render an annual accounting showing receipts, sales, and the property remaining. Section 1063. The Los Angeles County Bar suggests that this provision is unnecessary. The staff agrees; the general accounting provisions should be adequate.

§ 8863. Claims against property distributed to state

This section bars claims against escheated property after five years. The State Bar suggests that this provision should be re-examined as to the rights of minors. "Should they have the opportunity to claim within a reasonable amount of time after reaching majority?"

The staff is opposed to special rules of limitation favoring minors. At some point finality is desirable. The interests of a minor may be protected by the minor's legal representative.

§ 8880. Right to partition or allotment

Existing law refers to partition of "real or personal property" of the decedent. We ordinarily rely on our general definition of property to include real and personal property. Section 62. Because of concern expressed by the State Bar, we have added a cross-reference to this definition in the Comment.

§ 8882. Summons

Existing law provides for issuance of a citation directed to affected persons upon a petition for partition. A notice is all that should be necessary, and we have adjusted this section accordingly.

§ 8915. Sanction for failure to timely close estate

Section 8915 continues an existing statute that provides for reduction of attorney's fees for delay in administration. We have received a comment from Luther J. Avery that, "I believe the public needs protection from lawyer neglect. Therefore, there is need to provide for more protection than that attempted by Probate Code Section [8915] (reduction of fees for extending period for administration beyond 12 to 18 months)." Mr. Avery offers no specific suggestions.

§ 8930. Receipt for distributed property

Existing Section 1065 provides for a life tenant to acknowledge the life tenancy to the remainderman. The State Bar wonders whether this document should be filed. The Bar also wonders (as does the Los Angeles County Bar) whether the section is necessary if the decree of distribution itself lists the property being distributed to the life tenant; perhaps further receipt should be made only if the decree of distribution is not specific.

The staff has replaced the acknowledgment with a requirement that the personal representative file the receipt of the distributee. In the case of real property, this would be done by filing the record location of the court order of distribution.

§ 8931. Decree of discharge

Existing law requires the personal representative to produce satisfactory "vouchers" before obtaining discharge. We have omitted this requirement at the suggestion of the State Bar and the Los Angeles County Bar, who point out that vouchers are no longer required or used in practice. The receipt procedure of Section 8930 should be sufficient.

Distribution of property to minor

Valerie Merritt has written to us concerning the problem that arises where there has been no guardian appointed in a probate proceeding for minor children, typically because no property is being given directly to such children but rather passes through a trust. When there is after-discovered property that does not require probate, such as employee benefits, new proceedings may be necessary to add the property to an existing trust or to appoint a guardian for the property. Ms. Merritt suggests that this eventuality be anticipated in the decree of final distribution, thereby eliminating the need for subsequent proceedings. She would add a new provision along the following lines:

If decedent had a minor child or children at the time of his or her death, and if the decedent's estate is not distributable to said child(ren) or a guardian on their behalf, the decree for final distribution shall include either (1) a provision appointing the surviving parent of said child(ren) as guardian of the estate(s) of any minor child(ren) empowered to accept any

after-discovered assets payable to said child(ren) upon posting of an appropriate bond in the minimum amount then required by law or (2) a provision directing that any after-discovered assets payable to said minor child(ren) shall be paid to the trustee(s) of a trust established for their benefit under the terms of decedent's will. Decedent may, by the terms of his or her will, require the appointment of someone other than the surviving parent as said guardian of the estate(s) of his or her minor child(ren), if the surviving parent was not the decedent's spouse at the date of death.

This proposal was made some time ago, and the staff wonders whether the newly-enacted Uniform Transfers to Minors Act might not offer a better solution. The Act authorizes a person holding property of a minor to make an irrevocable transfer of the property to a custodian for the benefit of the minor. Probate Code § 3907.

Respectfully submitted,

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EXHIBIT 1

Outline

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[TO BE DRAFTED]

PART 9. DISTRIBUTION OF ESTATE
 CHAPTER 1. ORDER FOR DISTRIBUTION
Article 1. General Provisions

§ 8700. Petition for distribution

8700. (a) The personal representative or an heir or devisee[, or the transferee or successor in interest of an heir or devisee,] may petition the court for an order for distribution of the decedent's estate to the persons entitled.

(b) The petition shall be made at the time and in the manner prescribed in this chapter.

Comment. Section 8700 restates without substantive change a portion of the first sentence of former Section 1000 and of a portion of the first paragraph of former Section 1020, with the exception of the reference to distribution of "priorities." For the time and manner prescribed for making a petition, see Sections 8720 (petition for preliminary distribution) and 8740 (petition for final distribution). See also Sections 8910-8916 (time for closing estate).

Note. The bracketed language should be included in the definitions of heir and devisee so that repetition is not necessary.

§ 8701. Notice of hearing

8701. At least 10 days before the hearing of the petition notice of the hearing shall be served upon all of the following persons other than the petitioner:

(a) Persons who have filed a request for special notice pursuant to Section [1202].

(b) The personal representative.

(c) Devisees whose interest in the estate is affected by the petition.

(d) Heirs of the decedent entitled to succeed to any portion of the estate.

(e) The State Controller, if property is to be distributed to the state because there are no known heirs or if property is to be distributed to heirs or devisees whose whereabouts are unknown. A copy of the latest account filed with the court shall be served with the notice.

[(f) The State of California, if any portion of the estate is to escheat.]

Comment. Section 8701 restates without substantive change the third sentence of former Section 1000, the second paragraph of former Section 1020, and the second paragraph of former Section 1027. Subdivision (e) restates the third paragraph of former Section 1027 without substantive change, except that the time of notice is reduced from 30 days to 10. Notice must be delivered personally or sent by first-class mail, or in the case of a nonresident, by airmail. Sections 7150 and 7152. See also Section 7142 (clerk to set matters for hearing).

Note. The notice provisions (Section 1200.5, etc.) will be coordinated later.

CROSS-REFERENCES

Definition

Devisee § 34

§ 8702. Opposition to petition

8702. A [joint] personal representative or any interested person may oppose the petition.

Comment. Section 8702 restates without substantive change the last sentence of former Section 1000 and a portion of the first paragraph of former Section 1020.

CROSS-REFERENCES

Definition

Interested person § 48

Note. Perhaps the provision in this section for opposition by a joint personal representative should be replaced by a general provision in Section 7560 (joint personal representative) such as:

(d) Notwithstanding any other provision of this section, if there are two or more personal representatives, any one of them acting alone may oppose any petition made under this division.

§ 8703. Hearing and order

8703. (a) If the court determines that the requirements for distribution are satisfied, the court shall order distribution of the decedent's estate, or such portion as the court may direct, to the persons entitled.

(b) The order shall name the distributees and the share to which each is entitled.

Comment. Section 8703 restate portions of former Sections 1001 and 1021 without substantive change. For the requirements for distribution, see Sections 8722 (preliminary distribution) and 8740 (final distribution).

Note. Former Section 1055 (advancement and ademption transitional provision) needs to be preserved among the general transitional provisions.

§ 8704. Distribution to person other than heir or devisee

8704. (a) This section applies where distribution is to be made to any of the following persons:

(1) The transferee of an heir or devisee.

(2) Any person other than an heir or devisee pursuant to an agreement, request, or instructions of an heir or devisee or the attorney-in-fact of an heir or devisee.

(b) The court on its own motion, or on motion of any interested person or of the public administrator, may inquire into the circumstances surrounding the execution of, and the consideration for, the assignment, transfer, agreement, request, or instructions, and the amount of any fees, charges, or consideration paid or agreed to be paid by the heir or devisee.

(c) The court may refuse to order distribution except upon such terms as it deems just and equitable if the court finds either of the following:

(1) The fees, charges, or consideration paid or agreed to be paid by an heir or devisee is grossly unreasonable.

(2) The assignment, transfer, agreement, request, or instructions was obtained by duress, fraud, or undue influence.

(d) Notice of the hearing on a motion made pursuant to this section shall be served personally or by registered mail, as the court may direct, at least 10 days before the hearing upon the heir or devisee and upon the persons claiming under the heir or devisee.

Comment. Section 8704 restates former Section 1020.1 without substantive change.

Note. The notice provision is subject to further review.

§ 8705. Conclusiveness of order and distribution

8705. (a) A court order made pursuant to this chapter, when it becomes final, binds and concludes all interested persons.

(b) Distribution in accordance with the court order entitles the personal representative in this proceeding to a full discharge in relation to property included in the order.

(c) The distributees may demand, sue for, and recover their shares from the personal representative or any person in possession of the property.

Comment. Section 8705 restates former Section 1003 and portions of former Sections 1021 and 1054, without substantive change but eliminates the reference to a personal representative "in this state."

Note. This section will be reviewed in connection with general provisions on the conclusive effect of order.

CROSS-REFERENCES

Definition

Interested person § 48

Article 2. Preliminary Distribution

§ 8720. Time for petition

8720. A petition may be made for an order for distribution of all or a portion or a payment on account of the share of a decedent's estate to which an heir or devisee is entitled at any time after letters are issued to a general personal representative.

Comment. Section 8720 restates a portion of the first sentence of former Section 1000. Unlike the former provision, Section 8720 does not impose a limitation of time after which a petition may be made. If a petition is made before the time for making claims has expired, or if the estate is not otherwise in a condition to be finally closed and distributed, or where it otherwise appears proper, the court may require the distributee to give a bond. See Section 8722 (order for distribution).

§ 8721. Notice of hearing not required in certain cases

8721. If a petition is made under this article for an order for distribution to the surviving spouse and minor children of the wearing apparel of the family, the household furniture, or other property of the decedent exempt from enforcement of a money judgment, notice of the hearing need not be given.

Comment. Section 8721 is new.

§ 8722. Order for distribution

8722. (a) The court shall grant a petition made under this article if at the hearing all of the following appear:

(1) The estate is but little indebted.

(2) The distribution may be made without loss to creditors or injury to the estate or any interested person.

(b) The court may order distribution with or without bond, as the court may require. Any bond required by the court shall be given by the distributee to the personal representative. The bond shall be in such amount as the court fixes, conditioned on payment, if required by the court, of the proper share of the debts of the estate, not exceeding the amount distributed.

Comment. Section 8722 restates former Section 1001 without substantive change.

§ 8723. Distribution under Independent Administration of Estates Act

8723. Notwithstanding any other provision of this article:

(a) If authority is granted to administer the estate without court supervision under the Independent Administration of Estates Act, [citation], the personal representative may petition the court for authority [upon notice in the manner prescribed in Section 1200.5, or] ex parte, or upon such reduced notice as the court may prescribe, for an order for distribution.

(b) A petition pursuant to this section need not include an accounting for a distribution to a trustee if the trustee waives the accounting.

(c) The court shall make an order for distribution, if it appears, in addition to the other requirements of this article, that the time for making claims has expired and all uncontested claims have been paid or are sufficiently secured, but the estate is not in a condition to be closed.

Comment. Section 8723 restates former Section 1004 without substantive change except the court order for distribution is not limited to 50% of the net value of the estate.

Note. The notice provisions are subject to further review, including whether request for special notice should be included expressly.

§ 8724. Costs of proceeding

8724. The cost of a proceeding under this article shall be paid as follows:

(a) If the petition is made by the personal representative, by the estate.

(b) If the petition is made by a person other than the personal representative, by the petitioner or the estate in such proportions as the court in its discretion determines.

(c) Notwithstanding any other provision of this section, if a partition is made of property distributed pursuant to this article, the expenses of partition shall be borne in the manner prescribed in Section 8886.

Comment. Section 8724 supersedes former Section 1002. Under this section the allocation of costs where the personal representative is not the petitioner is left to the court. One factor in the exercise of the court's discretion could be whether the personal representative was negligent in failing to make prompt distribution, necessitating a petition under this chapter.

Note. Whether costs under this section are extraordinary services for purposes of fees is subject to later review.

Article 3. Final Distribution

§ 8740. Petition and order

8740. (a) A petition shall be made for, and the court shall make, a final order of distribution of the estate when the estate is in a condition to be settled.

(b) The court shall hear and determine and include in the order all questions arising under Section 6174 (ademption) or 6409 (advancement).

Comment. Subdivision (a) of Section 8740 restates portions of the first paragraphs of former Sections 1020 and 1027 without substantive change. Subdivision (b) restates a portion of former Section 1054 without substantive change. Unless there has been a waiver of accounts, the estate is not in a condition to be settled until final settlement of the accounts of the personal representative.

§ 8741. Accountability until final distribution

8741. From the time of a final order of distribution until actual distribution pursuant to the final order, the personal representative is accountable to the heirs and devisees entitled to distribution.

Comment. Section 8741 is new; it supersedes former Section 1020.5 (supplementary account).

CHAPTER 2. DETERMINATION OF PERSONS ENTITLED TO DISTRIBUTION

§ 8800. Petition

8800. At any time after letters are issued to a general personal representative and before a petition for final distribution is made, the personal representative, or any person claiming to be an heir or devisee of the decedent or otherwise entitled to distribution of a share of the estate, may file a petition setting forth the person's claim or reason and praying that the court determine who are entitled to distribution of the decedent's estate.

Comment. Section 8800 restates the first sentence of former Section 1080 without substantive change.

§ 8801. Notice of hearing

8801. Notice of hearing shall be given to the persons, for the period, and in the manner required by Section [1200.5]. In addition to the persons to whom notice is required to be given by Section [1200.5], notice of hearing shall be given to all devisees and to all known heirs of the decedent.

Comment. Section 8801 restates the second and third sentences of former Section 1080 without substantive change. See also Sections 7142 (clerk to set matters for hearing) and [1200.5] (time and manner of notice of hearing).

CROSS-REFERENCES

Definition

Devisee § 34

Note. Coordination of notice provisions will be done later.

§ 8802. Responsive pleading

8802. Any person may appear and file a written statement of the person's interest in the estate. No other pleadings are necessary and the allegations of each claimant shall be deemed denied by each of the other claimants to the extent the allegations conflict.

Comment. Section 8802 restates the fourth and fifth sentence of former Section 1080 without substantive change.

§ 8803. Attorney General as party

8803. The Attorney General shall be deemed to be a person entitled to distribution of the estate for purposes of [this chapter] if the estate involves or may involve any of the following:

(a) A charitable trust, other than a charitable trust with a designated trustee that may lawfully accept the trust.

(b) A devise for a charitable purpose without an identified devisee or beneficiary.

(c) An escheat to the State of California.

(d) The trustee does not accept the trust.

Comment. Subdivisions (a)-(c) of Section 8803 restates the last sentence of former Section 1080 without substantive change. Subdivision (d) is new.

CROSS-REFERENCES

Definition

Devise § 32

Note. Perhaps this section should be generalized.

§ 8804. Hearing

8804. The court shall hear the petition [and any objection to the petition that may have been presented]. The personal representative may file objections to the petition and participate in the proceedings as a party in order to assist the court.

Comment. Section 8804 restates without substantive change the second sentence and the first portion of the third sentence of former Section 1081, except that prior court order is not required for participation of the personal representative. The provisions of former Section 1081 for jury trial and special rules of evidence are not continued. The procedure applicable in a proceeding under this chapter is that applicable to civil actions generally. Section 7140 (general rules of practice govern).

§ 8805. Court order

8805. (a) The court shall make an order that determines who are the persons entitled to distribution of the decedent's estate and specifies their shares.

(b) When the court order becomes final it is conclusive as to the matters determined.

Comment. Subdivision (a) of Section 8805 restates the last portion of the second sentence of former Section 1081 without substantive change. Subdivision (b) restates former Section 1082 without substantive change.

Note. General provisions on the conclusive effect of orders have yet to be considered.

CHAPTER 3. DECEASED DISTRIBUTEE

§ 8820. "Deceased distributee" defined

8820. As used in this chapter, "deceased distributee" means an heir or devisee of the decedent who survives the decedent but dies before distribution of the share of the decedent's estate to which the heir or devisee is entitled.

Comment. Sections 8820-8224 supersede former Sections 1022 and 1023. They are intended to avoid the need to institute a full-fledged probate proceeding just to vest title in a beneficiary who died during the course of the first probate proceeding.

§ 8821. Distribution despite death of distributee

8821. (a) Except as provided in subdivision (b), distribution of a deceased distributee's share of the decedent's estate shall be made pursuant to this chapter, whether or not the deceased distributee is named in the order of distribution, with the same effect as though the distribution were made to the deceased distributee while living.

(b) Distribution of the share of a deceased distributee shall not be made pursuant to this chapter pursuant to a will that provides that a person is entitled to take under the will only if the person survives the date of distribution, and any purported distribution of the share of a deceased distributee pursuant to this chapter is void.

Comment. See Comment to Section 8820.

§ 8822. Manner of distribution

8822. The deceased distributee's share of the decedent's estate shall be distributed as follows:

(a) If no person has petitioned for appointment of a personal representative of the deceased distributee, to the heirs or devisees of the deceased distributee.

(b) If any person has petitioned for appointment of a personal representative of the deceased distributee, to the personal representative. Nothing in this section precludes the personal representative of the decedent from petitioning for appointment of a personal representative for the deceased distributee.

Comment. See Comment to Section 8820.

§ 8823. Effect of distribution

8823. Distribution of a deceased distributee's share of the decedent's estate pursuant to this chapter is, after the time for appeal has passed, conclusive as to the property so distributed to the same extent as a distribution made pursuant to court order in the estate of the deceased distributee would be.

Comment. See Comment to Section 8820.

§ 8824. Debts of deceased distributee

8824. If a distribution is made directly to the heirs or devisees of a deceased distributee pursuant to this chapter, the heirs or devisees are personally liable for the debts of the deceased distributee. The liability shall not exceed the value (at the date of death of the deceased distributee) of, less the amount of any liens and encumbrances on, the property distributed to the heirs or devisees.

Comment. See Comment to Section 8820.

CHAPTER 4. DEPOSIT WITH COUNTY TREASURER

§ 8840. When deposit with county treasurer authorized

8840. If property to be distributed consists of money, the personal representative may deposit the money in the name of the distributee with the county treasurer of the county in which the proceedings are pending in any of the following cases:

(a) The distributee resides out of, and has no agent in, this state.

(b) The distributee cannot be found or refuses to accept the distribution or to give a receipt therefor.

(c) The distributee is a minor or incompetent person who has no guardian or conservator to receive the distribution or person authorized to give a receipt therefor.

Comment. Section 8840 restates the first portion of former Section 1060 without substantive change.

Query. Does subdivision (a) make any sense? Also, existing law refers to distributee or "assignee". Is assignee different, and if so, what general provisions govern assignments? The staff is making inquiries of the county treasurers.

§ 8841. Sale of personal property and deposit of proceeds

8841. (a) The court shall order personal property sold in any of the following circumstances, if it appears to the court that sale is for the benefit of those interested:

(1) The property remains in the hands of the personal representative unclaimed after the final accounting.

(2) The distributee refuses to accept or give a receipt for the property.

(3) The distributee is a minor or incompetent person and has no legally qualified guardian or conservator of the estate.

(b) The court shall order personal property sold if the personal representative desires discharge and it appears to the court that no injury will result to those interested.

(c) The proceeds of sale, after deducting such expenses of sale as may be allowed by the court, shall be deposited in the county treasury.

Comment. Section 8841 restates former Section 1062 without substantive change, except that personal property need not be unclaimed for a year before it is sold pursuant to subdivision (a)(1) and the provision relating to proper vouchers is not continued.

Note. Treatment of interest on deposit is under review.

§ 8842. Receipt by county treasurer

8842. The county treasurer shall give a receipt for a deposit made pursuant to this chapter, and is liable on the official bond of the county treasurer for the money deposited. The receipt has the same force and effect as if executed by the distributee.

Comment. Section 8842 restates the last portions of former Sections 1060 and 1062 without substantive change, except that the provision for a receipt having the effect of a voucher is not continued.

§ 8843. Copy of decree of distribution

8843. Whenever money [or property] is deposited [or already on deposit] with the county treasurer, the personal representative shall give the county treasurer a certified copy of the order for distribution.

Comment. Section 8843 restates former Section 1060.1 without substantive change.

Query. To what does the bracketed language refer? Inquiries are being made of county treasurers.

§ 8844. Distribution to fiduciary instead of deposit in county treasury

8844. Notwithstanding Section 8840, if the distributee is a nonresident minor or nonresident incompetent person who has a guardian, conservator, or other fiduciary of the estate legally appointed under the law of another jurisdiction, the distribution of the person's share shall be made to the legally appointed fiduciary.

Comment. Section 8844 restates former Section 1061 without substantive change, except that the provision is made mandatory rather than permissive and the provision relating to a receipt with the effect of a voucher is not continued.

§ 8845. Claim of money or property deposited in county treasury

8845. (a) A person may claim money [or other personal property] on deposit in the county treasury by filing a petition with the court. The petition shall show the person's claim or right to the property or the proceeds of the property. The petition [shall be verified and] shall state the facts required to be stated in a petition filed under Section 1355 of the Code of Civil Procedure. Upon the filing of the petition, the same proceedings shall be had as are required by that section.

(b) At least [20] days before the hearing of the petition, a copy of the petition shall be served on the Attorney General. The Attorney General may answer the petition, at its discretion.

(c) If the court is satisfied of the claimant's right to the property claimed, the court shall make an order establishing the right. Upon presentation of a certified copy of the order, the county auditor shall draw a warrant on the county treasurer for the amount of money covered by the order. If the order covers personal property other than money, a certified copy of the order filed with the county treasurer shall serve as a sufficient warrant of authority for delivery of the personal property by the county treasurer to the claimant.

(d) A claim for money or other personal property distributed in the estate of a deceased person made subsequent to the deposit of the property in the State Treasury shall be governed by the provisions of Chapter 3 (commencing with Section 1335) of Title 10 of Part 3 of the Code of Civil Procedure.

Comment. Section 8845 restates subdivision (a) of former Section 1064 without substantive change, except that a court order is substituted for the certificate of right.

Note. The time for notice to A.G. will be reviewed in connection with the general Probate Code notice provisions, as will notice requirements for other persons.

CROSS-REFERENCES

Definition
Court § 30

§ 8846. Alternate procedure for claim of money or property

8846. (a) The following persons may, instead of filing the petition provided for in Section 8845, present a claim in form of an affidavit to the court:

(1) A claimant of money [or other personal property] deposited in the county treasury.

(2) A distributee of money who was a minor at the time of distribution [by a court of this state in the estate of a deceased person] who has since attained majority or had a general guardian appointed.

(b) The court may, upon the presentation of the claim, in its discretion, dispense with the filing of a petition and grant the claimant or distributee the certificate provided for in Section 8845.

Comment. Section 8846 restates subdivision (b) of former Section 1064 without substantive change.

Note. The procedures provided in Sections 8845 and 8846 are infrequently used, and only one may be necessary. This matter is being referred to the county treasurers for review.

CROSS-REFERENCES

Actions at chambers § 7123
Definition
Court § 30

CHAPTER 5. DISTRIBUTION TO STATE

§ 8860. Distribution to State of California

8860. (a) The court shall order distribution to the State of California property of the estate not [ordered] distributed to the known heirs or devisees.

(b) Insofar as practical, any real property or tangible personal property shall be converted to money before distribution to the state.

Comment. Section 8860 restates the last portion of the first paragraph of former Section 1027 without substantive change.

Note. The interrelation of this section with Sections 8840 and 8841 is under review, as well as the interrelation with escheat procedures.

§ 8861. Distribution to state in trust

8861. (a) Subject to subdivision (b), if the court orders distribution of any portion of the decedent's estate to the State of California, and the distributing clause contains words that otherwise create a trust in favor of unknown or unidentified persons as a class, the distribution shall vest in the state both legal and equitable title to the property so distributed.

(b) The right of the state pursuant to this section is subject to the right of claimants to appear and claim the estate or any portion, as provided in this chapter.

Comment. Section 8861 restates the fourth paragraph of former Section 1027 without substantive change.

§ 8862. Disposition of property distributed to state

8862. (a) If the court orders distribution to the State of California, the personal representative shall promptly:

(1) Deliver any money to the State Treasurer.

(2) Deliver any personal property other than money to the State Controller for deposit in the State Treasury.

(3) Cause a certified copy of the order to be recorded in the office of the county recorder of each county in which any real property is situated.

(b) At the time of making a delivery of property or recordation pursuant to this section, the personal representative shall deliver to the State Controller the recorded certified copy of the order for distribution.

Comment. Section 8862 restates without substantive change the fifth and sixth paragraphs of former Section 1027 and former Section 1028.

§ 8863. Claims against property distributed to state

8863. (a) Property distributed to the state shall be held by the State Treasurer for a period of five years from the date of the order for distribution, within which time any person may claim the property in the manner provided by Title 10 (commencing with Section 1300) of Part 3 of the Code of Civil Procedure.

(b) A person who does not claim the property within the time prescribed in this section is forever barred, and the property vests absolutely in the state.

Comment. Section 8863 restates the eighth and ninth paragraphs of former Section 1027 without substantive change.

§ 8864. No deposit in county treasury

8864. No deposit of property of an estate shall be made in the county treasury by a personal representative[, public or otherwise,] if the estate has previously been distributed to the State of California pursuant to this chapter, but the estate shall be transmitted forthwith to the State Treasurer or State Controller as provided in this chapter.

Comment. Section 8864 restates the seventh paragraph of former Section 1027 without substantive change.

Query. The need for this provision is subject to further review.

CHAPTER 6. PARTITION OR ALLOTMENT OF DISTRIBUTED PROPERTY

§ 8880. Right to partition or allotment

8880. If two or more heirs or devisees are entitled to the distribution of undivided interests in property of the [decedent] and have not agreed among themselves to a partition, allotment, or other division of the property, any of them, or the personal representative at the request of any of them, may petition the court to make such partition, allotment, or other division of the property as will be equitable and will avoid the distribution of undivided interests.

Comment. Section 8880 restates former Section 1100 without substantive change. Both real and personal property are subject to division under this chapter. See Section 62 ("property" defined).

CROSS-REFERENCES

Definitions

Devisee § 34

Property § 62

§ 8881. Petition

8881. (a) A petition pursuant to this chapter may be filed with the clerk at any time before the distribution of the affected property has been ordered.

(b) The petition shall:

(1) Describe the property.

(2) Give the names of the persons having or claiming undivided interests.

(3) State what the undivided interests are, so far as known to the petitioner.

Comment. Section 8881 restates the first and second sentences of former Section 1101 without substantive change, except that the petition may be filed before the time to make claims has expired.

§ 8882. Summons

8882. Upon the filing of a petition pursuant to this chapter the clerk shall cause notice of the petition to be served on the persons, other than the petitioner, who are entitled to distribution of the undivided interests and on the personal representative, directing them to respond to the petition within 30 days after service of the notice.

Comment. Section 8882 restates the third, fourth, and fifth sentences of former Section 1101 without substantive change, but substitutes a notice for the citation.

Note. The notice provisions will be coordinated later.

§ 8883. Parties and notice

8883. When all persons in interest have appeared or are in default, the clerk shall set the matter for hearing by the court. The persons in interest who have filed written appearances shall be considered the parties to the proceeding and each is entitled to five days' notice of the hearing. No one shall be considered as a plaintiff or as a defendant.

Comment. Section 8883 restates former Section 1102 without substantive change.

§ 8884. Disposition of property

8884. (a) The court shall take evidence and shall partition, allot, and divide the property so that each party receives property of a value proportionate to the party's interest in the whole.

(b) The court may direct the personal representative to sell property when, under the circumstances, sale would be more equitable than partition and when the property cannot conveniently be allotted to any one party. The sale shall be conducted in the same manner as other probate sales.

(c) Any two or more parties may agree to accept undivided interests.

Comment. Section 8884 restates former Section 1103 without substantive change.

§ 8885. Referees

8885. (a) The court, in its discretion, may appoint one or three referees to partition property capable of being partitioned, if requested to do so by a party. The number of referees appointed must conform to the request of at least one of the parties.

(b) The referees shall have the powers and perform the duties of referees in civil actions for partition, and the court shall have the same powers with respect to their report as in such actions.

Comment. Section 8885 restates former Section 1104 without substantive change.

§ 8886. Costs

8886. The expenses of partition shall be equitably apportioned by the court among the parties, but each party must pay the party's own attorney's fees. The amount charged to each party constitutes a lien on the property allotted to the party.

Comment. Section 8886 restates former Section 1105 without substantive change.

§ 8887. Effect of division

8887. (a) The partition, allotment, or other division made by the court shall control upon proceedings for distribution, unless modified for good cause upon reasonable notice.

(b) The proceedings leading to the partition, allotment, or other division may be reviewed upon appeal from the order for distribution.

Comment. Section 8887 restates former Section 1106 without substantive change.

PART 10. CLOSING ESTATE ADMINISTRATION

CHAPTER 1. TIME FOR CLOSING ESTATE

§ 8910. Time required for closing or status report

8910. The personal representative shall, not later than the following times, either petition for an order for final distribution of the estate or make a report of status of administration:

(a) In an estate not required to file a federal estate tax return, within one year after the date of issuance of letters.

(b) In an estate required to file a federal estate tax return, within 18 months after the date of issuance of letters.

Comment. Section 8910 restates the first sentence of former Section 1025.5 without substantive change.

CROSS-REFERENCES

Verification § ____

§ 8911. Report of status of administration

8911. If a report of status of administration is made pursuant to Section 8910:

(a) The report shall show the condition of the estate and the reasons why the estate cannot be distributed and closed.

(b) The report shall be filed with the court. Notice of hearing of the report shall be given in the manner provided in Section [1200.5].

(c) Upon the hearing of the report, the court may order either of the following:

(1) That the administration of the estate continue for the time and upon the terms and conditions that appear reasonable, if the court determines that continuation of administration is in the best interests of the estate or of interested persons.

(2) That the personal representative must petition for final distribution.

Comment. Section 8911 restates the second, third, and fourth sentences of former Section 1025.5 without substantive change.

CROSS-REFERENCES

Verification § _____

§ 8912. Failure to make petition or report

8912. (a) If the personal representative does not make a petition or report within the time required by this chapter or prescribed by the court, the court may, upon petition of any interested person or upon its own motion, cite the personal representative to appear before the court and show the condition of the estate and the reasons why the estate cannot be distributed and closed.

(b) Upon the hearing of the citation, the court may either order the administration of the estate to continue, as provided in Section 8911, or order the personal representative to petition for final distribution.

Comment. Section 8912 restates the second paragraph of former Section 1025.5 without substantive change.

Query. Should the court be able to remove the personal representative for an initial failure to file the report?

§ 8913. Continuation of administration to pay family allowance

8913. For purposes of this chapter, continuation of the administration of the estate in order to pay a family allowance is not in the best interests of the estate or interested persons unless the court determines both of the following:

(a) The family allowance is needed by the recipient to pay for necessities of life, including education so long as pursued to advantage.

(b) The needs of the recipient for continued family allowance outweigh the needs of the decedent's heirs or devisees whose interests would be adversely affected by continuing the administration of the estate for this purpose.

Comment. Section 8913 restates former Section 1026 without substantive change. Nothing in Section 8913 limits the power of the court to order a preliminary distribution of the estate.

Note. This provision was enacted in 1983 on Commission recommendation, which stated, "this new provision recognizes the strong public policy in favor of early closing of estates and at the same time gives the court authority to exercise its discretion to mitigate the serious hardships caused by terminating the family allowance in a case where the equities are in favor of the family allowance."

§ 8914. Failure of personal representative to comply with order

8914. Failure of the personal representative to comply with an order made under this chapter is ground for removal from office.

Comment. Section 8914 restates the third paragraph of former Section 1025.5 without substantive change.

§ 8915. Sanction for failure to timely close estate

8915. If the time taken for administration of the estate exceeds the time required by this chapter or prescribed by the court, the court may, upon the hearing for final distribution or for an allowance upon the commissions of the personal representative or upon the fees of the attorney, reduce the fees or commissions by an amount the court deems appropriate, regardless of whether the fees or commissions otherwise allowable under the provisions of Sections [901 and 910] would be reasonable compensation for the services rendered, if the court determines that the time taken was within the control of the personal representative or attorney and was not in the best interest of the estate or interested persons.

Comment. Section 8915 restates the fourth paragraph of former Section 1025.5 without substantive change.

§ 8916. Testamentary limitation of time for administration

8916. A limitation in a will of the time for administration of an estate is directory only and does not limit the power of the personal representative or the court to continue administration of the estate beyond the time limited if the continuation is necessary or convenient.

Comment. Section 8916 restates former Section 1025 without substantive change.

CHAPTER 2. DISCHARGE OF PERSONAL REPRESENTATIVE

§ 8930. Receipt for distributed property

8930. (a) The personal representative shall obtain the receipt of the distributee for all property of the estate distributed by the personal representative. In the case of real property, recordation of the court order for distribution is deemed to be a receipt for the property.

(b) The personal representative shall file receipts for all property of the estates with the petition for discharge. In the case of real property, the petition shall include information that identifies the record location of the court order for distribution.

Comment. Section 8930 is new. Failure of the personal representative to record the court order for distribution of real property does not affect title of the distributee.

§ 8931. Decree of discharge

8931. When the personal representative has complied with the terms of the order for distribution and has filed the appropriate receipts, the court shall, upon petition therefor, make an order discharging the personal representative from all liability incurred thereafter.

Comment. Section 8931 restates former Section 1066. The provision for production of vouchers is not continued. The estate is fully administered for purposes of this section when all sums of money due from the personal representative have been paid, all property of the estate has been distributed to the persons entitled pursuant to court order, and all the acts lawfully required of the personal representative have been performed.

§ 8932. Discharge without administration

8932. (a) At any time after appointment of a personal representative and whether or not letters have been issued, the personal representative may sign and file a petition setting forth the fact that it appears there is no property of any kind belonging to the estate and subject to administration, and praying for the termination of further proceedings and for discharge of the personal representative.

(b) If it appears to the satisfaction of the court upon the hearing that the facts stated in the petition are true, the court shall make an order terminating the proceeding and discharging the personal representative.

Comment. Section 8932 restates of former Section 1068 without substantive change. Proceedings may be taken under this section without the return of an inventory provided for by [Chapter 9 (commencing with Section 600) of Division 3]. See subdivision (a) ("at any time").

Note. Notice of hearing requirements are being reviewed in connection with this section. It would seem that the same notice provisions should apply as for a petition for final distribution. The extent to which another person should be able to act for the personal representative will be governed by general provisions.

CROSS-REFERENCES

Verification § ____

§ 8933. Administration after discharge

8933. If subsequent administration of an estate is necessary after the personal representative has been discharged because other property [of the estate] is discovered or because it becomes necessary or proper for any cause:

(a) The court shall appoint as personal representative the person entitled to appointment in the same order and manner as is directed in relation to original appointment, except that the person who served as personal representative at the time of the order of discharge has priority.

(b) If property has been distributed to the State of California, a copy of any petition for subsequent appointment of a personal representative and the notice of hearing shall be served upon the State Controller at the time and in the manner prescribed by Section [1200].

Comment. Section 8933 restates former Section 1067 without substantive change.

Note. Notice requirement is being reviewed. Status of state and county treasurers is being reviewed.

[CHAPTER 3. STATUTES OF LIMITATION/EFFECT OF DISCHARGE]

[TO BE DRAFTED]

EXHIBIT 2

0013L

Outline

CHAPTER 5. RULES OF CONSTRUCTION OF WILLS

Article 5. Marital Deduction Gifts

- § 6190. Definitions
- § 6191. Application of chapter
- § 6192. Marital deduction gifts and charitable remainder unitrusts and annuity trusts
- § 6193. Satisfaction of a pecuniary devise
- § 6194. Maximum marital deduction for will dated September 13, 1981, or earlier
- § 6195. Marital deduction gift in trust
- § 6196. Survivorship requirement for marital deduction gift
- § 6197. No inference as to prior law
- § 6198. Severability clause
- § 6199. Bona fide purchaser

CHAPTER 5. RULES OF CONSTRUCTION OF WILLS

Article 5. Marital Deduction Gifts§ 6190. Definitions

6190. As used in this article:

(a) "Pecuniary devise" means a gift in a will that either is expressly stated as a fixed dollar amount or is a gift of a dollar amount determinable by the provisions of the will.

(b) "Marital deduction" means the federal estate tax deduction allowed for transfers under Section 2056 of the Internal Revenue Code.

(c) "Maximum marital deduction" means the maximum amount qualifying for the marital deduction.

(d) "Marital deduction gift" means a gift intended to qualify for the marital deduction.

(e) "Fiduciary" means personal representative, trustee, guardian, or conservator, or any other legal representative.

(f) "Internal Revenue Code" means the United States Internal Revenue Code of 1954, as amended from time to time. Each reference to a section of the Internal Revenue Code refers as well to any subsequent provisions of law enacted in its place.

(g) "Gift" refers to all devises made in a will.

Comment. Section 6190 continues the substance of former Section 1030. See also Sections 32 ("devise" defined), 88 ("will" defined), 58.5 ("personal representative" defined), 10 (singular includes plural).

§ 6191. Application of chapter

6191. (a) This article applies to any distribution made after January 1, 1983, whether the testator died before, on, or after that date. However, this article does not apply to any will the terms of which expressly or by necessary implication make this article inapplicable.

(b) By an appropriate statement made in the testator's will, a testator may incorporate by reference the terms of this article, or any of its sections, as it may exist at the time the testator signs

the will. The effect of incorporating this article or any of its sections in a will is to make the incorporated section a part of the will as though the language of the incorporated section was set forth verbatim in the will. Unless a will incorporating any section of this article expressly provides otherwise, the will automatically incorporates any of the section's amendments.

Comment. Section 6191 continues the substance of former Section 1031. This article applies to trusts as well as wills. See Section 503 (law applicable to marital deduction gifts in trust).

§ 6192. Marital deduction gifts and charitable remainder unitrusts and annuity trusts

6192. (a) If a will contains a marital deduction gift, the provisions of the will, including any power, duty, or discretionary authority given to a fiduciary, shall be construed to comply with the marital deduction provisions of the Internal Revenue Code and the regulations thereunder in order to conform to the intent of the gift. Whether the will contains a marital deduction gift depends upon the intention of the testator at the time the will is executed. If the testator has adequately evidenced an intention to make a marital deduction gift, the fiduciary shall not take any action or have any power that may impair the deduction. This chapter does not apply to a trust that qualifies for the marital deduction under Section 20.2056(e)-2(b) of the Code of Federal Regulations (the so-called "estate trust"). This chapter neither requires nor prohibits a fiduciary making the election referred to in Section 2056(b)(7) of the Internal Revenue Code.

(b) If a will indicates the testator's intention at the time the will is executed to comply with the Internal Revenue Code requirements for a charitable remainder unitrust or a charitable remainder annuity trust as each is defined in Section 664 of the Internal Revenue Code, the provisions of the will, including any power, duty, or discretionary authority given to a fiduciary, shall be construed to comply with the charitable deduction provisions of Section 2055 of the Internal Revenue Code and the charitable remainder trust provisions of

Section 664 of the Internal Revenue Code in order to conform to that intent. In no event shall the fiduciary take any action or have any power that may impair the charitable deduction. After the death of the testator, the provisions of the will may be augmented in any manner consistent with subdivision (e) of Section 2055 of the Internal Revenue Code upon a petition provided for in Section 1130.

Comment. Section 6192 continues the substance of former Section 1032.

§ 6193. Satisfaction of a pecuniary devise

6193. (a) If a will authorizes the fiduciary to satisfy a pecuniary devise wholly or partly by distribution of property other than money, an asset selected for that purpose shall be valued at its fair market value on the date of distribution, unless the will expressly provides otherwise. If the will permits the fiduciary to value an asset selected for distribution as of a date other than the date of distribution, then, unless the will expressly provides otherwise, the assets selected by the fiduciary for that purpose shall have an aggregate fair market value on the date or dates of distribution which, when added to any cash distributed, will amount to no less than the amount of the pecuniary devise as stated in, or determined by, the will.

(b) A marital deduction gift shall be satisfied with only assets that qualify for the marital deduction.

Comment. Section 6193 continues the substance of former Section 1033.

§ 6194. Maximum marital deduction for will dated September 13, 1981, or earlier

6194. If a will [signed] on or before September 13, 1981, indicates the testator's intention to make a gift that will provide the testator's estate with the maximum marital deduction, then the will passes to the recipient an amount equal to the maximum marital deduction that would have been allowed as of the date of the testator's death for federal estate tax purposes under federal law as

it existed before August 13, 1981, (before the applicability of the Economic Recovery Tax Act of 1981) adjusted under all of the following, if applicable:

(a) The provisions of Section 2056(c)(1)(B) and (C) of the Internal Revenue Code as were in effect immediately before the Economic Recovery Tax Act of 1981, if required.

(b) So that the testator's gross estate does not include any property by reason of Section 2602(c)(5)(A) of the Internal Revenue Code.

(c) To reduce the amount passing under the gift by the final federal estate tax values of any other asset (1) passing from the testator to the testator's surviving spouse under the testator's will or outside of the will and (2) that qualifies for the marital deduction.

Comment. Section 6194 continues the substance of former Section 1034.

§ 6195. Marital deduction gift in trust

6195. If a will indicates the testator's intention to make a marital deduction gift in trust, in addition to the other provisions of this article, each of the following provisions also apply to the trust:

(a) The only income beneficiary of a marital deduction trust shall be the testator's surviving spouse.

(b) The income beneficiary shall be entitled to all of the trust income until the trust terminates.

(c) The trust income shall be payable to the income beneficiary not less frequently than annually.

(d) The income beneficiary shall have the right to require that the trustee of the trust make any unproductive property productive or to convert it into productive property within a reasonable time.

(e) Except in the case of a qualified terminable interest property resulting from an election pursuant to Section 2056(b)(7) of the Internal Revenue Code, upon termination of the trust, all of the remaining trust assets, including accrued or undistributed income,

shall pass either to the income beneficiary or pursuant to the exercise of a general power of appointment granted to the income beneficiary in favor of the income beneficiary's estate or to any other person or entity, in trust or outright. The general power of appointment shall be exercisable by the income beneficiary alone and in all events and the income beneficiary, or a fiduciary acting in behalf of the income beneficiary if the income beneficiary is then a minor or incompetent, may exercise the power in a will or an instrument other than a will unless the instrument creating the power specifically directs otherwise.

Comment. Section 6195 continues the substance of former Section 1035.

§ 6196. Survivorship requirement for marital deduction gift

6196. If a will contains a marital deduction gift, whether outright or in trust and whether or not there is a specific reference to this article, any survivorship requirement expressed in the will in excess of six months shall not apply to the property passing under a marital deduction, but shall be limited to a six-month period beginning with the testator's death.

Comment. Section 6196 continues the substance of former Section 1036.

§ 6197. No inference as to prior law

6197. No inference shall be drawn from the enactment of this article or of the previously existing provisions the substance of which this article continues as to the law as it might exist prior to the enactment of this article or of the previously existing provisions the substance of which this article continues.

Comment. Section 6197 continues the substance of former Section 1037.

§ 6198. Severability clause

6198. If any provision of this article or application thereof to any person or circumstances is held invalid, that invalidity shall not

affect other provisions or applications of the article that can be given effect without the invalidated provision or application, and to this end the provisions of this article are declared to be severable.

Comment. Section 6198 continues the substance of former Section 1038.

§ 6199. Bona fide purchaser

6189. The failure to comply with the provisions of this article shall not invalidate the interest of a good faith purchaser, lessee, or encumbracer for value in real property acquired without knowledge of an alleged violation of this article.

Comment. Section 6199 continues the substance of former Section 1039.

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January 14, 1986

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

Attn: Edwin K. Marzec

Re: Letter, California Law Revision Commission to
Honorable George Deukmejian, Governor of
California and The Legislature of California,
December 5, 1985

Dear Mr. Marzec:

There is a feeling oft expressed in the BIG WORLD out here that people who draft and enact legislation may not be in touch with reality or are from some other planet. Your Commission's recommendation concerning Civil Code section 4800.1 and 4800.2, in my opinion, is substantiating evidence of the underlying truth of that feeling.

Nonetheless, it is comforting to be told that constitutional issues can be avoided by passing legislation inferring there are none. And, that where a dispute exists about the terms of an oral agreement, I can expect the parties to "reconfirm" their oral agreement in writing before the litigation is commenced.

Frankly, I am unable to believe the recommendation of the Commission and the materials accompanying it are not a joke.

Very truly yours,



Robert J. Fulton
Certified Family Law Specialist

RJF:R3/au

cc: Lowell Sucherman, Esq.
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EXHIBIT 3

Probate Code § 1000 (repealed)

Comment. The introductory portion of the first half of the first sentence of former Section 1000 is superseded by Section 8720 (time for petition). The remainder of the first half of the first sentence is restated without substantive change in Sections 8700 (petition for distribution) and 8720 (time for petition). [The second half of the first sentence will be disposed of later.]

The second sentence is restated without substantive change in Section 7142 (clerk to set matters for hearing). The third sentence is restated without substantive change in Section 8701 (notice of hearing). The fourth sentence is restated without substantive change in Sections 7150 (service) and 7152 (mailing). The last sentence is restated without substantive change in Section 8702 (opposition to petition).

Probate Code § 1001 (repealed)

Comment. Former Section 1001 is restated without substantive change in Sections 8703(a) (hearing and order) and 8722 (order for distribution).

Probate Code § 1002 (repealed)

Comment. Former Section 1002 is superseded by Section 8724 (costs of proceeding).

Probate Code § 1003 (repealed)

Comment. Former Section 1003 is restated without substantive change in Section 8705(a)-(b) (conclusiveness of order and distribution).

Probate Code § 1004 (repealed)

Comment. Former Section 1004 is restated without substantive change in Sections 8723 (distribution under Independent Administration of Estates Act), 7142 (clerk to set matters for hearing), and 8722 (order for distribution), with the addition of authority for distribution of greater than 50% of the net value of the estate.

Probate Code § 1020 (repealed)

Comment. The first sentence of former Section 1020 is restated without substantive change in Sections 8740 (petition and order) and 8700 (petition for distribution). The second sentence is restated without substantive change in Section 8702 (opposition to petition). The third sentence is restated without substantive change in Section 8701 (notice of hearing). The fourth sentence is restated without substantive change in Sections 7150 (service) and 7152 (mailing).

Probate Code § 1020.1 (repealed)

Comment. Former Section 1020.1 is restated without substantive change in Section 8704 (distribution to person other than heir or devisee).

Probate Code § 1020.5 (repealed)

Comment. Former Section 1020.5 is not continued; it is superseded by Section 8741 (accountability until final distribution).

Probate Code § 1021 (repealed)

Comment. Former Section 1021 is restated without substantive change in Sections 8703(b) (hearing and order) and 8705(a) and (c) (conclusiveness of order and distribution).

Probate Code § 1022 (repealed)

Comment. Former Section 1022 is superseded by Sections 8820-8824 (predeceased distributee).

Probate Code § 1023 (repealed)

Comment. Former Section 1023 is superseded by Sections 8820-8824 (predeceased distributee).

Probate Code § 1024 (repealed)

Comment. Former Section 1024 is not continued, because it is unnecessary. Payment of taxes is an obligation of the personal representative (Section _____), and the estate may not be distributed unless obligations of the estate are accommodated (Section 8722 (order for distribution)).

Probate Code § 1025 (repealed)

Comment. Former Section 1025 is restated without substantive change in Section 8916 (testamentary limitation of time for administration).

Probate Code § 1025.5 (repealed)

Comment. The first sentence of the first paragraph of former Section 1025.5 is restated without substantive change in Sections 8910 (time required for closing or status report), _____ (verification), and 8911 (report of status of administration). The substance of the second, third, and fourth sentences is restated without substantive change in Section 8911 (report of status of administration).

The second paragraph is restated without substantive change in Section 8912 (failure to make petition or report). The third paragraph is restated without substantive change in Section 8914 (failure of personal representative to comply with order). The fourth paragraph is restated without substantive change in Section 8915 (sanction for failure to timely close estate).

Probate Code § 1026 (repealed)

Comment. Former Section 1026 is continued without substantive change in Section 8913 (continuation of administration to pay family allowance).

Probate Code § 1027 (repealed)

Comment. The first sentence of former Section 1027 is restated without substantive change in Section 8740 (petition and order). The remainder of the first paragraph is restated without substantive change in Section 8860 (distribution to State of California).

The first sentence of the second paragraph is restated in Section 8701 (notice of hearing). The second sentence is restated without substantive change in Sections 7150 (service) and 7152 (mailing).

The third paragraph is restated without substantive change in Section 8701, except that the provision for 30 days notice is not continued. The fourth paragraph is restated without substantive change in Section 8861 (distribution to state in trust). The fifth and sixth paragraphs are restated without substantive change in Section 8862 (disposition of property distributed to state). The seventh paragraph is restated without substantive change in Section 8864 (no deposit in county treasury). The eighth and ninth paragraphs are restated without substantive change in Section 8863 (claims against property distributed to state).

Probate Code § 1028 (repealed)

Comment. Former Section 1028 is restated without substantive change in Section 8862 (disposition of property distributed to state).

Probate Code § 1030 (repealed)

Comment. Former Section 1030 is continued without substantive change in Section 6190 (definitions).

Probate Code § 1031 (repealed)

Comment. Former Section 1031 is continued without substantive change in Section 6191 (application of chapter).

Probate Code § 1032 (repealed)

Comment. Former Section 1032 is continued without substantive change in Section 6192 (marital deduction gifts and charitable remainder unitrusts and annuity trusts).

Probate Code § 1033 (repealed)

Comment. Former Section 1033 is continued without substantive change in Section 6193 (satisfaction of a pecuniary devise).

Probate Code § 1034 (repealed)

Comment. Former Section 1034 is continued without substantive change in Section 6194 (maximum marital deduction for will dated September 13, 1981, or earlier).

Probate Code § 1035 (repealed)

Comment. Former Section 1035 is continued without substantive change in Section 6195 (marital deduction gift in trust).

Probate Code § 1036 (repealed)

Comment. Former Section 1036 is continued without substantive change in Section 6196 (survivorship requirement for marital deduction gift).

Probate Code § 1037 (repealed)

Comment. Former Section 1037 is continued without substantive change in Section 6197 (no inference as to prior law).

Probate Code § 1038 (repealed)

Comment. Former Section 1038 is continued without substantive change in Section 6198 (severability clause).

Probate Code § 1039 (repealed)

Comment. Former Section 1039 is continued without substantive change in Section 6199 (bona fide purchaser).

Probate Code § 1040 (repealed)

Comment. [To be drafted.]

Probate Code § 1041 (repealed)

Comment. [To be drafted.]

Probate Code § 1042 (repealed)

Comment. [To be drafted.]

Probate Code § 1043 (repealed)

Comment. [To be drafted.]

Probate Code § 1043a (repealed)

Comment. [To be drafted.]

Probate Code § 1054 (repealed)

Comment. Former Section 1054 is restated without substantive change in Sections 8740 (petition and order) and 8705 (conclusiveness of order and distribution).

Probate Code § 1055 (repealed)

Comment. [To be drafted. This provision should go among the transitional provisions.]

Probate Code § 1060 (repealed)

Comment. The first portion of former Section 1060 is restated without substantive change in Section 8840 (when deposit with county treasurer authorized). The last portion is restated without substantive change in Section 8842 (receipt by county treasurer), except that the provision for a receipt having the effect of a voucher is not continued.

Probate Code § 1060.1 (repealed)

Comment. Former Section 1060.1 is restated without substantive change in Section 8843 (copy of decree of distribution).

Probate Code § 1061 (repealed)

Comment. Former Section 1061 is restated without substantive change in Section 8844 (distribution to fiduciary instead of deposit in county treasury), except that the provision relating to a receipt with the effect of a voucher is not continued.

Probate Code § 1062 (repealed)

Comment. Former Section 1062 is restated without substantive change in Sections 8841 (sale of personal property and deposit of proceeds) and 8842 (receipt by county treasurer), except that personal property need not be unclaimed for a year before it is sold and the provision for a receipt having the effect of a voucher is not continued.

Probate Code § 1063 (repealed)

Comment. Former Section 1063 is not continued.

Probate Code § 1064 (repealed)

Comment. Subdivision (a) of former Section 1064 is restated without substantive change in Section 8845 (claim of money or property deposited in county treasury). Subdivision (b) is restated without substantive change in Sections 8846 (alternate procedure for claim of money or property) and 7123 (actions at chambers).

Probate Code § 1065 (repealed)

Comment. Former Section 1065 is not continued. For the receipt of the distributee, see Section 8930 (receipt for distributed property).

Probate Code § 1066 (repealed)

Comment. Former Section 1066 is restated without substantive change in Section 8931 (decree of discharge), except that the provision for production of vouchers is not continued.

Probate Code § 1067 (repealed)

Comment. Former Section 1067 is restated without substantive change in Section 8933 (administration after discharge).

Probate Code § 1068 (repealed)

Comment. Former Section 1068 is restated without substantive change in Sections 8932 (discharge without administration), ____ (verification), and 7142 (clerk to set matters for hearing).

Probate Code § 1080 (repealed)

Comment. The first sentence of former Section 1080 is restated without substantive change in Section 8800 (petition). The second and third sentences are superseded by Section 8801 (notice of hearing). The fourth and fifth sentences are restated without substantive change in Section 8802 (responsive pleading). The last sentence is restated without substantive change in Section 8803 (Attorney General as party).

Probate Code § 1081 (repealed)

Comment. The first sentence of the first paragraph of former Section 1081, providing for jury trial, is not continued. The second and third sentences are restated without substantive change in Sections 8804 (hearing) and 8805 (court order). The second paragraph is superseded by Section 7140 (general rules of practice govern).

Probate Code § 1082 (repealed)

Comment. Former Section 1082 is restated without substantive change in Section 8805(b) (court order).

Probate Code § 1100 (repealed)

Comment. Former Section 1100 is restated without substantive change in Sections 8880 (right to partition or allotment) and 62 ("property" defined).

Probate Code § 1101 (repealed)

Comment. The first and second sentences of Section 1101 are restated without substantive change in Section 8881 (petition). The third, fourth, and fifth sentences are restated without substantive change in Section 8882 (summons), with the substitution of a notice for a citation.

Probate Code § 1102 (repealed)

Comment. Former Section 1102 is restated without substantive change in Section 8883 (parties and notice).

Probate Code § 1103 (repealed)

Comment. Former Section 1103 is restated without substantive change in Section 8884 (disposition of property).

Probate Code § 1104 (repealed)

Comment. Former Section 1104 is restated without substantive change in Section 8885 (referees).

Probate Code § 1105 (repealed)

Comment. Former Section 1105 is restated without substantive change in Section 8886 (costs).

Probate Code § 1106 (repealed)

Comment. Former Section 1106 is restated without substantive change in Section 8887 (effect of division).