

11/25/85

0374a

First Supplement to Memorandum 85-103

Subject: Study L-1030 - Probate Code (Disposition of Small Estate Without Administration)

The Executive Committee of the Estate Planning, Trust and Probate Law Section makes the following comment concerning Memorandum 85-103:

2. Memorandum 85-103. Please see attached letter of November 15, 1985 from H. Neal Wells, III. Regarding Mr. Wells' options under Section 13100 the Executive Committee recommends that his first option be followed. Regarding his comments to section 13503 his comment embodies what we understand the section to mean. Apparently, there must have been a misunderstanding in the redrafting of the new section.

A copy of the letter of November 15, 1985, from H. Neal Wells, III, is attached as Exhibit 1. The comments contained in that letter are discussed below. The Comments are directed to the draft legislation that is attached to Memorandum 85-103.

The references to pages of the draft statute in the following discussion are references to the draft statute attached to Memorandum 85-103. The draft statute follows the preliminary portion of the Tentative Recommendation which explains the changes in existing law that would be made by the proposed legislation.

We have requested that the office of the Legislative Counsel put the staff draft in proper form for introduction in 1986. If the Commission approves introduction of the proposed legislation in 1986, we will revise the draft sent to us by the office of the Legislative Counsel to incorporate any changes made by the Commission. We anticipate that the office of the Legislative Counsel will make a few nonsubstantive changes in the draft and we plan to include those in our recommended legislation.

Section 13050. Exclusions in determining property or estate of decedent or its value (pages 6-7 of draft statute)

The 1985 legislative session (Assembly Bill 2409 - Chapter 1467 of the 1985 Statutes) expanded the provision relating to transfers by affidavit of manufactured homes, mobilehomes, commercial coaches, and truck campers (Health and Safety Code Section 18102) to include "floating homes."

A floating home is one that satisfies all of the following requirements:

- (1) It is subject to real property taxation pursuant to Section 229 of the Revenue and Taxation Code.
- (2) It is designed and built to be used, or is modified to be used, as a stationary waterborne residential building.
- (3) It has no mode of power of its own.
- (4) It is dependent for utilities upon a continuous utility linkage to a source originating on shore.
- (5) It has a permanent continuous hookup to a shoreside sewage system.

For a technical amendment to Section 18102 of the Health and Safety Code, see Exhibit 1 to Memorandum 85-106.

To conform Section 13050 to the 1985 amendment to Section 18102 of the Health and Safety Code, subdivision (b)(3) of Section 13050 should be revised to read:

- (3) Any manufactured home, mobilehome, commercial coach, ~~or~~ truck camper, or floating home registered under Part 2 (commencing with Section 18000) of Division 13 of the Health and Safety Code.

Section 13100. Transfer of personal property without probate (page 9 of draft statute)

The letter from H. Neal Wells III contains the following comment concerning this section:

Section 13100: This Section would preclude the use of an affidavit for collection of personal property whenever the gross value of the decedent's real property exceeds \$10,000. Thus, if the decedent's real and personal property aggregate \$60,000 or less, and the real property exceeds \$10,000, the affidavit may not be used even though the real property has been transferred pursuant to Section 13151. To avoid a probate of the personal property in this instance, the Commission may wish to consider permitting personal property to be transferred by affidavit

whenever the aggregate of the decedent's property is \$60,000 or less without regard to the value of the real property included in the \$60,000. This would entail the deletion of the words "and the gross value of the decedent's real property, if any, in this state does not exceed ten thousand dollars (\$10,000)" from Section 13100.

The letter outlines two other alternatives that the writer of the letter and the Executive Committee do not favor.

The staff believes that the letter identifies a significant problem in the staff draft and the staff believes that the solution advocated in the letter (set out above) is a solution to the problem. We recommend that the Commission adopt this solution and delete the words "and the gross value of the decedent's real property, if any, in this state does not exceed ten thousand dollars (\$10,000)" from Section 13100.

Also, as suggested by the letter, if this suggestion is adopted by the Commission, a conforming change should be made by deleting subdivision (f) from Section 13101.

Section 13101. Furnishing of affidavit (pages 11-12 of draft statute)

The letter suggests in substance that paragraphs (k) and (1) of Section 13101 be revised to read:

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

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

The staff has no problem with these suggested revisions and recommends that they be adopted by the Commission.

Section 13102. Presenting decedent's evidence of ownership (page 13 of draft statute)

The letter expresses concern about the requirement of this section:

Section 13102: . . . However, expanding the instances in which evidences of ownership must be presented creates problems. For example, the holder of a promissory note payable to a decedent would not want to present the original unpaid note to

its maker until the note has been paid in full. Instead, the holder would prefer to give a copy of the note, because, unlike a stock certificate, the note is difficult to replace if lost in the mail, or misplaced or damaged by the maker. Also, unlike a stock certificate or registration, a new document of title (e.g., a new promissory note) is not to be reissued for the existing note and nothing is to be endorsed upon it.

Use of a bank passbook as an example in the Section may also create problems because many institutions no longer consider the passbook to be a document of title. Instead, the institutions rely primarily upon statements issued to customers.

The letter makes a good point. We propose that the section be revised to read:

13102. (a) If the decedent had evidence of ownership of the property described in the affidavit or declaration and the holder of the property would have had the right to require presentation of the evidence of ownership before the duty of the holder to pay, transfer, or deliver the property to the decedent would have arisen, the evidence of ownership, if available, shall be presented with the affidavit or declaration to the holder of the decedent's property.

(b) If the evidence of ownership is not presented to the holder pursuant to subdivision (a), the holder may require, as a condition for the payment, delivery, or transfer of the property, that the person presenting the affidavit or declaration provide the holder with a bond or undertaking in a reasonable amount determined by the holder to be sufficient to indemnify the holder against all liability, claims, demands, loss, damages, costs, and expenses that the holder may incur or suffer by reason of the payment, delivery, or transfer of the property. Nothing in this subdivision precludes the holder and the person presenting the affidavit or declaration from dispensing with the requirement that a bond or undertaking be provided and instead entering into an agreement satisfactory to the holder concerning the duty of the person presenting the affidavit or declaration to indemnify the holder.

Subdivision (b) above is revised to reflect the substance of a revision suggested by the office of the Legislative Counsel to permit the parties to make an agreement concerning the extent of the liability of the person furnishing the affidavit or declaration. The office of the Legislative Counsel is drafting the precise language along the lines set out above and we will substitute the Legislative Counsel language for the language set out above if it is an improvement on the language set out above.

Section 13103. Inventory and appraisal of real property required
(page 14 of draft statute)

The letter contains the following comment concerning this section:

Section 13103: This Section invisions probate court appointment of the probate referee who is to appraise the real property which is the subject of the inventory. It may be preferable to permit the affiant or declarant to select any probate referee in the county. This would save time and attorney's fees otherwise expended in obtaining the court appointment of the referee, permit the selection of referees who are prompt in the performance of their services, and save the court the administrative burden of making numerous appointments for property with little value as to which the court will have no other involvement.

This is a good point. Section 13103 imposes a new requirement--the requirement that any real property in the estate of the decedent be appraised by a probate referee. Under existing law, there is no such requirement. The suggestion made in the letter would make this new requirement less burdensome and costly to the affiant or declarant. Accordingly, the staff recommends that the following be substituted for the second sentence of Section 13103:

The form, content, and manner of making the inventory and appraisal of the real property shall be as set forth in Chapter 9 (commencing with Section 600) of Division 3. The inventory and appraisal shall be made by a probate referee selected by the affiant or declarant from those probate referees appointed by the Controller under Section 1305 to appraise property in the county where the real property is located.

Section 13105. Transfer of property to successor (page 17 of draft statute)

In response to a suggestion in the letter, the staff recommends that the introductory portion of subdivision (b) be revised to read:

(b) If the holder of the decedent's property refuses to pay, deliver, or transfer any personal property or evidence thereof within a reasonable time, the person or persons entitled to the property may recover . . .

This addition makes clear how fast a person holding property of the decedent must respond to a demand for payment or delivery.

Section 13106. Protection of transferor from liability (page 18 of draft statute)

The letter makes the following comment concerning Section 13106:

Section 13106: If a person who is holding property of the decedent is to be subject to suit for refusing to transfer property (Section 13105), then the person should be able to rely upon any statement in the affidavit or declaration rather than merely being freed from a duty to inquire into the truth thereof. This is particularly true of large institutions or corporations wherein an employee who is not dealing with the transfer may have knowledge that is contrary to the statements made in the declaration. The Committee suggests substituting "and may rely upon" for "or to inquire into the truth of" in the last sentence of the Section.

If the Commission believes that this suggestion is a good suggestion, the staff recommends that the last sentence of Section 13106 be revised to read:

The holder has no duty to see to the application of the property or the evidence thereof and may rely upon any statement in the affidavit or declaration.

We would include in the Comment to Section 13106 a statement that the last sentence does not protect the holder if the holder is a party to a fraud.

Section 13111. Restitution if estate proceeding commenced (page 21 of draft statute)

The letter contains the following comment concerning Section 13111:

Section 13111: The phrase at the end of the first sentence "together with the net income the person received from the property" may refer either to property which is restored to the estate or to both such property and property as to which its fair value is being restored. The Section is ambiguous in this regard. Also, the Section is silent as to whether a person who disposes of property is liable for the return of the income on the proceeds of the property during the period from the date of disposition to the date of restoration. (e.g. if the person receives real property 40 days after death, sells it 30 days later, and puts the proceeds into a certificate of deposit for a year, after which demand is made for restoration to the estate, how much is to be restored, the sales price of the property or the sales price plus the interest on the certificate?)

In view of this comment, the staff suggests the Section 13111 be revised to read as follows:

13111. (a) Subject to Section 13112, if proceedings for the administration of the decedent's estate are commenced, each person to whom payment, delivery, or transfer of the decedent's property is made under this chapter is liable for:

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

(2) The restitution to the estate of the fair market value of the property as of the date of disposition of the property if the person no longer has the property, together with (A) the net income the person received from the property and (B) interest from the date of disposition at the rate payable on a money judgment on the fair market value of the property as of the date of disposition.

(b) An action to enforce the liability under this section is forever barred five years after the affidavit or declaration was presented under this chapter to the holder of the decedent's property.

Note that the proposed revised section would require payment of interest at 10 percent on the fair market value of property that has been disposed of, commencing on the date of disposition.

A conforming change should be made in the last portion of subdivision (a) of Section 13112 so that that portion will read:

. . . and the person restores the property and net income or its fair market value and interest and net income to the estate in compliance with Section 13111.

Section 13112. Limitation on liability (page 22 of draft statute)

The letter comments:

Section 13112: The protection afforded by this Section to a person who has to restore property to an estate should be extended to a person who has to pay property to a superior claimant.

Section 13112 in its present form protects the person who has to restore property to an estate and has paid or delivered property to a superior claimant. Subdivision (b) provides that the "property or amount required to be restored to the estate under Section 13111 shall be reduced by any property or amount paid by the person to satisfy a liability under Sections . . . 13110." Section 13110 is the section that imposes personal liability to the person having a superior

right. Hence, the effect of this provision is to reduce the amount required to be restored to the estate by the amount paid to a person having a superior right. In addition, subdivision (c) of Section 13112 places a limit on the personal liability of a person under Section 13110. Hence, the staff does not believe that any further revision is needed in Section 13112.

Chapter 4. Court Order Determining Succession to Real Property
(Draftsman's Note - pages 23-24 of draft statute))

The letter approves the scheme of the proposed legislation in the form in which it is drafted and would not revise it to permit an order determining that personal property is property passing to the petitioner. No change is required in view of the comment in the letter. The letter comments:

The extension of this chapter to personal property is not favored. The chapter was not envisioned as a substitute to probate in all cases of \$60,000 or less. Instead, it was created to respond to a need for a way to clear title to desert lots and other real property of little value where no other economical alternative presently exists.

Section 13152. Contents of petition; inventory and appraisal
(pages 25-26 of staff draft

Subdivision (b) of Section 13152 does not permit the petitioner to select the probate referee who will make the inventory and appraisal required by that subdivision. In this respect, the subdivision is inconsistent with the suggested revision of Section 13103.

Section 13153. Notice of hearing (page 27 of draft statute)

The letter comments:

Section 13153: No provision is made for the time period of the notice. Consistent with other commission recommendations, the committee suggests that the Section provide for a 10 day notice.

This is a good point. The section should specify the time period of the notice. The committee suggests a 10-day notice. This suggestion would make the notice under Section 13153 consistent with

the staff proposal for the notice for a petition by a surviving spouse under the procedure that supersedes existing Section 650 et seq. See Section 13655(b) (page 55 of staff draft attached to Memorandum 85-103). It should be noted that that proposed Section 13655 reduces the existing period on notice from 20 to 10 days. See the Comment to Section 13655. Accordingly, the staff recommends that the introductory portion of Section 13153 be revised to read:

13153. The clerk shall set the petition for hearing. At least 10 days before the hearing on the petition, notice of the hearing . . .

Section 13200. Filing affidavit in superior court (pages 30-31 of draft statute)

In response to a suggestion made in the letter, the staff recommends that paragraphs (8) and (9) of subdivision (a) be revised to read:

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

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

To conform subdivision (c) to the Section 13103 as revised in response to the comment contained in the letter, the staff recommends that the subdivision be revised to read as follows:

(c) There shall be attached to the affidavit an inventory and appraisal of the real property in the decedent's estate in this state. The form, content, and manner of making the inventory and appraisal of the real property shall be as set forth in Chapter 9 (commencing with Section 600) of Division 3. The inventory and appraisal shall be made by a probate referee selected by the affiant from those probate referees appointed by the Controller under Section 1305 to appraise property in the county where the real property is located.

Section 13201. Filing fee (pages 31-32 of draft statute)

The Executive Committee approves the \$35 filing fee contained in the staff draft.

Section 13206. Restitution if estate proceeding commenced (page 34 of draft statute)

The letter comments concerning Section 13206:

Section 13206. See comment to Section 13111 respecting "the net income" the person received from the property. Also, this Section and related Sections make no provision for the value of any improvements to the property by the holder during the period of his or her possession. (e.g. what if the holder has taken possession of a \$2,000 car and replaced the motor and transmission, or taken possession of a \$2,000 lot and built a \$50,000 weekend retreat upon it?)

In response to this suggestion, the staff recommends that Section 13206 be revised to read:

13206. (a) Subject to Section 13207 and to subdivision (b), if proceedings for the administration of the decedent's estate are commenced, each person who is designated as a successor to property in a certified copy of an affidavit issued under Section 13202 is liable for:

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

(2) The restitution to the estate of the fair market value of the interest as of the date of its disposition if the person no longer has the interest, together with (A) the net income the person received from the property prior to disposing of the property and (B) interest from the date of disposition at the rate payable on a money judgment on the fair market value of the property as of the date of disposition.

(b) If the person liable under subdivision (a) made a significant improvement to the property in the good faith belief that the person was the successor of the decedent to the property, the person may satisfy the requirement of subdivision (a) by doing either of the following:

(1) The restitution of the property to the estate of the decedent upon the condition that the estate reimburse the person making restitution for the amount by which the improvement increases the fair market value of the property as of the time of restitution.

(2) The restoration to the estate of the fair market value of the property as of the date of the issuance of the certified copy of the affidavit under Section 13202, together with interest from that date at the rate payable on a money judgment on the fair market value of the property as of that date.

(c) An action to enforce the liability under this section is forever barred five years after the certified copy of the affidavit is issued under Section 13202.

If this revision of Section 13206 is adopted by the Commission, a conforming revision of Section 13207 will be required, so that Section 13207 will read:

13207. (a) A person designated as a successor to property 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) The interest in the property or amount required to be restored to the estate under Section 13206 shall be reduced by any property or amount paid by the person to satisfy a liability under Sections 13204 or 13205.

(c) The aggregate of the personal liability of a person under Sections 13204 and 13205 shall not exceed the fair market value at the date of the issuance of the certified copy of the affidavit under Section 13202 of the decedent's property received by that person, less the amount of any liens and encumbrances on that property.

Section 13503. Election to transfer property to trustee (page 38 of draft statute)

The letter comments:

Section 13503: The committee suggests that the surviving spouse be permitted to elect to probate less than all of the decedent's one-half of the community property or quasi-community property when less than all is needed for administration purposes.

This comment does not appear to be directed toward Section 13503. Section 13503 relates to the election to transfer property to a trustee. Section 13502 relates to the surviving spouse's election of administration.

Section 13502 clarifies one matter that may not be clear under existing law. Subdivision (a)(3) is a new provision that makes clear that the surviving spouse may elect to probate only a portion of the surviving spouse's one-half of the community or quasi-community property. This addition was made at the suggestion of Mr. Collier. The addition is consistent with the practice under prior law and permits, for example, probate of all of a block of stock that is community property without the need to probate the surviving spouse's one-half share of the other community property.

The suggestion made in the letter may relate to the above described addition to Section 13502, but the letter refers to the right of the surviving spouse to elect to probate less than all of the decedent's one-half of the community or quasi-community property. The staff does not understand how this election would work in practice and would need more information as to how only a part of an estate could be probated. What would be done with the unprobated portion of the estate?

Section 13505. Application of this part (page 39 of draft statute)

The letter comments:

Section 13505: The committee suggests that all provisions concerning small estates as embodied in Memorandum 85-103 be retroactive, not just Chapter 5. This would enable the cleaning up of old titles which have long gone unattended.

Actually, subdivision (a) of Section 13505 makes this part (Part 2. Passage of Property to Surviving Spouse Without Administration) retroactive. Subdivision (b) limits the retroactive application of Chapter 5 of this part by limiting the use of that chapter to cases where the deceased spouse died on or after January 1, 1985.

The staff agrees that it would be useful if the entire part were to apply retroactively. The effect of subdivision (b) is that the petition procedure cannot be used to confirm title to separate property passing to the surviving spouse unless the deceased spouse died on or after January 1, 1985. Subdivision (b) continues the substance of the prior law that contained a provision that limited the use of the petition procedure for separate property to cases where the decedent died on or after January 1, 1985, the operative date of the legislation that extended the use of the petition procedure to separate property passing to the surviving spouse. Section 13505 retains this limitation. The limitation could be eliminated and the need to refer to prior law avoided if Section 13505 were revised to read:

13505. This part applies whether the deceased spouse died before, on, or after January 1, 1987.

There remains the problem of the application of Part 1 (Collection or Transfer of Small Estate Without Administration). The

staff did not include any provision in the statute that indicates the application of Part 1. Accordingly, the part could be used after the operative date of the legislation (January 1, 1986) to obtain a transfer or court order confirming title to property without regard to when the decedent died.

But Part 1 also contains provisions that spell out the liability of the person who obtains property or title to property using the procedures provided in the part.

The new procedures provided in Chapters 4 and 5 of Part 1 are not found in existing law. Accordingly, making Part 1 apply retroactively would create no problems with respect to this portion of Part 1 because the new procedures could be used only after the operative date of the new law.

The provisions that would raise possible constitutional questions if applied to transfers before the operative date are those found in Chapter 3 of Part 1. These provisions apply to the liability of a person who uses the affidavit procedure for the collection or transfer of personal property. Existing law provides for an affidavit procedure for personal property but does not spell out the liability of the person who receives property using the procedure. The proposed legislation spells out the liability. It could be argued that making liability rules apply to a transfer that occurred prior to the operative date of the new statute would be unconstitutional to the extent that it would make a person liable where there was no liability at the time the transfer was made.

To give the major portion of Part 1 retroactive application, the the following new section could be added to Chapter 2 (General Provisions) of Part 1:

§ 13052. Application of part

13052. (a) Except as provided in subdivision (b), this part applies whether the decedent died before, on, or after January 1, 1987.

(b) Sections 13109 to 13112, inclusive, do not apply to the case where where the payment, delivery, or transfer of the decedent's property was made pursuant to the law in effect prior to January 1, 1987; and, if the payment, delivery, or transfer was made pursuant to the law in effect prior to January 1, 1987, the case shall be governed by the law in effect prior to January 1, 1987, rather than by Sections 13109 to 13112, inclusive.

There is a problem with subdivision (b) of the new section set out above. The problem is that there is no law of which the staff is aware that spells out the liability of a person who receives payment, delivery, or transfer of the decedent's property pursuant to the existing affidavit procedure. Accordingly, litigation may be necessary to determine the extent of such liability, and it is not unlikely that the court would look to the new provisions to determine the extent of liability, even though subdivision (b) makes them not applicable.

The staff believes that a better solution to the problem would be to substitute the following for subdivision (b) of the new section set out above:

(b) In case the application of any provision of this part to any person or circumstances would be unconstitutional, the law in effect prior to January 1, 1987, shall apply to the extent necessary to avoid the unconstitutional application.

Section 13600. Collection of salary or other compensation, not exceeding \$5,000, by affidavit (pages 45-47 of draft statute)

The letter comments:

Section 13600: See earlier comments re affidavit forms. Also, subdivision 7 seems to preclude collecting monies from 2 or more employers at one time even though the aggregate to be collected may be less than \$5,000. It would be quicker and less expensive to the surviving spouse to send letters to all employers concurrently.

To conform Section 13600 to the other affidavit provisions as revised, paragraph (10) of subdivision (b) should be revised to read:

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

It is true that the affidavit requirement does require that monies be collected from employers one at a time. This seems to be the only way to assure that not more than \$5,000 is collected. The staff draft provisions should not impose any great burden because in the usual case there will be only one employer. Where there are two

or more employers, the affidavit can first be presented to the employer who is likely to owe the most to the deceased spouse.

The form used in the draft statute is taken from a form set out in 1 California Decedent Estate Administration § 3.21, at 127 (Cal. Cont. Ed. Bar 1971). That form was prepared for use by a surviving spouse to collect the deceased spouse's money on deposit in a bank under former Section 630.5. It required that the affidavit include a statement: "I have not, nor has anyone on my behalf, withdrawn or received any money of the decedent on deposit in any bank under the provisions of California Probate Code section 630.5, except the sum of \$ _____ from _____ Bank."

Section 13602. Protection of employer from liability (page 48 of draft statute)

The letter suggests that "may rely upon" be substituted for "to inquire into the truth of" in the last sentence of Section 13602. This revision would conform to the revision earlier suggested for Section 13106.

Section 13656. Court order (page 57 of draft statute)

Mr Collier earlier suggested and the Executive Committee of the State Bar Section also believes that Section 13656 should be revised to restore existing language relating to the authority of the court to make orders that may be necessary to cause ownership of the property to be confirmed or to cause delivery of the property to the surviving spouse. See the comment of Mr. Collier set out as a single spaced indented quotation at page 3 of Memorandum 85-103. The staff concurs in the view of Mr. Collier and the Executive Committee and recommends that Section 13656 be revised as follows:

(1) Add the following additional sentence at the end of subdivision (a):

The court may issue any further orders which may be necessary to cause delivery of the property or its proceeds to the surviving spouse.

(2) Add the following sentence at the end of subdivision (b):

If the court determines that property passes to the surviving spouse, the court may issue any further orders which may be necessary to cause delivery of that property or its proceeds to the surviving spouse.

(3) Add the following to the last sentence of subdivision (c):

. . . the court shall issue an order describing the property and confirming the ownership of the surviving spouse and may issue any further orders which may be necessary to cause ownership of the property to be confirmed in the surviving spouse.

Section 13659. Inventory and appraisal (page 59 of draft statute)

The letter comments: "The committee does not understand the purpose of this Section."

The purpose of the section is stated in the Comment to the section as follows:

An inventory and appraisal is not required to obtain an order under this chapter. However, Section 13659 gives the petitioner the option to file an inventory and appraisal in a proceeding under this chapter if the petitioner so desires. This option permits the petitioner to obtain an independent appraisal made by a probate referee if such an appraisal is desired by the petitioner.

Perhaps a statement should be added at the end of the portion of the Comment set out above to state: "The petitioner may consider the independent appraisal useful for purposes of capital gains taxes or other taxes."

The express authority to file the inventory and appraisal in the proceeding (even though not required) may not be necessary. If this is so, all of the section except the first sentence could be omitted. However, the remainder of the section would appear to be useful to make clear that the inventory and appraisal may be filed in the proceeding.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

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H. NEAL WELLS III
PARTNER

November 15, 1985

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Re: LRC Memo 85-103

Dear Jim:

Team C has reviewed memorandum 85-103. Our comments follow.

Section 13100. This Section would preclude the use of an affidavit for collection of personal property whenever the gross value of the decedent's real property exceeds \$10,000. Thus, if the decedent's real and personal property aggregate \$60,000 or less, and the real property exceeds \$10,000, the affidavit may not be used even though the real property has been transferred pursuant to Section 13151. To avoid a probate of the personal property in this instance, the commission may wish to consider permitting personal property to be transferred by affidavit whenever the aggregate of the decedent's property is \$60,000 or less without regard to the value of the real property included in the \$60,000. This would entail the deletion of the words

"and the gross value of the decedent's real property, if any, in this state does not exceed ten thousand dollars (\$10,000)" from Section 13100.

There are 2 other alternatives which the commission could consider. They are (1) permitting personal property to be included in a Section 13151 petition or (2) deleting real property passing pursuant to a 13151 petition from the calculation of the value of real property in Section 13100. The committee does not favor the former alternative because the committee opposes the use of Section 13151 as a joint real/personal property mini probate. If the Section may be used for this purpose, the \$60,000 limitation may well be deleted in the future thereby making Section 13151 an alternative to probate in all instances. If the state is to have an unsupervised probate alternative to a formal supervised probate, it should be carefully thought through on its merits, not be the outgrowth of small estate proceedings.

Section 13101(f): See comment to Section 13100 re deletion of this requirement.

Section 13101(k & l): These paragraphs are in the third person whereas the rest of the Section is in the first person. To be consistent, these paragraphs should be in the third person. Also, paragraph "l" should conform with normal California practice by reciting that the affiant "declares under penalty of perjury under the laws of the

State of California that the foregoing is true and correct" (e.g. Petition for Probate, Judicial Council Form).

Section 13102: The placement of Health and Safety Code Section 18102, Vehicle Code Sections 5910 and 9916 and Financial Code Sections 6950 and 6652 in the new Estates and Trusts Code may be of convenience to persons administering estates. However, expanding the instances in which evidences of ownership must be presented creates problems. For example, the holder of a promissory note payable to a decedent would usually not want to present the original unpaid note to its maker until the note has been paid in full. Instead, the holder would prefer to give a copy of the note, because, unlike a stock certificate, the note is difficult to replace if lost in the mail, or misplaced or damaged by the maker. Also, unlike a stock certificate or registration, a new document of title (e.g., a new promissory note) is not to be reissued for the existing note and nothing is to be endorsed upon it.

Use of a bank passbook as an example in the Section may also create problems because many institutions no longer consider the passbook to be a document of title. Instead, the institutions rely primarily upon statements issued to customers.

Section 13103: This Section invisions probate court appointment of the probate referee who is to appraise

the real property which is the subject of the inventory. It may be preferable to permit the affiant or declarant to select any probate referee in the county. This would save time and attorney's fees otherwise expended in obtaining the court appointment of the referee, permit the selection of referees who are prompt in the performance of their services, and save the court the administrative burden of making numerous appointments for property with little value as to which the court will have no other involvement.

Section 13105(2)(b): This Subsection is silent as to how fast a person holding property of the decedent must respond to a demand for payment. The committee suggests inclusion of the words "within a reasonable time" after the word "refuses" in the first line of this Subsection.

Section 13106: If a person who is holding property of the decedent is to be subject to suit for refusing to transfer property (Section 13105), then the person should be able to rely upon any statement in the affidavit or declaration rather than merely being freed from a duty to inquire into the truth thereof. This is particularly true of large institutions or corporations wherein an employee who is not dealing with the transfer may have knowledge that is contrary to the statements made in the declaration. The committee suggests substituting "and may rely upon" for "or to inquire into the truth of" in the last sentence of the Section.

Section 13111: The phrase at the end of the first sentence "together with the net income the person received from the property" may refer either to property which is restored to the estate or to both such property and property as to which its fair value is being restored. The Section is ambiguous in this regard. Also, the Section is silent as to whether a person who disposes of property is liable for the return of the income on the proceeds of the property during the period from the date of disposition to the date of restoration. (e.g., if the person receives real property 40 days after death, sells it 30 days later, and puts the proceeds into a certificate of deposit for a year, after which demand is made for restoration to the estate, how much has to be restored, the sales price of the property or the sales price plus the interest on the certificate?)

Section 13112: The protection afforded by this Section to a person who has to restore property to an estate should be extended to a person who has to pay property to a superior claimant.

Section 13115: The extension of this chapter to personal property is not favored. The chapter was not envisioned as a substitute to probate in all cases of \$60,000 or less. Instead, it was created to respond to a need for a way to clear title to desert lots and other real property of

little value where no other economical alternative presently exists.

Section 13153: No provision is made for the time period of the notice. Consistent with other commission recommendations, the committee suggests that the Section provide for a 10 day notice.

Section 13200(8) & (9): See earlier comment re change of person and form of declaration under penalty of perjury.

Section 13201: The committee concurs with the draftsman as to the \$35.00 filing fee.

Section 13206: See comment to Section 13111 respecting "the net income" the person received from the property. Also, this Section and related Sections make no provision for the value of any improvements to the property by the holder during the period of his or her possession. (e.g. what if the holder has taken possession of a \$2,000 car and replaced the motor and transmission, or taken possession of a \$2,000 lot and built a \$50,000 weekend retreat upon it?)

Section 13503: The committee suggests that the surviving spouse be permitted to elect to probate less than all of the decedent's one-half of the community property or quasi community property when less than all is needed for administrative purposes.

Section 13505: The committee suggests that all provisions concerning small estates as embodied in memorandum 85-103 be retroactive, not just Chapter 5. This would enable the cleaning up of old titles which have long gone unattended.

Section 13600: See earlier comments re affidavit forms. Also, Subdivision 7 seems to preclude collecting monies from 2 or more employers at one time even though the aggregate to be collected may be less than \$5,000. It would be quicker and less expensive to the surviving spouse to send letters to all employers concurrently.

Section 13602: See comment to Section 13101 with respect to reliance upon the truth of the affidavit or declaration.

Section 13656: The committee concurs with Chuck Collier.

Section 13659: The committee does not understand the purpose of this Section.

Respectfully submitted,



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