

Second Supplement to Memorandum 86-15

Subject: Study L - Amendments to Assembly Bill 2625 (Comprehensive Probate Bill)

Attached as Exhibit 1 is a letter from the Legislative Committee of the Estate Planning, Probate and Trust Section of the Beverly Hills Bar Association. The Legislative Committee has reviewed the recommendation regarding the disposition of estates without administration and makes the comments discussed below. A copy of Assembly Bill 2625 is attached to the First Supplement to Memorandum 86-15. Refer to the bill in connection with the discussion below.

Chapter 2 (commencing with Section 13540) pages 38-39 of bill.

The Legislative Committee (item 1 of letter attached as Exhibit 1) questions whether this chapter is needed. See the letter for more details. As to joint tenancy, the Legislative Committee states: "To clear any cloud on title, the surviving spouse need only record an Affidavit/Death of Joint Tenant." As to property held as community property, the Legislative Committee notes that marketable title can be obtained by filing a Section 650 petition.

Chapter 2 (commencing with Section 13540) continues existing law with a clarification that the chapter applies only if the title is held of record as described in Section 13540. You will recall that the Commission received a letter from the title company association stating that the existing law must be continued.

To understand the purpose of the chapter, one must recognize that a married person has the right to dispose of his or her one-half of the community or quasi-community property by will without regard to how the title to the property is held. For example, if one spouse purchases real property using community funds and takes title in his or her own name only, the real property continues to be community property, and the nonacquiring spouse can dispose of his or her

one-half interest in the property by will. Or if property is acquired using community funds and the title is taken by the married persons in joint tenancy (for convenience and without the intent to change the nature of the property to separate property), either spouse can dispose of his or her one-half interest in the property by will because the property continues to be community property. Or if real property is acquired by married persons and the title to the property is taken as community property, either spouse can dispose of his or her one-half interest in the property by will.

Accordingly, without regard to how the title to real property is held of record, there is always the possibility that the property is community or quasi-community property and was disposed of by the will of the deceased spouse. The provision of existing law continued as Section 13540(a) is the reason that a title company is willing to insure title when property is transferred by a married person and the property is held as of record in the name of the surviving spouse, or by the deceased spouse and the surviving spouse as joint tenants, or by the deceased spouse and the surviving spouse as community property. This provision protects the grantee, purchaser, encumbrancer, or lessee against the possibility that the property was community or quasi-community property and was disposed of by will of the deceased spouse. Absent the provision, title companies will be unwilling to insure title when a surviving spouse transfers real property acquired during marriage, just as they will not now insure title of property transferred by one spouse during marriage unless both spouse join in the transfer or the other spouse gives a quit claim deed. The Legislative Committee correctly notes that the surviving spouse can obtain marketable title to property held as of record as community property by filing a Section 650 petition. However, if Chapter 2 were not continued, it would be necessary to file such a petition where the property is held as of record only in the name of the surviving spouse or is held as of record by the deceased spouse and the surviving spouse as joint tenants. Accordingly, it would be a disaster not to continue the existing provisions that are continued in Chapter 2 (commencing with Section 13540).

The Legislative Committee also expresses the view that Section 13541 (pages 38-39 of bill) requires revision. This section continues existing law without substantive change. The section provides that a person can prevent transfer by the surviving spouse by merely filing a notice that the person claims an interest in the property. The Legislative Committee raises a number of questions relating to how the person claiming the interest in the property is to secure a marketable title. The answer is that the statute does not purport to deal with that question. Some provisions of the Probate Code provide a means by which a person claiming an interest in property of the decedent may be able to obtain a marketable title in the proceedings for administration of the estate of the deceased spouse (Section 851.5), but it is likely that the person claiming the interest will have to commence a quiet title action or some other action to obtain a marketable title. The bill has no effect on this situation and does not change the situation as it exists today under existing law.

Use of 13650 Procedure (pages 44-49 of bill) for Trust

The Legislative Committee of the Estate Planning, Probate and Trust Law Section of the Beverly Hills Bar Association makes one other suggestion:

Our Committee believes that it would carry out both the intent of this Chapter [determination or confirmation of property passing or belonging to surviving spouse] and the estate planning objectives of the deceased spouse and the surviving spouse if the provisions of § 13650 were amended (a) to permit the Trustee of a trust for the benefit of the surviving spouse, which trust is revocable by the surviving spouse or over which the surviving spouse has a general power of appointment exercisable during the surviving spouse's lifetime, to file a petition under § 13650; and (b) to permit the use of as petition under § 13650 when, under the provisions of the decedent's will or other written instrument, the property will pass to an existing trust for the benefit of the surviving spouse, which trust is revocable by the surviving spouse or as to which the surviving spouse has a general power of appointment exercisable during the surviving spouse's lifetime.

The reason for this recommendation is stated in the last paragraph of the letter attached as Exhibit 1. The staff would be reluctant to make the suggested revision in Assembly Bill 1625, but we believe that the suggestion merits study. We would be interested in the views of the Executive Committee of the Estate Planning, Trust and Probate Law Section. The decision to be made when we have the views of the State Bar Section is what priority should be given to further study of this suggestion: should we seek to develop the suggestion for inclusion in the new Estates and Trusts Code or should we defer work on the suggestion until we have completed the drafting of the new code.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Exhibit 1

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January 8, 1986

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California Law Revision Commission
4000 Middlefield Road, Room D-2
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Re: Study L-1030
Disposition of Estates Without Administration

Dear Mr. DeMouilly:

The Legislative Committee of the Estate Planning, Probate and Trust Section of the Beverly Hills Bar Association has reviewed the tentative recommendation regarding the disposition of estates without administration and would like to make the following comments and suggestions in connection with Part 2 of Division 8 dealing with Passage of Property to Surviving Spouse without Administration:

1. Chapter 2 of Part 2 of Division 8 - §13540 et seq.: Right of Surviving Spouse to Dispose of Real Property. This chapter deals with the right of the surviving spouse, or the legal representative of the surviving spouse, to dispose of community or quasi-community real property after 40 days from the death of a spouse. Our committee questions the need for this Chapter in view of the provisions of the following existing and/or proposed sections of the Estates and Trusts Code and other applicable law:

(a) If title to the real property was held by the deceased spouse and the surviving spouse as joint tenants, no administration of any kind is required and title to the real property vests in the surviving spouse immediately upon the death of the deceased spouse, at which time the surviving spouse acquires all incidents of ownership of the property. To clear any cloud on title, the surviving spouse need only record an Affidavit/Death of Joint Tenant.

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(b) If title to the real property was held by the deceased spouse and the surviving spouse as their community property, or if title to the property was held in the name of either the deceased spouse alone or the name of the surviving spouse alone and the property is claimed to be either community property or quasi-community property, the deceased spouse's interest in the property can be transferred to the surviving spouse by means of a Court Order obtained after the filing of a petition under §13650 or under §13151.

If the Commission should determine that Chapter 2 is necessary and should be retained, our Committee believes that the provisions of §13541, relating to the recording of notice of interest in the property by someone other than the surviving spouse, require revision for the following reasons:

(a) §13541 provides that §13540 does not apply if the notice of interest in the property is recorded within 40 days from the death of the spouse. In view of the fact that a person claiming a right to succeed to the deceased spouse's interest in the property is prohibited by §13151 from filing a petition requesting a Court Order determining that right to succeed to the property until 40 days have elapsed since the death of the decedent, the person claiming a right to succession to the property is placed in the contradictory position of having to record a notice prior to the time that the 40-day time period has expired, but to wait until after the 40-day time period has expired before he can request the Court to determine his right to succession. It therefore appears reasonable that the time period prescribed in §13541 should be extended to at least 60 days, or that the provisions of §13151 requiring a 40-day waiting period should be deleted.

(b) §13541 should be amended to provide that the recording of a certified copy of a petition filed under §13151 will be deemed adequate notice under §13541.

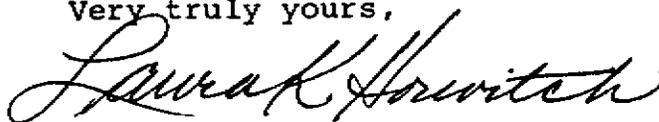
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2. Chapter 5 of Part 2 of Division 8 - §13650 et seq.
Determination or Confirmation of Property Passing or Belonging to
Surviving Spouse:

Our Committee believes that it would carry out both the intent of this Chapter and the estate planning objectives of the deceased spouse and the surviving spouse if the provisions of §13650 were amended (a) to permit the Trustee of a trust for the benefit of the surviving spouse, which trust is revocable by the surviving spouse or over which the surviving spouse has a general power of appointment exercisable during the surviving spouse's lifetime, to file a petition under §13650; and (b) to permit the use of a petition under §13650 when, under the provisions of the decedent's Will or other written instrument, the property will pass to an existing trust for the benefit of the surviving spouse, which trust is revocable by the surviving spouse or as to which the surviving spouse has a general power of appointment exercisable during the surviving spouse's lifetime.

The surviving spouse's general power of appointment or power of revocation gives the surviving the spouse the power to vest title to the property in the surviving spouse's name should he or she decide to do so and, therefore, for all practical purposes, property passing to a trust subject to such power(s) is equivalent to property "passing to the surviving spouse." Further, the direct transfer of the property to a trust over which the surviving spouse has the power of revocation or a general power of appointment would eliminate the need for successive transfers, and the time and expense in connection therewith, which are now required when the property passes to the surviving spouse who desires to immediately transfer it to a trust for her benefit.

Very truly yours,



LAURA KIMCHE HORWITCH,
Chairman, Legislative Comm.
Estate Planning, Probate and
Trust Section
Beverly Hills Bar Association