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Memorandum 87-63

Subject: Study L - Miscellaneous Provisions in Division 3 (Staff Draft)

We have been systematically cleaning out Division 3 of the Probate Code (decedent estate administration). We have been doing this by subject matter groups such as estate administration, inventory and appraisal, estate management, and the like. This process has left a few odds and ends unaccounted for in any of the major subject matter groups.

This memorandum disposes of the unaccounted for provisions. See Exhibit 1. There are notes following a few of the provisions that the Commission should review. We do not plan to distribute a tentative recommendation on this matter, but merely to incorporate the provisions in the 1988 legislation that disposes of Division 3.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Exhibit 1
DISPOSITION OF MISCELLANEOUS DIVISION 3 PROVISIONS

Prob. Code § 20 (amended). Application of definitions

SEC. . Section 20 of the Probate Code is amended to read:

20. Unless the provision or context otherwise requires, the definitions in this part govern the construction of Division 1 (commencing with Section 1), Division 2 (commencing with Section 100), ~~Chapter 22 (commencing with Section 1200) and Chapter 22.5 (commencing with Section 1280)~~ of Division 3 (commencing with Section 1000), Division 6 (commencing with Section 6100), Division 7 (commencing with Section 7000), Division 8 (commencing with Section 13000), Division 9 (commencing with Section 15000), Division 10 (commencing with Section 20100), and Division 11 (commencing with Section 21100).

Comment. Section 20 is amended to reflect the reorganization of Division 3 of the Probate Code.

Prob. Code § 260 (Division heading). Disclaimer of testamentary and other instruments

SEC. . The heading of Division 2.5 (commencing with Section 260) of the Probate Code is amended to read:

~~DIVISION 2.5~~ PART 8. DISCLAIMER OF TESTAMENTARY AND OTHER INTERESTS

Comment. Division 2.5 (commencing with Section 260) is converted to Part 8 of Division 2 in order to effectuate the reorganization of the Probate Code.

Prob. Code § 260 (amended). Definitions

SEC. . Section 260 of the Probate Code is amended to read:

260. Unless the provision or context otherwise requires, the words and phrases defined in this chapter govern the construction of this ~~division part~~.

Comment. Section 260 is amended to reflect the reorganization of Division 2.5 as Part 8 of Division 2.

Prob. Code § 261 (repealed). "Account" defined

SEC. . Section 261 of the Probate Code is repealed.

~~261. "Account" means a contract of deposit of funds between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account, and other like arrangement.~~

Comment. Former Section 261 duplicated Section 21 ("account" defined). See also Section 20 (application of definitions).

Prob. Code § 268 (repealed). "Person" defined

SEC. . Section 268 of the Probate Code is repealed.

~~268. "Person" means an individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, or other entity.~~

Comment. Former Section 268 duplicated Section 56 ("person" defined). See also Section 20 (application of definitions).

Prob. Code § 270 (repealed). "Totten trust account" defined

SEC. . Section 270 of the Probate Code is repealed.

~~270. "Totten trust account" means an account in the name of one or more parties as trustee for one or more beneficiaries where the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sums on deposit in the account. In a Totten trust account, it is not essential that payment to the beneficiary be mentioned in the deposit agreement. A Totten trust account does not include (1) a regular trust account under a testamentary trust or a trust agreement which has significance apart from the account or (2) a fiduciary account arising from a fiduciary relation such as attorney-client.~~

Comment. Former Section 270 duplicated Section 80 ("Totten trust account" defined). See also Section 20 (application of definitions).

Prob. Code § 275 (amended). Authority to disclaim

SEC. . Section 275 of the Probate Code is amended to read:

275. A beneficiary may disclaim any interest, in whole or in part, by filing a disclaimer as provided in this division part.

Comment. Section 275 is amended to reflect the reorganization of Division 2.5 as Part 8 of Division 2.

Prob. Code § 280 (amended). Filing of disclaimer

SEC. . Section 280 of the Probate Code is amended to read:

280.

(b) If a disclaimer made pursuant to this division part affects real property or an obligation secured by real property

Comment. Section 280 is amended to reflect the reorganization of Division 2.5 as Part 8 of Division 2.

Prob. Code § 283 (amended). Disclaimer not a fraudulent transfer

SEC. . Section 283 of the Probate Code is amended to read:

283. A disclaimer is not a fraudulent conveyance transfer by the beneficiary under Title 2 (commencing with Section 3439) of Part 2 of Division 4 of the Civil Code.

Comment. Section 283 is amended to reflect enactment of the Uniform Fraudulent Transfer Act.

Prob. Code § 284 (amended). Waiver of right to disclaim

SEC. . Section 284 of the Probate Code is amended to read:

284. A person who could file a disclaimer under this division part may instead file a written waiver of the right to disclaim. The waiver shall specify the interest to which the waiver applies. Upon being filed as provided in Section 280, the waiver is irrevocable and is binding upon the beneficiary and all persons claiming by, through, or under the beneficiary.

Comment. Section 284 is amended to reflect the reorganization of Division 2.5 as Part 8 of Division 2.

Prob. Code § 287 (amended). Transitional provision

SEC. . Section 287 of the Probate Code is amended to read:

287. An interest created before January 1, 1984, that has not been accepted may be disclaimed after December 31, 1983, in the manner provided in this ~~division~~ part, but no interest that arose before January 1, 1984, in a person other than the beneficiary may be destroyed or diminished by any action of the disclaimant taken pursuant to this division.

Comment. Section 287 is amended to reflect the reorganization of Division 2.5 as Part 8 of Division 2.

Prob. Code § 288 (amended). Disclaimer exclusive

SEC. . Section 288 of the Probate Code is amended to read:

288. This ~~division~~ part does not limit or abridge any right a person may have under any other law to assign, convey, or release any property or interest, but after December 31, 1983, an interest that would otherwise be taken by a beneficiary may be declined, refused, renounced, or disclaimed only as provided in this ~~division~~ part.

Comment. Section 288 is amended to reflect the reorganization of Division 2.5 as Part 8 of Division 2.

Prob. Code § 295 (amended). Effect of federal law

SEC. . Section 295 of the Probate Code is amended to read:

295. Notwithstanding any other provision of this ~~division~~ part, if as a result of a disclaimer or transfer the disclaimed or transferred interest is treated pursuant to the provisions of Title 26 of the United States Code, as now or hereafter amended, or any successor statute thereto, and the regulations promulgated thereunder, as never having been transferred to the beneficiary, then the disclaimer or transfer is effective as a disclaimer under this ~~division~~ part.

Comment. Section 295 is amended to reflect the reorganization of Division 2.5 as Part 8 of Division 2.

Prob. Code §§ 300-301 (added). Trust company as fiduciary

SEC. . Part 9 (commencing with Section 300) is added to Division 2 of the Probate Code, to read:

PART 9. TRUST COMPANY AS FIDUCIARY

§ 300. Appointment of trust company

300. A trust company may be appointed to act as a personal representative, guardian or conservator of an estate, or trustee, in the same manner as an individual. A trust company may not be appointed guardian or conservator of the person of a ward or conservatee.

Comment. Section 300 restates former Section 480 without substantive change.

CROSS-REFERENCES

Definitions

Personal representative § 58
Trust company § 83
Trustee § 84

§ 301. Oath and bond of trust company

301. (a) A trust company appointed to act as a personal representative, or guardian or conservator of an estate, may not be required to give a bond.

(b) The liability of a trust company and the manner of its making of oaths and affidavits are governed by Article 3 (commencing with Section 1540) of Chapter 12 of Division 1 of, and Section 1587 of, the Financial Code.

Comment. Section 301 restates former Section 481, but omits the reference to a trust company acting as a trustee. This matter is governed by Section 15602 (trust law).

CROSS-REFERENCES

Definitions

Personal representative § 58
Trust company § 83

Note. In response to a request of the Commission, the staff has collected information concerning reserve and other security requirements for trust companies.

Financial Code Sections 1540 and 1541 require a trust company to deposit securities with the State Treasurer, based on total assets being administered with the trust company. The maximum deposit required of a trust company for this purpose is \$500,000. The Commission also asked the staff to provide information on the change in the value of the dollar since the deposit requirements were enacted. The \$500,000 maximum deposit was first enacted in 1915. Between 1915 and the present the value of the dollar has declined by a factor of 9 or 10, based on consumer price indices.

In addition to the deposit requirement, National Banks are required to set aside collateral security at least equal to the face value of non-FDIC insured trust funds, awaiting investment or distribution, that are deposited in the commercial banking department. State Banks also collateralize trust funds deposited in the commercial banking department in excess of FDIC insurance.

Apart from the deposit and collateralization requirements, there are trust fund segregation requirements that immunize assets in the trust department of a trust company from general creditors of the bank. The California Bankers Association wrote to the Commission some time ago when this issue first came up (November 26, 1985), noting these requirements and questioning whether the requirements should be increased absent a proven need.

Prob. Code § 6104 (added). Effect of duress, menace, fraud, or undue influence

SEC. . Section 6104 is added to the Probate Code, to read:

6104. The execution or revocation of a will or a part of a will is ineffective to the extent the execution or revocation was procured by duress, menace, fraud, or undue influence.

Comment. Section 6104 restates former Section 328.3 without substantive change.

Prob. Code § 6105 (added). Conditional will

SEC. . Section 6105 is added to the Probate Code, to read:

6105. A will, the validity of which is made conditional by its own terms, shall be admitted to probate or rejected, or denied effect after admission to probate, in conformity with the condition.

Comment. Section 6105 restates former Section 328.7 without substantive change.

Prob. Code § 6112 (amended). Interested witness

SEC. . Section 6112 of the Probate Code is amended to read:

6112. (a) Any person generally competent to be a witness may act as a witness to a will.

(b) A will or any provision thereof is not invalid because the will is signed by an interested witness. Unless there are at least two other subscribing witnesses to the will who are disinterested witnesses, the fact that the will makes a devise to a subscribing witness creates a presumption that the witness procured the devise by duress, menace, fraud, or undue influence. This presumption is a presumption affecting the burden of proof.

(c) If a devise made by the will to an interested witness fails because the presumption established by subdivision (b) applies to the devise and the witness fails to rebut the presumption, the interested witness shall take such proportion of the devise made to the witness in the will as does not exceed the share of the estate which would be distributed to the witness if the will were not established. Nothing in this subdivision affects the law that applies where it is established that the witness procured a devise by duress, menace, fraud, or undue influence.

(d) A provision in a will that a person who contests or attacks the will or any of its provisions takes nothing under the will or takes a reduced share does not apply to a contest or attack on a provision of the will that benefits a witness to the will.

Comment. Subdivision (d) of Section 6112 restates former Section 372.5 without substantive change.

Prob. Code § 6179 (added). Transitional provision

SEC. . Section 6179 is added to the Probate Code, to read:

6179. The repeal of former Sections 1050, 1051, 1052, and 1053, and the amendment of former Section 1054, by Chapter 842 of the Statutes of 1983, apply only to cases where the decedent died on or after January 1, 1985. If the decedent died before January 1, 1985, the case is governed by the former provisions as they would exist had Chapter 842 of the Statutes of 1983 not been enacted.

Comment. Section 6179 restates former Section 1055 without substantive change.

Prob. Code § 8806 (added). Change in ownership statement

SEC. . Section 8806 is added to the Probate Code, to read:

8806. The personal representative shall file the change in ownership statement required by subdivision (b) of Section 480 of the Revenue and Taxation Code at the time the inventory is filed.

Comment. Section 8806 restates the last portion of the first sentence of former Section 600, but recognizes that the inventory is required by Section 8800 (inventory and appraisal required) to be filed before the appraisal.

CROSS-REFERENCES

Definitions

Personal representative § 58

Note. A provision should probably be added to the statement of duties given to the personal representative [see opening estate administration] indicating the existence of this requirement, either in addition to or instead of this section. The substantive requirement exists independently of this section in Revenue and Taxation Code Section 480.

Rev. & Tax. Code § 480 (amended). Change in ownership statement

SEC. . Section 480 of the Revenue and Taxation Code is amended to read:

480. (a) Whenever any change in ownership of real property or of a mobilehome subject to local property taxation, and which is assessed by the county assessor, occurs, the transferee shall file a signed change in ownership statement in the county where the real property or mobilehome is located, as provided in subdivision (c). In the case of a change in ownership where the transferee is not locally assessed, no change in ownership statement is required.

(b) ~~The administrator or executor~~ personal representative shall file a change in ownership statement with the county recorder or assessor in each county where the decedent owned real property at the time of death. The statement shall be filed at the time the inventory ~~and appraisement~~ is filed with the court clerk.

(c) Except as provided in subdivision (d), the change in ownership statement as required pursuant to subdivision (a) shall be declared to be true under penalty of perjury and shall give such information relative to the real property or mobilehome acquisition transaction as the board shall prescribe after consultation with the California Assessors' Association. The information shall include, but not be limited to, a description of the property, the parties to the transaction, the date of acquisition, the amount, if any, of the consideration paid for the property, whether paid in money or otherwise, and the terms of the transaction. The change in ownership statement shall not include any question which is not germane to the assessment function. The statement shall contain a notice that is printed, with the title in at least 12-point boldface type and the body in at least 8-point boldface type, in the following form:

"Important Notice"

"The law requires any transferee acquiring an interest in real property or mobilehome subject to local property taxation, and which is assessed by the county assessor, to file a change in ownership statement with the county recorder or assessor. The change in ownership statement must be filed at the time of recording or, if the transfer is not recorded, within 45 days of the date of the change in ownership. The failure to file a change in ownership statement within 45 days from the date of a written request by the assessor results in a penalty of either: (1) one hundred dollars (\$100), or (2) 10 percent of the taxes applicable to the new base year value reflecting the change in ownership of the real property or mobilehome, whichever is greater, but not to exceed two thousand five hundred dollars (\$2,500) if such failure to file was not willful. This penalty will be added to the assessment roll and shall be collected like any other delinquent property taxes, and be subject to the same penalties for nonpayment."

(d) The change in ownership statement may be attached to or accompany the deed or other document evidencing a change in ownership filed for recording, in which case such notice, declaration under penalty of perjury, and any information contained in the deed or other transfer document otherwise required by subdivision (c) may be omitted.

(e) If the document evidencing a change in ownership is recorded in the county recorder's office, then the statement shall be filed with the recorder at the time of recordation. However, the recordation of the deed or other document evidencing a change in ownership shall not be denied or delayed because of the failure to file a change of ownership statement, or filing of an incomplete statement, in accordance with this subdivision. If the document evidencing a change in ownership is not recorded or is recorded without the concurrent filing of a change in ownership statement, then the statement shall be filed with the assessor no later than 45 days from the date the change in ownership occurs.

(f) Whenever a change in ownership statement is filed with the county recorder's office, the recorder shall transmit, as soon as possible, the original statement or a true copy thereof to the assessor along with a copy of every recorded document as required by Section 255.7.

(g) The change in ownership statement may be filed with the assessor through the United States mail, properly addressed with the postage prepaid.

(h) In the case of a corporation, the change in ownership statement shall be signed either by an officer of the corporation or an employee or agent who has been designated in writing by the board of directors to sign such statements on behalf of the corporation. In the case of a partnership or other legal entity, the statement shall be signed by an officer, partner, or an employee or agent who has been designated in writing by the partnership or legal entity.

(i) No person or entity acting for or on behalf of the parties to a transfer of real property shall incur liability for the consequences of assistance rendered to the transferee in preparation of any change in ownership statement, and no action may be brought or maintained against any such person or entity as a result of such assistance.

Nothing in this section shall create a duty, either directly or by implication, that such assistance be rendered by any person or entity acting for or on behalf of parties to a transfer of real property.

Comment. Subdivision (b) of Section 480 is amended to require the statement of change in ownership at the time the inventory is filed. This may differ from the time the appraisal is filed. See Prob. Code § 8800 (inventory and appraisal required); see also Prob. Code § 8806 (change in ownership statement). Cf. Prob. Code § 58 ("personal representative" defined).

MISCELLANEOUS COMMENTS TO REPEALED SECTIONS

Prob. Code § 322 (repealed)

Comment. Former Section 322 is omitted. The section's major effect was to enable a title insurer to provide insurance in the occasional case in which title is insured in a purchaser from an heir without requiring administration proceedings, the insurance being predicated on the property's small value and satisfactory proof (usually by affidavit) of heirship. 2 Bowman, Ogden's Revised California Real Property Law, § 29.82 at p. 1498 (1975). For this purpose, Sections 13200-13209 (affidavit procedure for real property of small value) provide a more complete and detailed procedure.

Note. Existing Section 322 provides:

The rights of a purchaser or encumbrancer of real property, in good faith and for value, derived from any person claiming the same by succession, are not impaired by any devise made by the decedent from whom succession is claimed, unless within four years after the devisor's death the instrument containing such devise is duly proved as a will, or written notice of such devise is recorded with the recorder of the county where the land lies. This section does not limit the finality of any decree of distribution in the estate of the decedent.

This section in effect enables a decedent's "heir" to transfer good title to the decedent's real property to a BFP where there has been no probate of the decedent's estate and more than four years have elapsed since the decedent's death.

As nearly as the staff can tell, this is special legislation of a fairly ancient lineage that has rarely, if ever, been relied upon. Can there ever be a true BFP of property of this sort where there is a break in the chain of title? The staff doubts that a title insurance company would actually insure title under this section based on someone's claim, unsupported by court order, to be an heir authorized to transfer the decedent's real property. Ogden states that an insurer may be willing to issue a title policy based on proof of heirship if the property is of small value.

The staff thinks a better means of obtaining clear title to real property of small value may be found in the Commission's legislation on nonprobate transfers, effective July 1. Sections 13200-13209 provide a complete affidavit procedure for clearing title to real property where the real property in the decedent's estate is less than \$10,000. The procedure specifies the decedent's successors entitled to file the affidavit, the contents of the affidavit, recording information, liability of the successors for the decedent's debts, and BFP protection, among other details. This is a broader and more useful procedure than that provided in Section 322, and the staff would eliminate Section 322 in reliance on the new procedure.

Prob. Code § 956 (repealed)

Comment. The first clause of former Section 956 is restated in Section 11640 (petition and order for final distribution) without substantive change. The last clause is superseded by Section 12201 (report of status of administration).

Prob. Code § 1021.5 (repealed)

Comment. Former Section 1021.5 is restated in Section 11603 (hearing and order for distribution) without substantive change.

Prob. Code § 1055 (repealed)

Comment. Former Section 1055 is restated in Section 6179 without substantive change.