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Memorandum 89-66

Subject: Study L - New Probate Code (Miscellaneous Issues)

§ 1206. Notice to known heirs or devisees

Section 1206(b) provides that notice need not be given to an heir or devisee "if the person's interest has been satisfied pursuant to court order or as evidenced by the person's written receipt or written acceptance." The concept of a written acceptance is not implemented in the statutes on distribution; the statutes provide only for a "receipt" by the distributee, which may also take the form of a recordation of a court order or the personal representative's deed. Section 11751. Section 1206 could be made consistent by eliminating the reference to a written acceptance:

> (b) Notice need not be given to a person under subdivision (a) if the person's interest has been satisfied pursuant to court order or as evidenced by the person's ~~written~~ receipt ~~or written acceptance~~.

A similar change should be made in Section 11850 (when deposit with county treasurer authorized).

§ 1480 et seq. Transitional provisions

The new guardianship and conservatorship law became operative on January 1, 1981. Because the new law made significant substantive and procedural changes, elaborate transitional provisions were also provided. Most of the transitional no longer serve a function and should be repealed. In any case, general transitional provisions for the entire Probate Code adequately cover most of the problems. See Sections 2 and 3.

The staff would make these changes in the old guardianship and conservatorship provisions:

Chapter 5. Transitional Provisions

~~1480. As used in this chapter:~~
~~(a) "Operative date" means January 1, 1981.~~
~~(b) "Prior law" means the applicable law in effect on December 31, 1980.~~

~~1481.--Subject to Sections 1484 and 1485, a guardianship or conservatorship in existence under this code on the operative date continues in existence and is governed by this division.~~

~~1482.---(a) The bonds, security, and other similar obligations in effect immediately prior to the operative date shall continue to apply on and after the operative date the same as if filed, issued, taken, or incurred under this division after the operative date.~~

~~(b) If a guardian or conservator or surety is liable under prior law for any act or omission prior to the operative date, the repeals made by this act do not affect such liability.----Such liability may be determined and enforced under prior law as fully and to the same extent as if such repeals had not been made.~~

~~1483.--The changes made in prior law by this division on and after the operative date in the standards for appointment of a guardian shall not affect the validity of any nomination, appointment, or confirmation made under prior law, but any appointment on or after the operative date is governed by this division.~~

~~1484.---(a) Any order, judgment, or decree made under prior law shall continue in full force and effect in accordance with its terms or until modified or terminated by the court.~~

~~(b) Any petition, report, account, or other matter filed or commenced before the operative date shall be continued under this division, so far as applicable, unless in the opinion of the court application of a particular provision of this division would substantially interfere with the effective conduct of the matter or with the rights of the parties or other interested persons, in which case the particular provision of this division does not apply and prior law applies.~~

~~1485.--(a) A guardianship of an adult, or a guardianship of the person of a married minor, in existence under this code on the operative date shall be deemed to be a conservatorship and is governed by the provisions of law applicable to conservatorships without petition or order, whether or not the letters of guardianship or the title of the proceeding are amended as provided in this chapter.~~

~~(b) The validity of transactions and acts of a guardian or conservator shall not be affected by a misdescription of the office, nor shall any judgment, decree, or order of the court be invalidated by any such misdescription.~~

~~1487.--(a) At or before the time of the court's first periodic review after the operative date under Section 1850, the court shall review the conservatorship to determine whether an order should be made under Section 1873 broadening the legal capacity of the conservatee.~~

~~(b) This section does not apply with respect to guardianships described in Section 1485 or to conservatorships where the conservator was appointed under prior law on the ground that the conservatee was a person for whom a guardian could have been appointed.~~

~~(c) Noncompliance with this section gives rise to no penalty.~~

1488. If, ~~prior to the operative date~~ before January 1, 1981, an adult has in a signed writing nominated a person to serve as guardian if a guardian is in the future appointed for such adult, such nomination shall be deemed to be a nomination of a conservator. This section applies whether or not the signed writing was executed in the same manner as a witnessed will so long as the person signing the writing had at the time the writing was signed sufficient capacity to form an intelligent preference.

1489. If, ~~prior to the operative date~~ before January 1, 1981, a parent or other person has in a signed writing appointed a person to serve as the guardian of the person or estate or both of a minor, or as the guardian of the property the minor receives from or by designation of the person making the appointment, such appointment shall be deemed to be a nomination of a guardian if the requirements of Section 1500 or 1501 are satisfied and, in such case, shall be given the same effect it would have under Section 1500 or 1501, as the case may be, if made ~~after the operative date~~ on or after January 1, 1981. This section applies whether or not the signed writing is a will or deed so long as the person signing the writing had at the time the writing was signed sufficient capacity to form an intelligent preference.

1490. ~~(a)~~ When used in any statute of this state with reference to an adult or to the person of a married minor, "guardian" means the conservator of that adult or the conservator of the person in case of the married minor.

~~(b) Any reference in the statutes of this state to the term "absentee" or "secretary concerned" as defined in former Section 1751.5 of the Probate Code shall be deemed to be a reference to the definitions of those terms in this division.~~

~~(c) Any reference in the statutes of this state to the definitions of the terms "account in an insured savings and loan association," "shares of an insured credit union," or "single premium deferred annuity" in former Section 1510 of the Probate Code shall be deemed to be a reference to the definitions of those terms in this division.~~

~~1491. The Judicial Council may provide by rule for the orderly transition of pending proceedings on the operative date, including but not limited to rules relating to amendment of title of the proceedings and amendment of, or issuance of, letters of guardianship or conservatorship.~~

In this connection, it would be useful to make a technical expansion of the coverage of some of the transitional provisions, thus:

§ 2. Continuation of existing law; construction of provisions drawn from uniform acts

2. (a) A provision of this code, insofar as it is substantially the same as a previously existing provision relating to the same subject matter, shall be construed as a restatement and continuation thereof and not as a new

enactment, and the subject matter continues to be governed by the provision of this code notwithstanding repeal of the previously existing provision.

(b) A provision of this code, insofar as it is the same in substance as a provision of a uniform act, shall be so construed as to effectuate the general purpose to make uniform the law in those states which enact that provision.

Comment. Subdivision (a) of Section 2 is amended to emphasize that the repeal of previously existing law does not affect the continued coverage of new law that is substantially the same. Thus, for example, if a fiduciary relationship is created, an obligation is entered into, a liability is incurred, an appointment is made, an order or judgment is made or entered, a petition is filed or proceeding is commenced, or a transaction is executed, under the previously existing law, its validity and continued existence is unaffected by the restatement and continuation of the previously existing law in this code.

§ 7. Reference to statute includes amendments and additions

7. Whenever a reference is made in this code to any portion of this code or to any other law, or in any other statute to any portion of this code, the reference applies to all amendments and additions and renumberings heretofore or hereafter made.

Comment. Section 7 is amended to expand its coverage to references made to this code in other statutes, notwithstanding Section 6 (construction of code). Section 7 is also amended to make clear that a reference in this code or elsewhere to a provision of this code by section number picks up subsequent renumberings of the section. See also Section 2 (continuation of existing law).

§ 2901. Recording certification in county property records; providing information and property to public guardian

Section 2901 should be amended to delete the reference to the immunity of the county recorder. The county recorder is not as a general principle subject to liability for recording any instrument authorized or required by law to be recorded. Just the opposite--the county recorder is liable for failing to record as required. See, e.g., Gov't Code §§ 27101, 27203.

§ 2901. Recording certification in county property records; providing information and property to public guardian

2901. (a) A public guardian who is authorized to take possession or control of property under this chapter may issue a written certification of that fact. The written certification is effective for five days after the date of issuance.

(b) The public guardian may record a copy of the written certification in any county in which is ~~situated~~ located real property of which the public guardian is authorized to take possession or control under this chapter.

(c) A financial institution or other person shall, without the necessity of inquiring into the truth of the written certification and without court order or letters being issued:

(1) Provide the public guardian information concerning property held in the sole name of the proposed ward or conservatee.

(2) Surrender to the public guardian property of the proposed ward or conservatee that is subject to loss, injury, waste, or misappropriation.

(d) Receipt of the written certification:

(1) Constitutes sufficient acquittance for providing information and for surrendering property of the proposed ward or conservatee.

(2) Fully discharges the ~~county--recorder,~~ financial institution ~~,~~ or other person from any liability for any act or omission of the public guardian with respect to the property.

Comment. Section 2901 continues Section 2901 of the repealed Probate Code without substantive change. The reference to the county recorder has been omitted from subdivision (d)(2) as unnecessary since the county recorder's only involvement is to record the written certification of the public guardian in the county real property records. Section 2901 is comparable to Section 7603 (providing information, access, or property to public administrator).

Background on Section 2901 of Repealed Code

Section 2901 was added by 1988 Cal. Stat. ch. 1199 § 72. The section was drawn from Section 7603 of the repealed Probate Code. See the Comment to Section 7603 of the new Probate Code for the source of Section 7603 of the repealed Probate Code. For background on the provisions of this part, see the Comment to this part under the part heading.

A parallel change should be made in Section 7603 (providing information and access to public administrator), from which Section 2901 was drawn.

§ 3208. Order authorizing treatment

Where an adult is in need of medical treatment but is unable to give informed consent and has no conservator, an interested person can petition the court to authorize medical treatment. The court may authorize the treatment on a determination that the person's medical condition requires the treatment and, if untreated, the condition will become life-endangering or "result in a serious threat to the physical health" of the person. Section 3208.

This provision appears to be unduly narrow in its application to treatment for problems that are a threat to the physical, as opposed to mental, health of the person. Expansion of the statute to cover threats to the person's mental health would make the statute more useful. There are numerous protections against abuse built into the statute in the form of appointment of an attorney to represent the person's interest, notice to interested persons, court determination that treatment is necessary, and limitation on the type of treatment that can be given (no placement in mental health facility, no experimental drugs, no convulsive treatment). See Sections 3200-3211.

If the Commission concludes that the court may authorize treatment if the condition will result in a serious threat to the "physical or mental health" of the person, a parallel change should also be made in Section 2357 (court ordered medical treatment for minor ward or conservatee).

§ 3920.5. Delayed time for transfer to minor; procedure

Under the California Uniform Transfers to Minors Act (CalUTMA), the general rule is that the custodianship of a minor's property terminates when the minor reaches 18, and the property is transferred to the minor. Section 3920. However, a person who transfers property under CalUTMA by will, trust, nomination, irrevocable exercise of power of appointment, or irrevocable gift, may specify that the custodianship is to extend beyond the age of 18. Under Section 3920.5, the age may be extended to 25, except in the case of an irrevocable gift, in which case it may be extended to age 21.

The reason for the limitation to age 21 in the case of a gift is that a gift held beyond age 21 will not qualify for the $10,000 annual gift tax exclusion under Internal Revenue Code Section 2503(c). A question is raised whether the state should be so paternalistic, however. If a person wants to make a gift to a minor and have the custodianship continue until age 25, shouldn't the person be able to do that even if it means paying a gift tax? Why should the state restrict the persons options on the assumption that the most important controlling factor for that person will be the tax liability on the gift?

A logical response to these questions is that most people would want the gift to be limited to 21 years if they were aware of the adverse tax consequences. The law protects these people from the consequences of an uninformed choice of 21 years. A person who wants to tie up a gift for a longer period can use some other device such as a trust. The law should be designed for the common case, not for the exception.

The Commission should review the policy on this issue. If the decision is to allow custodianship of an irrevocable gift to be extended to age 25, this could be easily implemented by amendment of Section 3920.5 to read:

> 3920.5. (a) Subject to the requirements and limitations of this section, the time for transfer to the minor of custodial property transferred under or pursuant to Section 3903, 3904, or 3905 may be delayed until a specified time after the time the minor attains the age of 18 years, which time shall be specified in the transfer pursuant to Section 3909.
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> (b) To specify a delayed time for transfer to the minor of the custodial property, the words "as custodian for _____ (Name of Minor) until age _____ (Age for Delivery of Property to Minor) under the California Uniform Transfers to Minors Act" shall be substituted in substance for the words "as custodian for _____ (Name of Minor) under the California Uniform Transfers to Minors Act" in making the transfer pursuant to Section 3909.
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> (c) The time for transfer to the minor of custodial property transferred under or pursuant to Section 3903 or 3905 may be delayed under this section only if the governing will or trust or nomination provides in substance that the custodianship is to continue until the time the minor attains a specified age, which time may not be later than the time the minor attains 25 years of age, and in that case the governing will or trust or nomination shall determine the time to be specified in the transfer pursuant to Section 3909.
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> (d) The time for transfer to the minor of custodial property transferred by irrevocable gift or the irrevocable exercise of a power of appointment under Section 3904 may be delayed under this section only if the transfer pursuant to Section 3909 provides in substance that the custodianship is to continue until the time the minor attains a specified age, which time may not be later than the time the minor attains 25 years of age.
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> ~~(e) The time for transfer to the minor of custodial property transferred by irrevocable gift under Section 3904 may be delayed under this section only if the transfer~~

~~pursuant to Section 3909 provides in substance that the custodianship is to continue until the time the minor attains a specified age, which time may not be later than the time the minor attains 21 years of age.~~

~~(f)~~ (e) If the transfer pursuant to Section 3909 does not specify any age, the time for the transfer of the custodial property to the minor under Section 3920 is the time when the minor attains 18 years of age.

~~(g)~~ (f) If the transfer pursuant to Section 3909 provides in substance that the duration of the custodianship is for a time longer than the maximum time permitted by this section for the duration of a custodianship created by that type of transfer, the custodianship shall be deemed to continue only until the time the minor attains the maximum age permitted by this section for the duration of a custodianship created by that type of transfer.

§ 6211. 120-hour survival requirement

AB 158 includes the Commission's recommendation to apply a 120-hour survival requirement in order for an heir to take by intestate succession. The statutory will fails to include any survival requirement, but the policies that suggest a 120-hour survival requirement for intestate succession apply with equal force to devolution under a statutory will. In fact, it has been said that the law of intestate succession is in effect a statutory will for persons who have failed to execute their own will.

The 120-hour survival requirement could be applied to the statutory will be addition of the following provision:

§ 6211. 120-hour survival requirement

6211. (a) A reference in a California statutory will to a person who "survives me" means a person who survives the decedent by 120 hours. A person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for the purpose of the California statutory will, and the beneficiaries are determined accordingly. If it cannot be established by clear and convincing evidence that a person who would otherwise be a beneficiary has survived the decedent by 120 hours, it is deemed that the person failed to survive for the required period. The requirement of this section that a person who survives the decedent must survive the decedent by 120 hours does not apply if the application of the 120-hour survival requirement would result in the escheat of property to the state .

(b) This section does not apply to a California statutory will executed on a form that does not include the text of this section.

Comment. Section 6211 provides a 120-hour survival rule. Section 6211 is the same in substance as Section 6403 (requirement that heir survive decedent).

Conforming changes would also be appropriate:

§ 221. Exceptions to applicability of chapter

221. (a) This chapter does not apply in any case where Section 103, 6146, 6211, or 6403 applies.

(b) This chapter does not apply in the case of a trust, deed, or contract of insurance, or any other situation, where (1) provision is made dealing explicitly with simultaneous deaths or deaths in a common disaster or otherwise providing for distribution of property different from the provisions of this chapter or (2) provision is made requiring one person to survive another for a stated period in order to take property or providing for a presumption as to survivorship that results in a distribution of property different from that provided by this chapter.

Comment. Section 221 continues Section 221 of the repealed Probate Code ~~without change~~ with the addition of the reference to Section 6211 (120-hour survival requirement). Subdivision (a) makes clear that the provisions of this chapter do not apply in cases where Section 103 (effect on community and quasi-community property where married person does not survive death of spouse), 6146 (wills), 6211 (California statutory will) or 6403 (intestate succession) applies. Subdivision (b) provides that the distribution provision of a trust, deed, contract of insurance, or other instrument controls if it results in a different distribution of property than that provided in this chapter. Subdivision (b) uses language drawn from Section 2-601 of the Uniform Probate Code (1987) and includes the substance of the 1953 revision of Section 6 of the Uniform Simultaneous Death Act. As to the construction of provisions drawn from uniform acts, see Section 2.

Section 226 limits the application of this chapter to cases where the person the priority of whose death is in issue died on or after January 1, 1985 (the date this chapter of the repealed Probate Code first became operative).

Background on Section 221 of Repealed Code

Section 221 was added by 1983 Cal. Stat. ch. 842 § 22. Subdivision (a) was new. Subdivision (b) continued the substance of former Probate Code Section 296.6 (repealed by 1983 Cal. Stat. ch. 842 § 20) but omitted the reference to "wills" (will now being covered by Section 6146), substituted "trust" for "living trusts," added language drawn from Section 2-601 of the Uniform Probate Code (1987), and included the substance of the 1953 revision of Section 6 of the Uniform Simultaneous Death Act. As to the construction of provisions drawn from uniform acts, see Section 2. The 1953 revision, which had not previously been adopted in California, inserted the phrase "or any other situation" and added the clause which appeared as the last portion of clause

(2) of subdivision (b) of Section 221. For background on the provisions of this part, see the Comment to this part under the part heading.

§ 230. Petition for purpose of determining survival

230. A petition may be filed under this chapter for any one or more of the following purposes:

(a) To determine for the purposes of Section 103, 220, 222, 223, 224, 6146, 6147, 6211, 6242, 6243, 6244, or 6403, or other provision of this code whether one person survived another.

(b) To determine for the purposes of Section 1389.4 of the Civil Code whether issue of an appointee survived the donee.

(c) To determine for the purposes of Section 24606 of the Education Code whether a person has survived in order to receive benefits payable under the system.

(d) To determine for the purposes of Section 21371 of the Government Code whether a person has survived in order to receive money payable under the system.

(e) To determine for the purposes of a case governed by former Sections 296 to 296.8, inclusive, repealed by Chapter 842 of the Statutes of 1983, whether persons have died other than simultaneously.

Comment. Section 230 continues Section 230 of the repealed Probate Code ~~without substantive change~~ with the addition of the reference to Section 6211 (120-hour survival requirement). This section refers to various provisions that present an issue of survival. See also Sections 1020-1023 (signing and verifying petition).

Background on Section 230 of Repealed Code

Section 230 was a new provision added by 1983 Cal. Stat. ch. 842 § 22. Sections 230-234 were drawn from former Sections 296.41 and 296.42 (repealed by 1983 Cal. Stat. ch. 842 § 20). For background on the provisions of this part, see the Comment to this part under the part heading.

§ 8544. Special powers, duties, and obligations

Section 8544(c) provides:

(c) Except where the powers, duties, and obligations of a general personal representative are granted under Section 8545, the special administrator is not liable to a creditor on a claim against the decedent.

Although this provision speaks of the "liability" of the special administrator, it is misleading in that a personal representative is not ordinarily personally liable for claims against a decedent.

A creditor's claim is not barred until four months after appointment of a general personal representative, and the filing of a claim tolls the statute of limitations. Sections 9100 and 9352. If

the claim is rejected, the creditor may bring an action on the claim. Although Section 9252 states that the action is "against the estate", it is generally understood that the personal representative is the defendant. See, e.g., Section 573(a) (cause of action may be maintained "against the decedent's personal representative").

All the statutes governing litigation involving a decedent need to be revised for clarity, simplicity, and consistency, and in fact the staff has in hand a draft of an overhaul of these provisions. However, this is a large project that the Commission has temporarily assigned to the "probate back burner". For now, it may be useful simply to overrule the implication that a general personal representative may be personally liable on a creditor's claim:

> (c) Except where the powers, duties, and obligations of a general personal representative are granted under Section 8545, the special administrator is not ~~liable to a creditor~~ a proper party to an action on a claim against the decedent.

The reference to an action "against the estate" in Section 9252, though erroneous, does not appear to be causing any particular problems, so the staff would not deal with it until the general topic of litigation involving the decedent is addressed comprehensively. Similar references in Sections 9807, 9820, and 9831 can also be addressed at that time.

§ 9805. Execution of instrument; liability of personal representative

The personal representative may, pursuant to court order, execute a note and mortgage or deed of trust on estate property. Section 9805(b) states that, "The personal representative is not personally liable on the note or the mortgage or deed of trust or other instrument by reason of so signing." This provision raises the intriguing question whether the personal representative is personally liable for signing other documents in cases where the statute is silent as to this issue.

The general rule is that the personal representative is personally liable to third persons unless the personal representative makes clear that the action is being taken in a representative capacity. See, e.g., 3 California Decedent Estate Practice § 23.13 at 23-11 (CEB Rev. 7/88). The predecessor of Section 9805(b), former Section 833, was

clear on this point: "The note or notes and mortgage or deed of trust shall be signed by the executor or administrator as such, and shall create no personal liability against the person so signing." (Emphasis added.)

It may be useful to provide a general rule on this, rather than the hit and miss approach of existing estate administration law. The trust law, for example, has a clear general provision that states:

> 18000. (a) Unless otherwise provided in the contract or in this chapter, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administration of the trust unless the trustee fails to reveal the trustee's representative capacity or identify the trust in the contract.
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> (b) The personal liability of a trustee on a contract entered into before July 1, 1987, is governed by prior law and not by this section.

A similar provision could also be added to the Guardianship and Conservatorship Law, which has a provision similar to Section 9805 (although it preserves the "as such" language).

§ 9832. Matters relating to real property

Section 9832 permits the personal representative to extend, renew, or modify a lease of real property in the estate without prior court authorization in either of the following circumstances:

> (1) The lease is from month to month.
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> (2) The term of the lease does not exceed one year and the monthly rental does not exceed $1500.

The Commission should consider whether the $1500 maximum rental for the personal representative to deal with a lease without court authorization should be increased to $2500. Recent price increases in the real estate market in California have resulted in rapid rises in rentals. It is not uncommon for monthly rentals, even for residential properties, to exceed $1500.

Should the personal representative be required to obtain a court order, with the attendant cost to the estate, simply to renew a lease at market rates? Increasing the maximum rental to $2500 monthly for independent personal representative action would take the routine cases out of court review.

If the Commission approves this change, a parallel change would also be made in Section 9941 (initiating a lease without prior court authorization). The rules governing leasing of guardianship and conservatorship property (Sections 2501 and 2555) would be conformed as well.

§ 9962. Minimum purchase price

Section 9962 requires that an option to sell real property in the estate must be for at least 90% of appraised value of the property, based on a probate referee appraisal. The section fails to recognize that appraisal by a probate referee may have been waived under Section 8903 and the property appraised by another person. This adjustment has already been made by the Commission in Section 10309, the general section requiring estate sales to be at 90% of appraised value. To conform Sections 9962 with Section 10309, the following revision should be made:

> 9962. The purchase price of the real property subject to the option shall be at least 90 percent of the appraised value of the real property. The appraisal shall be one made ~~by a probate referee~~ in the manner provided in subdivision (c) of Section 10309 within one year prior to the hearing of the petition.
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> Comment. Section 9962 incorporates the appraisal procedure of Section 10309(c). Under that provision, if a new appraisal is needed, the new appraisal need not be made by a probate referee if the original appraisal of the property was made by a person other than a probate referee. If the original appraisal of the property was made by a probate referee, the new appraisal may be made by the probate referee who made the original appraisal without further order of the court or further request for the appointment of a new probate referee. If appraisal by a probate referee is required, a new probate referee must be appointed, using the same procedure as for the appointment of an original referee, to make the new appraisal if the original probate referee is dead, has been removed, or is otherwise unable to act, or if there is other reason to appoint another probate referee.

§ 12250. Order of discharge

Section 12250 provides for discharge of the personal representative after compliance with the terms of the order for final distribution. While the section does not preclude discharge where

distribution is made before entry of an order for distribution, it does not expressly recognize this practice either.

By way of contrast the provisions governing payment of debts state that the personal representative is not required to pay a debt until the court has ordered payment, but that "Nothing in this section precludes settlement of an account of a personal representative for payment of a debt made without prior court authorization." Section 11422(d).

It may be useful to recognize by statute the practice of making informal distribution, just as the practice of informal payment of debts is statutorily recognized. This could be done by amendmending Section 12250 to read:

> 12250. (a) When the personal representative has complied with the terms of the order for final distribution and has filed the appropriate receipts or the court has excused the filing of a receipt, the court shall, on ex parte petition, make an order discharging the personal representative from all liability incurred thereafter.
>
> (b) Nothing in this section precludes discharge of the personal representative for distribution made without prior court order, so long as the terms of the order for final distribution are satisfied.
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> Comment. Subdivision (b) is added to Section 12250 to codify existing practice.

§ 13106.5. Recording of affidavit or declaration where property is obligation secured by lien on real property

Subdivisions (c) and (d) of Section 13106.5 protect a good faith purchaser "or lessee" for value of property who relies on a recorded reconveyance under a deed of trust or discharge under a mortgage. This protection seems appropriate, but it raises the issue whether good faith lessees for value should be protected in all situations where good faith purchasers for value are protected.

Occasional provisions in the Probate Code protect various third persons who rely on ostensible authority or title in good faith and for valuable consideration. Two provisions limit their protection to a good faith "purchaser". See Sections 11750 (distribution of property) and 18103 (effect on purchaser of omission of trust from grant of real property). Three provisions protect a "purchaser or encumbrancer".

See Sections 1875 (legal capacity of conservatee), 3074 (management or disposition of community property where spouse lacks legal capacity), 18104 (effect on real property transactions where beneficiary undisclosed). Sections 13106.5 and 13204 (affidavit procedure) protect a purchaser, lessee, or lender. A number of provisions broadly protect a "third person" who acts in good faith. See Sections 2546 (guardianship and conservatorship sales), 8278 (revocation of probate), 18100-18102 (third persons dealing with trustee). And Section 10591 (persons dealing with personal representative under Independent Administration) protects both a "bona fide purchaser" and other "third persons" dealing with the personal representative.

There appears to be no occasion to distinguish among the various persons protected under most of these statutes. It is arguable that protection of a purchaser or "encumbrancer" picks up a lessee as well, since a lessee is arguably a type of encumbrancer even though not a lienholder. Civil Code 1114 defines "incumbrances" to include taxes, assessments, and all liens on real property, but Ogden points out that cases have applied the term to covenants, restrictions, reservations of right-of-way, easements, leases, and deeds of trust, among other interests. 1 A. Bowman, Ogden's Revised California Real Property Law §§ 3.4, 11.20 (1974). However, in the staff's opinion it is not really satisfactory to convert all the Probate Code BFP references to "good faith purchaser or encumbrancer." The existing references to "third persons acting in good faith" are both better and more prevalent in the code, and the staff would broaden all of them this way unless it is clear from the context that a narrower reading is appropriate.

Respectfully submitted,

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