

#L-1030

ns98
09/07/90

First Supplement to Memorandum 90-95

Subject: Study L-1030 - Disposition of Small Estate Without Probate
(Comments of Richard S. Kinyon)

Attached to this memorandum is a copy of a suggested revisions of the tentative recommendation relating to disposition of a small estate without probate, received from Richard S. Kinyon of San Francisco.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

MORRISON & FOERSTER
ATTORNEYS AT LAW

345 CALIFORNIA STREET
SAN FRANCISCO, CA 94104-2675
TELEPHONE (415) 677-7000
FACSIMILE (415) 677-7322

PLEASE USE FELT-TIP PEN TO COMPLETE THIS FORM

FACSIMILE FORM AND COVER SHEET

TO:

Name: _____

MoFo Office:

- Hong Kong
- London
- Tokyo

- Denver
- Los Angeles
- New York
- Orange County

- Palo Alto
- Walnut Creek
- Washington, D.C.

TO:

Name: ROBERT J. MURPHY III, STAFF COUNSEL

Firm: CALIF LAW REV'N COMMISSION

Fax Number: (415) 494-1827

Main or Confirming Number: (415) 494-1335

Preparer of this slip has confirmed that fax number given is correct: 1696, PMD
(Comp. # / Initials)

FROM:

Name: RICHARD S. KINYON

We are transmitting a total of 11 pages including this cover letter.

Date: 9-7-90 Time: _____

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL THE SENDER AS SOON AS POSSIBLE AT (415) 677-7035.

If confidential treatment is requested, indicate name and telephone number of person who should be contacted to receive this transmission.

Name: _____ Phone: (_____) _____

Comments: Re: Memorandum 90-95 - suggested REVISIONS

retirement plan to survive the decedent, and disclaimer of insurance or retirement benefits by the beneficiary.

Probate Code § 13006 (amended). Successor of the decedent

SEC. 4. Section 13006 of the Probate Code is amended to read:

13006. "Successor of the decedent" means:

(a) If the decedent died leaving a will, the sole beneficiary or all of the beneficiaries who succeeded to a particular item of property of the decedent under the decedent's will. For the purposes of this part, the trustee of a trust created during the decedent's lifetime is a beneficiary under the decedent's will if the trust succeeds to the particular item of property under the decedent's will.

(b) If the decedent died without a will, the sole person or all of the persons who succeeded to the particular item of property of the decedent under Sections 6401 or 6402 or, if the law of a sister state or foreign nation governs succession to the particular item of property, under the law of the sister state or foreign nation.

Comment. Section 13006 is amended to delete the language which precluded the trustee of a testamentary trust from using the procedures under this part. This deletion allows the trustee of a testamentary trust created in the decedent's will to act on behalf of the trust. This permits the trustee to use a small estate summary procedure where no proceeding is being or has been conducted in California for administration of the decedent's estate or where the decedent's personal representative has consented to use of the procedure. See Sections 13101(a)(4), 13108(a)(2), 13150(b), 13200(a)(7).

Probate Code § 13051 (amended). Guardians, conservators, trustees, custodians, sister state personal representatives

SEC. 5. Section 13051 of the Probate Code is amended to read:

13051. For the purposes of this part:

✓
"a trust"
cf § 13051

DISPOSITION OF SMALL ESTATE WITHOUT PROBATE

(a) A guardian or conservator of the estate of a person entitled to any of the decedent's property may act on behalf of the person without authorization or approval of the court in which the guardianship or conservatorship proceeding is pending.

(b) A trustee of a trust created during the decedent's lifetime may act on behalf of the trust.

(c) If the decedent's will ^{authorizes} ~~designates~~ a custodian to receive a devise to a beneficiary under the Uniform Gifts to Minors Act or the Uniform Transfer to Minors Act of any state ~~and the nomination has not been revoked~~, the custodian may act on behalf of the beneficiary until such time as the custodianship terminates.

(d) A sister state personal representative may act on behalf of the beneficiaries as provided in Chapter 3 (commencing with Section 12570) of Part 13 of Division 7.

by Comment. Subdivision (b) of Section 13051 is amended to eliminate the restriction that the trust must be created during the decedent's lifetime. This deletion allows the trustee of a testamentary trust created ~~by~~ the decedent ~~to~~ ^{to} act on behalf of the trust. ~~This permits~~ ^{and it} the trustee to use a small estate summary procedure where no proceeding is being or has been conducted in California for administration of the decedent's estate or where the decedent's personal representative has consented to use of the procedure. See Sections 13101(a)(4), 13108(a)(2), 13150(b), 13200(a)(7). See also Section 13006.

Probate Code § 13101 (amended). Furnishing affidavit or declaration

SEC. 6. Section 13101 of the Probate Code is amended to read:

13101. (a) To collect money, receive tangible personal property, or have evidences of a debt, obligation, interest, right, security, or chose in action transferred under this chapter, an affidavit or a declaration under penalty of perjury under the laws of this state shall be furnished to the holder of the decedent's property stating all of the following:

DISPOSITION OF SMALL ESTATE WITHOUT PROBATE

- (1) The decedent's name.
- (2) The date and place of the decedent's death.
- (3) "At least 40 days have elapsed since the death of the decedent, as shown in a certified copy of the decedent's death certificate attached to this affidavit or declaration."
- (4) *Either of the following, as appropriate:*
 - (A) "No proceeding is now being or has been conducted in California for administration of the decedent's estate."
 - (B) "The decedent's personal representative has consented in writing to the payment, transfer, or delivery to the affiant or declarant of the property described in the affidavit or declaration."
- (5) "The ~~gross~~ ^{fair market} value of the decedent's real and personal property in California, excluding the property described in Section 13050 of the California Probate Code, does not exceed sixty thousand dollars (\$60,000)."
- (6) A description of the property of the decedent that is to be paid, transferred, or delivered to the affiant or declarant.
- (7) The name of the successor of the decedent (as defined in Section 13006 of the California Probate Code) to the described property.
- (8) *Either of the following, as appropriate:*
 - (A) "The affiant or declarant 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."
 - (B) "The affiant or declarant is authorized under Section 13051 of the California Probate Code to act on behalf of the successor of the decedent (as defined in Section 13006 of the California Probate Code) with respect to the decedent's interest in the described property."
- (9) "No other person has a right to the interest of the decedent in the described property."

cf. §13111(a)
+ 13106(a)

DISPOSITION OF SMALL ESTATE WITHOUT PROBATE

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

(11) "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."

(b) Where more than one person executes the affidavit or declaration under this section, the statements required by subdivision (a) shall be modified as appropriate to reflect that fact.

(c) If the particular item of property to be transferred under this chapter is a debt or other obligation secured by a lien on real property and the instrument creating the lien has been recorded in the office of the county recorder of the county where the real property is located, the affidavit or declaration shall satisfy the requirements both of this section and Section 13106.5.

(d) A certified copy of the decedent's death certificate shall be attached to the affidavit or declaration.

(e) If the ~~person or persons executing the affidavit or declaration~~ ^{want} claim under the decedent's will, a copy of the will shall be attached to the affidavit or declaration.

(1) ~~If~~ the decedent's personal representative has consented to the payment, transfer, or delivery of the described property to the affiant or declarant, a copy of the consent shall be attached to the affidavit or declaration.

Comment. Subdivision (e) is added to Section 13101 to require that a copy of the decedent's will be attached to the affidavit or declaration if the person or persons executing the affidavit or declaration claim under the decedent's will. This makes Section 13101 consistent with Section 13200.

Subdivision (a)(4) is revised and subdivision (f) is added to reflect the new authorization for the decedent's personal representative to consent to use of the affidavit procedure, notwithstanding that an estate proceeding is pending or has been conducted in this state. See Section 13108(a)(2).

certified

and the personal representative letters

certified

{ and ⁽¹⁾ no estate proceeding is pending or has been conducted in California }

DISPOSITION OF SMALL ESTATE WITHOUT PROBATE

15

13108. (a) The procedure provided by this chapter may be used only if *no one of the following requirements is satisfied:*

(1) *No proceeding for the administration of the decedent's estate is pending or has been conducted in this state.*

(2) *The decedent's personal representative consents in writing to the payment, transfer, or delivery of the property described in the affidavit or declaration pursuant to this chapter.*

(b) Payment, delivery, or transfer of a decedent's property pursuant to this chapter does not preclude later proceedings for administration of the decedent's estate.

Comment. Subdivision (a)(2) is added to Section 13108 to permit use of the procedure provided by this chapter, notwithstanding that an estate proceeding is pending or has been conducted in this state.

Probate Code § 13111 (amended). Restitution if estate proceeding commenced or on request of personal representative

SEC. 9. Section 13111 of the Probate Code is amended to read:

13111. (a) Subject to subdivisions (b), (c), (d), and (e), if proceedings for the administration of the decedent's estate are commenced in this state, *or if the decedent's personal representative has consented to the payment, transfer, or delivery of the decedent's property under this chapter and the personal representative later requests that the property be restored to the estate*, 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, if the person ~~no longer~~ has the property, together with (A) the net income the person received from ~~that~~ ^{the}

has disposed of

property and (B) interest on the fair market value of the property from the date of disposition at the rate payable on a money judgment. For the purposes of this subdivision, the "fair market value of the property" is ~~the fair market value, value~~ *determined* as of the time of the disposition of the property, of the property paid, delivered, or transferred to the person under this chapter, excluding any liens and encumbrances on the property at that time.

(b) Subject to subdivision (c) and subject to any additional liability the person has under Sections 13109 to 13112, inclusive, if the person fraudulently secured the payment, delivery, or transfer of the decedent's property under this chapter, the person is liable under this section for restitution to the decedent's estate of three times the fair market value of the property. For the purposes of this subdivision, the "fair market value of the property" is ~~the fair market value, value~~ *determined* as of the time the person liable under this subdivision presents the affidavit or declaration under this chapter, of the property paid, delivered, or transferred to the person under this chapter, excluding the amount of any liens and encumbrances on the property at that time.

(c) The property and amount required to be restored to the estate under this section shall be reduced by any property or amount paid by the person to satisfy a liability under Section 13109 or 13110.

(d) An action to enforce the liability under this section may be brought only by the personal representative of the estate of the decedent. In an action to enforce the liability under this section, the court's judgment may enforce the liability only to the extent necessary to protect the interests of the heirs, devisees, and creditors of the decedent.

(e) An action to enforce the liability under this section is forever barred three years after presentation of the affidavit or declaration under this chapter to the holder of the decedent's property, or three years after the discovery of the fraud,

DISPOSITION OF SMALL ESTATE WITHOUT PROBATE

21

13154. (a) If the court makes the determinations required under subdivision (b), the court shall issue an order determining (1) that real property, to be described in the order, of the decedent is property passing to the petitioners and the specific property interest of each petitioner in the described property and (2) ~~that no administration of the decedent's estate is necessary if the petition so requests, that personal property, to be described in the order, of the decedent is property passing to the petitioners and the specific property interest of each petitioner in the described property.~~

(b) The court may make an order under this section only if the court makes all of the following determinations:

(1) The gross value of the decedent's real and personal property in this state, excluding the property described in Section 13150, does not exceed sixty thousand dollars (\$60,000).

(2) Not less than 40 days have elapsed since the death of the decedent.

(3) *Whichever of the following is appropriate:*

(A) No proceeding is being or has been conducted in this state for administration of the decedent's estate.

(B) *The decedent's personal representative has consented ~~in writing~~ to use of the procedure provided by this chapter.*

(4) The real property described in the order is property of the decedent passing to the petitioner.

(c) If the petition has attached an inventory and appraisal that satisfies the requirements of subdivision (b) of Section 13152, the determination required by paragraph (1) of subdivision (b) of this section shall be made on the basis of the verified petition and the attached inventory and appraisal, unless evidence is offered by a person opposing the petition that the gross value of the decedent's real and personal property in this state, excluding the property described in Section 13150, exceeds sixty thousand dollars (\$60,000).

(9) "The affiant is the successor of the decedent (as defined in Section 13006 of the Probate Code) and 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."

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

(b) For each person executing the affidavit, the affidavit shall contain a notary public's certificate of acknowledgment identifying the person.

(c) There shall be attached to the affidavit an inventory and appraisal of the decedent's real property in this state, excluding the real property described in Section 13050. The form, content, and manner of making the inventory and appraisal of the real property shall be as set forth in Part 3 (commencing with Section 8800) of Division 7. The appraisal shall be made by a probate referee selected by the affiant from those probate referees appointed by the Controller under Section 400 to appraise property in the county where the real property is located.

(d) ~~If the person or persons executing the affidavit claims~~^{ant} under the decedent's will, a copy of the will shall be attached to the affidavit.

certified

(e) A certified copy of the decedent's death certificate shall be attached to the affidavit. ~~By the decedent's personal representative has consented in writing to use of the procedure provided by this chapter, a copy of the consent shall be attached to the affidavit.~~

and the p.n. letters

(f) The affiant shall personally serve or mail, postage prepaid, a copy of the affidavit and attachments to any person identified in paragraph (4) of subdivision (a).

Comment. Section 13200 is amended to recognize that the decedent's personal representative may consent to use of the procedure provided by this chapter, notwithstanding that an estate proceeding is pending or has been conducted in this state. See Section 13210.

(1) and no estate proceeding is pending or has been conducted in California

cf S 13101

DISPOSITION OF SMALL ESTATE WITHOUT PROBATE

25

Probate Code § 13206 (amended). Restitution if estate proceeding commenced or on request of personal representative

SEC. 17. Section 13206 of the Probate Code is amended to read:

13206. (a) Subject to subdivisions (b), (c), (d), and (e), if proceedings for the administration of the decedent's estate are commenced, or if the decedent's personal representative has consented to use of the procedure provided by this chapter and the personal representative later requests that the property be restored to the estate, each person who is designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 is liable for:

(1) The restitution to the decedent's estate of the property the person took under the certified copy of the affidavit if the person still has the property, together with the net income the person received from the property.

(2) The restitution to the decedent's estate of the fair market value of the property if the person no longer has the property, together with (A) the net income the person received from the property prior to disposing of it and (B) interest from the date of disposition at the rate payable on a money judgment on the fair market value of the property. For purposes of this paragraph, the "fair market value of the property" is ~~the fair market value, valued~~ *determined* as of the time of the disposition of the property, of the property the person took under the certified copy of the affidavit, excluding the amount of any liens and encumbrances on the property at the time the certified copy of the affidavit was issued.

(b) Subject to subdivision (d), if the person fraudulently executed or filed the affidavit under this chapter, the person is liable under this section for restitution to the decedent's estate of three times the fair market value of the property. For the purposes of this subdivision, the "fair market value of the property" is ~~the fair market value, valued~~ *determined* as of the time the

certified copy of the affidavit was issued, of the property the person took under the certified copy of the affidavit, excluding the amount of any liens and encumbrances on the property at that time.

(c) Subject to subdivision (d), if proceedings for the administration of the decedent's estate are commenced and a person designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 made a significant improvement to the property taken by the person under the certified copy of the affidavit in the good faith belief that the person was the successor of the decedent to that property, the person is liable for whichever of the following the decedent's estate elects:

(1) The restitution of the property, as improved, to the estate of the decedent upon the condition that the estate reimburse the person making restitution for (A) the amount by which the improvement increases the fair market value of the property restored, ~~valued~~ *determined* as of the time of restitution, and (B) the amount paid by the person for principal and interest on any liens or encumbrances that were on the property at the time the certified copy of the affidavit was issued.

(2) The restoration to the decedent's estate of the fair market value of the property, ~~valued~~ *determined* as of the time of the issuance of the certified copy of the affidavit under Section 13202, excluding the amount of any liens and encumbrances on the property at that time, together with interest on the net amount at the rate payable on a money judgment running from the date of the issuance of the certified copy of the affidavit.

(d) The property and amount required to be restored to the estate under this section shall be reduced by any property or amount paid by the person to satisfy a liability under Section 13204 or 13205.

(e) An action to enforce the liability under this section may be brought only by the personal representative of the estate of the decedent. In an action to enforce the liability under this