

Memorandum 91-36

Subject: Study L-3051 - Transfer of Unintentionally Omitted Property to Trust by Conservator

Attached is a staff draft of a *Tentative Recommendation relating to Transfer by Conservator to Trust of Unintentionally Omitted Property*. This draft is drawn from a suggestion by attorney Michael Anderson of Sacramento considered at the last meeting. Mr. Anderson thought the conservatorship court should be permitted under the substituted judgment provisions to order the conservator to make a pour-over will for the conservatee, making a devise to a trust created under those provisions. A majority of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section opposed authorizing the conservator to make a will for the conservatee for any purpose. See also *Conservatorship of Romo*, 190 Cal. App. 3d 279, 283-85, 235 Cal. Rptr. 377 (1987) (neither the conservator nor the court may make a will for the conservatee).

The Commission thought a better approach would be to authorize the court to order the conservator to transfer to the trust any later-discovered property unintentionally omitted from the trust. The order would not require the conservator to make or revise the conservatee's will. This is the approach taken in the attached *Tentative Recommendation*.

The conservator may discover property unintentionally omitted from the trust after the conservatee's death. After the conservatee's death, the conservator continues to have the duty of custody and conservation of the estate pending its delivery to the conservatee's personal representative or other disposition according to law. Prob. Code § 2467. See also Prob. Code § 2630 (continuing jurisdiction of court). Is it possible that disputes will arise between the conservator (who wants to include the property in the trust) and the conservatee's personal representative (who wants to include the property in the probate estate)? If this is a real problem, it illustrates the limitations of not authorizing the conservator to make a pour-over will to pick up later-discovered property. On the other

hand, it may be that in the usual case substantially all of the conservatee's property will have been transferred to the trust and there will thus be no probate.

The staff recommends the Commission approve the attached *Tentative Recommendation* for distribution for comment.

Respectfully submitted,

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4/16/91

TENTATIVE RECOMMENDATION
relating to
TRANSFER OF UNINTENTIONALLY OMITTED PROPERTY
TO TRUST BY CONSERVATOR

Under the substituted judgment provisions of the Probate Code,¹ the court in a conservatorship proceeding may authorize or require the conservator to take various actions relating to the conservatee's estate plan, including creating revocable or irrevocable trusts for the benefit of the conservatee or others.² The trust may be funded with property of the conservatorship estate and may contain testamentary provisions.³

Property of the conservatee may be discovered at the conservatee's death that should have been included in the trust, but was inadvertently omitted. Authority should be included in the substituted judgment provisions to permit the court to authorize or require the conservator to transfer to the trust later-discovered property⁴ that was unintentionally omitted from the trust.⁵

1. Prob. Code §§ 2580-2586.

2. Prob. Code § 2580.

3. W. Johnstone & S. House, California Conservatorships and Guardianships § 13.3 (Cal. Cont. Ed. Bar 1990).

4. If property is discovered after the death of the conservatee, the conservator continues to have control of conservatorship assets pending delivery to the conservatee's personal representative "or other disposition according to law." Prob. Code § 2467. See also Prob. Code § 2630 (continuing jurisdiction of court).

5. The Commission is informed that this problem is sometimes dealt with under existing law by obtaining a court order under Probate Code Sections 9860-9868 relating to conveyance or transfer of property claimed to belong to decedent or other person. By adding to the substituted judgment provisions express authority for the court to authorize or require the conservator to transfer later-discovered property to the trust, any doubt about the statutory authority for this practice will be eliminated.

PROPOSED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following amendment:

Probate Code § 2580 (amended). Petition to authorize proposed action

2580. (a) The conservator or other interested person may file a petition under this article for an order of the court authorizing or requiring the conservator to take a proposed action for any one or more of the following purposes:

(1) Benefiting the conservatee or the estate.

(2) Minimizing current or prospective taxes or expenses of administration of the conservatorship estate or of the estate upon the death of the conservatee.

(3) Providing gifts for such purposes, and to such charities, relatives (including the other spouse), friends, or other objects of bounty, as would be likely beneficiaries of gifts from the conservatee.

(b) The action proposed in the petition may include, but is not limited to, the following:

(1) Making gifts of principal or income, or both, of the estate, outright or in trust.

(2) Conveying or releasing the conservatee's contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety.

(3) Exercising or releasing the conservatee's powers as donee of a power of appointment.

(4) Entering into contracts.

(5) Creating for the benefit of the conservatee or others, revocable or irrevocable trusts of the property of the estate, which trusts may extend beyond the conservatee's disability or life. The court's order may authorize or require the conservator to transfer to the trust so created any property unintentionally omitted from the trust.

(6) Exercising options of the conservatee to purchase or exchange securities or other property.

(7) Exercising the rights of the conservatee to elect benefit or payment options, to terminate, to change beneficiaries or ownership, to

assign rights, to borrow, or to receive cash value in return for a surrender of rights under any of the following:

(i) Life insurance policies, plans, or benefits.

(ii) Annuity policies, plans, or benefits.

(iii) Mutual fund and other dividend investment plans.

(iv) Retirement, profit sharing, and employee welfare plans and benefits.

(8) Exercising the right of the conservatee to elect to take under or against a will.

(9) Exercising the right of the conservatee to disclaim any interest that may be disclaimed under Part 8 (commencing with Section 260) of Division 2.

(10) Exercising the right of the conservatee (i) to revoke a revocable trust or (ii) to surrender the right to revoke a revocable trust, but the court shall not authorize or require the conservator to exercise the right to revoke a revocable trust if the instrument governing the trust (i) evidences an intent to reserve the right of revocation exclusively to the conservatee, (ii) provides expressly that a conservator may not revoke the trust, or (iii) otherwise evidences an intent that would be inconsistent with authorizing or requiring the conservator to exercise the right to revoke the trust.

(11) Making an election referred to in Section 13502 or an election and agreement referred to in Section 13503.

Comment. Section 2580 is amended to add the second sentence to paragraph (5) of subdivision (a). If the court makes an order authorizing or requiring the conservator to transfer to the trust property unintentionally omitted from the trust and such property is discovered after the death of the conservatee, the conservator continues to have control of conservatorship property pending disposition of the property according to law. Prob. Code § 2467. See also Prob. Code § 2630 (continuing jurisdiction of court).