

First Supplement to Memorandum 85-48

Subject: Study L-1030 - Probate Code (Collection or Transfer of
Small Estate Without Administration)

This supplement considers the comments relating to Memorandum 85-48 submitted by the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar. The comments of the Executive Committee are set out as item 2 in the letter attached as Exhibit 1 to this memorandum. Each of the comments of the Executive Committee is noted and discussed below.

§ 9606. Successor of the decedent.

The Executive Committee notes that Section 9606(b) defines a successor of the decedent so that the surviving spouse is the successor even if the property is separate property, some of which is inherited by the decedent's children. Although this does not mean that the surviving spouse inherits all of the separate property, it is a technical defect that should be corrected by revising subdivision (b) of Section 9606 to read:

(b) If the decedent died without a will, the person or persons who succeeded to the property of the decedent under Sections 6401 and 6402.

Note that under Section 9631, the affidavit must contain a statement that it "is executed by the successor of the decedent (as defined in Section 9606 of the California Probate Code) to the decedent's interest in the described property" and that "[n]o other person has a right to the interest of the decedent in the described property."

Method of valuation of real property

The existing affidavit procedure provisions permit use of the affidavit procedure to collect personal property where the other

requirements are satisfied "only where the gross value of the decedent's real property in this state does not exceed ten thousand dollars (\$10,000)." Any liens or encumbrances on the real property are ignored with the result that the affidavit procedure cannot be used, for example, where the decedent has an equity of \$1,000 in a parcel of real property having a gross value of \$10,001. In other words, the standard used in the affidavit procedure is one that has no relationship to the equity of the decedent in the property. By way of contrast, a report prepared by a student legal assistant indicates that other states having similar procedures generally use the standard of the value of the estate, less liens and encumbrances:

Uniform Probate Code § 3-1201 (1980) (value of the estate, less liens and encumbrances)

Alaska Stat. §§ 13.16.680, 13.16.685 (Supp. 1984) (Uniform Probate Code scheme)

Arizona Rev. Stat. Ann. §§ 14-3971, 14-3972 (1984) (Uniform Probate Code scheme)

Ark. Stat. Ann. § 62-2127 (Supp. 1983) (Value, less encumbrances, excluding homestead and statutory allowances, does not exceed \$25,000)

Hawaii Rev. Stat. § 560:3-1201 (Supp. 1983) (Uniform Probate Code scheme)

Idaho Code §§ 15-3-1201, 15-3-1202 (1979) (Uniform Probate Code scheme)

Indiana Code Ann. § 29-1-8-1 (West 1979) (Uniform Probate Code scheme)

Louisiana Code Civ. Proc. Ann. arts. 3431, 3432, 3434 (West Supp. 1985) (No dollar limit on value of estate if estate includes no real property and the sole heirs are the descendants, ascendants, brothers or sisters or surviving spouse of the decedent)

Maine Rev. Stat. Ann. tit. 18-A, § 3-1201 (1981) (Uniform Probate Code scheme)

Mississippi Code Ann. § 91-7-322 (1984) (Uniform Probate Code scheme)

Missouri Ann. Stat. § 473.097 (Vernon Supp. 1984) (Uniform Probate Code scheme)

Montana Code Ann. § 72-3-1101 (1983) (Uniform Probate Code scheme)

Nebraska Rev. Stat. § 30-24,125 (1979) (Uniform Probate Code scheme)

New Mexico Stat. Ann. § 45-3-1201 (Supp. 1984) (1978) (Uniform Probate Code scheme)

North Carolina Gen. Stat. § 28A--25-1 (1982) (Uniform Probate Code scheme)

North Dakota Cent. Code § 30.1-23-01 (1981) (Uniform Probate Code scheme)

Utah Code Ann. § 75-3-1201 (1978) (Uniform Probate Code scheme)

Virginia Code §§ 64.1-132.2, 64.1-132.3 (1984) (Uniform Probate Code scheme)

Wyoming Stat. § 2-1-201 (1981) (Uniform Probate Code scheme)

The states listed above use a statutory scheme that uses a standard based on the equity interest of the decedent to determine whether the affidavit procedure can be used, rather than the standard used in California (gross value of property). The standard used in California (gross value of property) has no relationship to the actual value of the decedent's estate.

The existing California law requires that the person using the affidavit procedure state in the affidavit that the gross value of the property does not exceed \$60,000 in value and that the gross value of the real property does not exceed \$10,000 in value. To provide a clear standard for determining the value of the real property when the affidavit procedure is used, the staff has suggested that the true cash value determined from the assessed value for property tax purposes be used. This value can be easily determined and is a matter of fact, not opinion. Arizona is one state that uses this scheme. The Executive Committee objects to the using of the assessed value because if property has been owned for a long time the true cash value determined using the assessed value will be significantly lower than the fair market value of the property. However, if property is recently purchased the true cash value determined using the assessed value will be close to the fair market value. The staff believes that

the true cash value standard is a reasonable method of determining when the affidavit procedure can be used. If the property is recently purchased, the true cash value will be close to the fair market value but it is likely that there will be large liens and encumbrances on the property, with the result that the decedent's equity in the property will be significantly lower than the true cash value. If the property has been owned for a long time, the assessed value will be considerably less than the fair market value, but the liens and encumbrances on the property are likely to be low, with the result that the decedent's equity in the property will be much closer to the true cash value. If we are to use "gross value" (rather than gross value, less liens and encumbrances, which is generally used in other states), then the use of true cash value determined using the assessed value provides a standard that will reflect more closely the equity the decedent has in the property than the use of fair market value.

The Executive Committee suggests that the fair market value of the property be determined by a probate referee. There is no requirement in existing law that the value of property for use of the affidavit procedure be determined by a probate referee. The usual use of the affidavit procedure is to collect money owing the decedent, to have deposit accounts of the decedent transferred into the name of the successor of the decedent, and to transfer shares of stock into the name of the successor of the decedent. This procedure has worked well. It would be unfortunate if we were to add a requirement that there be an appraisal by a probate referee before the affidavit procedure can be used. So far as we can determine, all of the other states that provide for an affidavit procedure rely on the valuation of the person executing the affidavit; none require an independent appraisal.

The staff is of the view that the scheme of the draft statute is sound if the concept of using the gross value of property (and ignoring liens and encumbrances on the property) is to be retained. One way to deal with the concern of the Executive Committee would be to restrict use of the affidavit procedure to cases where the true cash value of the real property in the estate as determined from the assessed value does not exceed \$10,000 and revise the court procedure

drawn from Section 650 to permit use of true cash value as determined using the assessed value only where the true cash value so determined does not exceed \$10,000 and to require an inventory and appraisal by a probate referee if the estate includes real property where the true cash value so computed exceeds \$10,000. The staff believes that this would be a reasonable solution to the concern expressed by the Executive Committee. If this scheme is not acceptable to the Commission in light of the concern expressed by the Executive Committee, the staff suggests that the present draft be limited to the affidavit procedure for personal property and real property and that a new proposal be prepared for a future meeting dealing with a court procedure similar to the Section 650 procedure. So limiting the present draft would have the following effect:

(1) The affidavit procedure would be permitted to be used only where the gross value of the estate does not exceed \$60,000 and the gross value of the real property in the estate does not exceed \$10,000, with the gross value of the real property being defined as the true cash value determined from the assessed value. This is the existing law except for providing a precise value in place of the "gross value" of real property standard now used.

(2) An affidavit procedure would be provided for the transfer of real property having a gross value not in excess of \$10,000, the gross value of the real property being defined as the true cash value determined from the assessed value. This procedure is set out in Chapter 5 (commencing with Section 9680) of the draft statute attached to Memorandum 85-48.

(3) The procedure provided in Chapter 4 (commencing with Section 9650) (draft statute attached to Memorandum 85-48) for obtaining a court order determining succession to real property would be dealt with in a draft prepared for a future meeting. The new draft probably would expand the court proceeding to permit the order to also determine the succession to personal property. The new draft would consider when an inventory and appraisal by a probate referee would be required. This would provide a procedure for small estates comparable to the existing Section 650 procedure for a surviving spouse.

§ 9610. Gross value of decedent's property in this state must not exceed \$60,000; exclusions in determining value

The Executive Committee comments: "Section 9610(c) would be better understood as a renumbered, separate section." Section 9610 is designed to provide a standard for determining whether the value of the estate of the decedent is such that the summary procedures can be used. Subdivisions (b) and (c) list exclusions in determining the property and its value. The staff believes that it would be a mistake to place some of these exclusions in a separate section. We think that compiling subdivision (c) in a separate section would create confusion rather than eliminate confusion.

§ 9631. Furnishing of affidavit

The Executive Committee states: "Section 9631 is unclear as to whether all person seeking to receive property must execute the affidavit. Such appears to be the intent (subsection 9 states "each person signing the affidavit"), but there appears to be no requirement that all must sign."

Section 9631(a)(7) requires that the affidavit contain the statement that "The affidavit is executed by the successor of the decedent (as defined in Section 9606 of the California Probate Code) to the decedent's interest in the described property." Section 9606 defines the successor in interest as the person or persons who succeeded to the property of the decedent. We could add more to the section, but the staff believes that the section is adequate in its present form.

§ 9636. Claim against estate in probate

The Executive Committee states: "Section 9636 does not deal with the possibility of simultaneous death. Should be reviewed by staff."

Section 9636 provides for payment "to the extent that the decree of distribution determines that the deceased heir or devisee was entitled to the money or property under the will or the laws of succession (emphasis added)." The staff does not believe that any revision is required in Section 9636 which continues the substance of existing law. However, the staff will review this section in

connection with the provisions relating to distribution insofar as those provisions include provisions that relate to situation where the heir or devisee of a deceased person dies while the estate of the deceased person is being administered in this state.

§ 9638. Personal liability for decedent's unsecured debts

The Executive Committee comments:

Section 9638 makes the recipient of property liable for the "unsecured debts" of the decedent. "Unsecured debts" is not a defined term. Does the recipient of the property have any liability for a deficiency arising from a particularly secured debt of the decedent. This section needs to be reworked to better define the scope of liability.

Section 9638 is drawn from existing Section 645.3 (small estate set-aside) which provides in part: "The surviving spouse or a minor child or children in whom title has vested pursuant to Section 645 shall be personally liable for the unsecured debts of the decedent." The Commission recommended legislation relating to use of the affidavit procedure for vehicles and other state registered property likewise imposes liability for "unsecured debts." In the staff's view, this means that if the debt is secured, the person taking the decedent's property is not liable under Section 9638 for the secured debt, whether or not the security is adequate. Any other scheme would require the addition of fairly complex provisions involving court proceedings. The staff recommends that no change be made in the section.

§ 9641. Limitation on liability

The Executive Committee comments:

Section 9641 limits the liability of the recipient to the fair market value of the property, less liens and encumbrances. No procedure is provided for the creditor who makes a demand upon the recipient of the property after the recipient has paid cash to other creditors equal to its fair market value. In this instance, the recipient would not be required to disgorge anything further and there is no procedure for the unsecured creditors whose debts have been satisfied to contribute to the unsecured creditors who receive nothing. This situation may not arise very often, but it would create an injustice in that the "early bird catches the worm."

The staff believes that it would not benefit creditors to introduce a procedure whereby one creditor could go after another who had been paid. The cost of such proceedings could be significant and impose a real burden on creditors. In addition, in the case of creditors, generally the early bird does catch the worm. The staff believes that an effort to implement this suggestion would create considerable complexity in the statute and would not operate to the benefit of creditors generally.

§ 9652. Contents of petition

The Executive Committee comments: "Section 9652 requires the new form of petition to be verified by 'all the petitioners,' should not the sworn testimony of one petitioner be sufficient." The staff included the requirement that the petition be verified by all the petitioners because we believe that any person who is to receive property under the petition should have to make a statement under penalty of perjury that the person is entitled to the property. Also, we want to be assured that none of the petitioners has knowledge that would preclude the granting of the petition.

§ 9682. Issuance and recording of certified copy of affidavit

The Executive Committee has two comments concerning this section. The first is that the section should provide that the "county" clerk and not the court clerk will file the affidavit. The scheme of the section, which is drawn from the Arizona procedure, is that the affidavit and attachments are filed with the superior court of the county in which the real property is located and the court clerk issues a certified copy of the affidavit (without the attachments) and this certified copy is recorded in the real property records. Section 9682 is consistent with this scheme and needs no revision.

The Executive Committee also suggests: "Section 9682 should be redrafted for a caption to facilitate indexing and should state the manner in which the affidavit will be indexed in the records of the county clerk and the recorder's office." The official form for the

petition prepared by the Judicial Council will provide the necessary caption (similar to the official form now provided for a Section 650 petition). The staff does not believe it necessary or desirable to specify the form for the petition in the statute. However, a provision could be included in the statute specifying how the certified copy of the affidavit should be indexed by the recorder. We suggest that the following sentence might be added at the end of Section 9682:

The county recorder shall index the certified copy in the index of grantors and grantees. The decedent shall be indexed as the grantor and each person designated as a successor to the property in the certified copy shall be indexed as a grantee.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Exhibit 1

LAW OFFICES OF

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May 7, 1985

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Re: LRC Memoranda 85-47; 85-48; and 85-49

Dear John:

The Executive Committee of the Estate Planning, Trust and Probate Law Section the State Bar of California has reviewed Memorandum 85-47 (Passage of Property to Surviving Spouse Without Administration), Memorandum 85-48 (Collection or Transfer of Small Estates Without Administration) and Memorandum 85-49 (Small Estate Set Aside). This letter sets forth our comments and questions for the commissions review.

1. Memorandum 85-47: Passage of Property to Surviving Spouse without Administration. The Executive Committee has reviewed and agrees with the staff recommendation dispensing with the need to obtain court approval of the lawyer's fee. Many other transfers of property at death are done without court supervision of attorney's fees such as severance of joint tenancies, collection of life insurance policies and the like. It would seem appropriate in the 650 type proceeding to allow the attorney and client to set a fee independent of court confirmation. It is also the opinion of many practicing lawyers that it is not required of them to have the court review the fee currently. A court review would only be of assistance in collecting the fee if collection is an issue. The new sections dealing with collection by affidavit of compensation owed to a deceased spouse (new section 9550 et seq.) are a good addition to the code to allow a surviving spouse reasonable access to accrued compensation without great time delay or expense.

2. Memorandum 85-48: Collection or Transfer of Small Estates Without Administration. The Executive Committee has several fundamental problems with the draft statute as presented. The value of the decedent's real property is

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defined in the draft statute as "gross value of the decedent's interest in real property as determined from the full cash value of the property as determined from the County Assessors role as defined in Section 9602 of the Probate Code." The comment to the new statute states "using full cash value as determined from the assessment role avoids the need for an appraisal of the property, and at the same time, provides sufficient assurance that use of the summary procedures is restricted to relatively small estates." One member of our section reviewed the "assessment role value" for his condominium at Mammoth, purchased approximately 3 years ago, and found the "full value" to be close enough for the draftsman's purposes. He also reviewed the current property tax bill for his residence, purchased pre-proposition 13, and found the "full value" to be only 25% of market value. Another member of the committee noticed the "full value" of her residence is 40% of market value and would be considerably less but for a recent addition and structural change. Based upon these examples and many others that could be made, the new procedure could be utilized to transfer real property having a market value of 4 x \$60,000 i.e. \$240,000. If property of this value can be transferred, the "relatively small estate," is a fiction.

The State Bar would accept the concept of the draft statute if it was limited to estates of fair market value of \$60,000 as established by a probate referee appraisal, which would only cost \$75, rather than by property tax bills which have little relationship to actual value and will have even less reality as more time goes by. In this regard, it may be noted that the draftsman of the proposed statute must have recognized the lack of relationship with real property tax rules to fair market value because, in Section 9641, the draftsman switched back to the use of "fair market value" instead of "full cash value" in setting the limit of liability of the recipient of the property for the decedent's debts.

It also should be noted that Section 9606(b) defines a successor of the decedent to mean "if the decedent died without a Will, the surviving spouse of the decedent or, if none, the persons who succeeded to the property of the decedent under Section 6402." This definition could mean that the surviving spouse would inherit 100% of the separate property of the decedent to the exclusion of the children.

Section 9638 makes the recipient of property liable for the "unsecured debts" of the decedent. "Unsecured debts" is not a defined term. Does the recipient of the property have any liability for a deficiency arising from a partially secured debt

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Section 9631 is unclear as to whether all persons seeking to receive property must execute the affidavit. Such appears to be the intent (subsection 9 states "each person signing the affidavit"), but there appears to be no requirement that all must sign.

Section 9682 should provide that the "County" Clerk and not the Court Clerk will file the affidavit.

Section 9682 should be redrafted for a caption to facilitate indexing and should state the manner in which the affidavit will be indexed in the records of the County Clerk and the Recorder's Office.

Section 9610(c) would be better understood as a renumbered, separate section.

Section 9636 does not deal with the possibility of simultaneous death. Should be reviewed by staff.

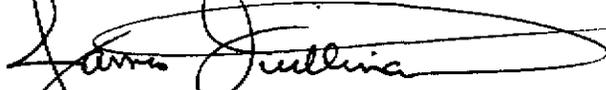
The commission is asked to review the previous comments of the State Bar to Memorandum 85-14 and supplements thereto submitted by committee member William H. Plageman, Jr. in his letter of January 4, 1985. Many of the same comments and problems that we perceived then are present in the new draft.

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3. Memorandum 85-49: Small Estate Set Aside. The State Bar supports the redrafting of the small estate set aside procedures.

Looking forward to seeing you in Sacramento on May 16th and 17th.

Very truly yours,



James V. Quillinan
Attorney at Law

JVQ:im

cc: Charles A. Collier
Theodore Cranston
Kenneth Klug