

Memorandum 90-10

Subject: Study F-641/L-3020 - Right of Surviving Spouse to Dispose of
Community Property (Suggestions for Revision)

A surviving spouse has a right to dispose of community property that passes to the survivor from the deceased spouse, without first having run the decedent's one-half share through probate. The Commission has received correspondence raising two problems with the statute governing governing this matter. The problems are analyzed below.

Right of Surviving Spouse to Dispose of Real Property

Section 13540 gives the surviving spouse the right to deal with and dispose of community real property if there is no notice of an adverse interest recorded within 40 days after the decedent's death. Thus if the decedent leaves the decedent's one-half interest in the community property to a beneficiary other than the surviving spouse, the beneficiary has 40 days within which to record the notice, failure of which enables the surviving spouse freely to dispose of the property.

Presumably, if the beneficiary fails to record the notice and the surviving spouse disposes of the property, the beneficiary would have a right to recover one-half the value of the property from the surviving spouse. But this is nowhere stated in the statute. The Comment to the section does address this issue, however:

Subdivision (b) makes clear that this section does not affect or limit the liability of a surviving spouse under Sections 13550-13553. Although Section 13540 may preclude a devisee or creditor from enforcing his or her rights against a grantee, purchaser, encumbrancer, or lessee or against the property interest transferred to the grantee, purchaser, encumbrancer, or lessee, the section does not relieve the surviving spouse of any liability under Sections 13550-13553. If the surviving spouse is liable under those sections and the devisee or creditor obtains a judgment against the surviving spouse, the judgment may be enforced against any property of the surviving spouse (including the proceeds of the disposition described in Section 13540) that is subject to the enforcement of a judgment.

The problem with this Comment is that the liability under Sections 13550-13553 relates only to the decedent's debts and not to rights of the decedent's devisees.

David B. Flinn of San Francisco (Exhibit 1) writes that, "My experience with this section has led me to conclude that it is wholly inappropriate law." He points out that (1) most devisees are unaware of the need to record a document immediately in order to protect their rights, (2) the surviving spouse is motivated to delay any contact with the decedent's devisees until the 40 days has run, in order to be able to deal with the property with impunity, and (3) the law gives no guidance as to rights of parties where the devisee records after the 40 day period has run but before the surviving spouse has acted to dispose of the property, including whether the devisee is entitled to partition.

The staff notes that the decision to require recordation within 40 days was intentional and was consistent with case law. However, the staff believes that Mr. Flinn's points are good. The staff draft to cure the problems that have been identified is attached as Exhibit 2.

Right of surviving spouse to dispose of personal property

Richard S. Kinyon of San Francisco has written to us that a potential transferee of property from the surviving spouse may be unwilling to enter into the transfer of personal property for fear that the surviving spouse does not really have full power to dispose of the property. This can occur where the decedent made a will that gives the decedent's share of the community property to a person other than the surviving spouse. A person who wants to be secure in accepting a transfer may refuse to consummate the transaction until the surviving spouse obtains a court order confirming the surviving spouse's ownership of the property.

Probate Code Section 13540 provides that after 40 days have elapsed since the death of the decedent, the surviving spouse has "full power" to sell, lease, mortgage, or otherwise deal with and dispose of community real property, "and the right, title, and interest of any grantee, purchaser, encumbrancer, or lessee shall be free of rights of devisees or creditors of the deceased spouse to the same extent as if the property had been owned as the separate property of the surviving

spouse." Mr. Kinyon points out that the anomalous result of this statute is that the surviving spouse is free to transfer real property of potentially great value but is unable freely to transfer personal property no matter how small in value.

As a practical matter, however, this may only be a problem for transfer of personal property of a type where title is evidenced by some sort of documentation, such as cars, stocks, accounts receivable, and the like, that can be quite substantial in value. Most tangible personal property is untitled and of relatively low value, and its transferability by the possessor is not ordinarily questioned.

Where there is documentary evidence of title to personal property, tangible or intangible, existing laws go a considerable way in protecting the security of a transaction involving the property entered into by the person in whose name title stands. Bona fide purchasers, for example, are ordinarily protected from adverse claims to property transferred by the person in whose name title stands.

A good illustration of this principal can be found in the provisions governing transfer of community property securities. The Corporations Code and the Commercial Code give considerable protection to the parties to a securities transfer. A certificated security is a negotiable instrument under Commercial Code Section 8105. Corporations Code Section 420 immunizes a corporation and its transfer agent and registrar for executing a securities transfer properly indorsed by the person to whom the securities are registered, even if the registration shows the securities are held as community property. Commercial Code Section 8302 provides that the transferee takes a security free of any adverse claim if the transferee is a bona fide purchaser for value in good faith and without notice of any adverse claim.

These provisions would seem to cover the usual securities transfer and would enable the surviving spouse in whose name the securities are registered to dispose of the securities in the ordinary course of business without impediment. These provisions do not, however, cover the situation where the transfer is not an open market transaction and the transferee has actual knowledge of the decedent's will giving the decedent's community property interest in the securities to a person other than the surviving spouse.

Should the law be expanded beyond the Commercial Code and facilitate the transfer in such a case? Mr. Kinyon believes it should, because of the basic uncertainty in the law that is caused by reliance on the bona fide purchaser doctrine. Also, special bona fide purchaser statutes such as that applicable to securities transfers do not cover every type of personal property whose transferability may be impaired.

The public policy question here is the balance between protecting possible devisees of the decedent and enabling property to pass between spouses with minimal delay and difficulty. The staff agrees with Mr. Kinyon that the balance favors effective nonprobate transfers between spouses, at least with regard to securities held in the name of the surviving spouse. A draft statute to implement the concept that a surviving spouse in whose name securities are registered has full power of disposition of the securities could read:

§ 13545. Securities

13545. (a) After the death of a married person, the surviving spouse, or the legal representative of the surviving spouse, has the same power to manage, pledge, assign, transfer, or otherwise deal with and dispose of community and quasi-community property securities registered in the name of the surviving spouse as the surviving spouse or legal representative would have if the deceased spouse had not died, and the right, title, and interest of any encumbrancer, assignee, transferee, or other person shall be free of the rights of devisees or creditors of the deceased spouse to the same extent as if the property had been owned as the separate property of the surviving spouse.

(b) Nothing in this section affects or limits the liability of a surviving spouse under Sections 13550 to 13553, inclusive.

Comment. Section 13545 is new. It gives the surviving spouse the same power to dispose of community and quasi-community property securities as the surviving spouse had before the death of the decedent. See generally Civ. Code § 5125. The recourse of a devisee of the deceased spouse's interest in securities sold after the deceased spouse's death is against the surviving spouse for the value of that interest. See *Knego v. Grover*, 208 Cal. App. 2d 134, 147-48, 25 Cal. Rptr. 158 (1962).

Section 13545 does not permit the surviving spouse to make a gift of community property securities. See *Morghee v. Rouse*, 224 Cal. App. 2d 745, 37 Cal. Rptr. 112 (1964).

The staff believes this extension of the law is warranted because it is useful to be able to rely on registered ownership and because securities are a special case where it may be necessary to act

quickly. Whether the law should be further extended to securities not registered in the name of the surviving spouse, or to other types of personal property, is more problematical in view of the potential harm to rightful successors. Mr. Kinyon argues that if the surviving spouse is not given the express right to deal with all types of community personal property, persons aware of the other spouse's death will be unwilling to deal with the survivor. The lack of authority "may even affect the surviving spouse's power to deal with his or her own separate property unless third parties who know of the other spouse's death can be convinced that the property is in fact the surviving spouse's separate property (which may be very difficult to do)."

Mr. Kinyon is also concerned that the surviving spouse might be absolutely liable for losses suffered by the decedent's successors in interest resulting from the survivor's management and control of the property on the grounds that the survivor had no right to deal with the property unilaterally. He believes the surviving spouse should be expressly given the right to deal with the community personal property subject to the survivor's fiduciary duty to the deceased spouse's successors in interest.

The report we have on this matter from Study Team 1 of the State Bar Probate Section takes the position that consideration should be given to management and control of all types of community personal property, not just securities registered in the name of the surviving spouse. The discussion of the Study Team on this matter is worth noting:

Richard S. Kinyon and other members of the team felt that there should be some legislation on this matter to authorize a surviving spouse to deal with community personal property so that a potential transferee from the surviving spouse will be willing to enter into a transaction with the surviving spouse.

On the other hand, Lynn P. Hart and other members of the team pointed out that the deceased spouse has a right to dispose of his or her one-half of community property to a person other than the surviving spouse, and the rights of the potential transferees of this one-half community property interest are jeopardized if the surviving spouse has unlimited power to act over such property. All members of the Study Team seemed to agree that there were conflicting policies and that some balance or compromise between the two policies was appropriate.

Perhaps an appropriate solution is to require the surviving spouse to wait a period of time, such as 40 days, before he or she can have the power to sell, lease, mortgage or otherwise deal with and dispose of community personal property. Charles Collier suggests that we use 40 days to be consistent with the treatment of community real property. Generally, our team agrees. He further points out that current Sections 13100 and 13151 have adopted a 40-day rule. One member of our Study Team felt that a 40-day wait may be too long in the case of perishable property, or perhaps even depreciating property.

Perhaps also the potential transferees (other than the surviving spouse) of the decedent's one-half of the community personal property should have some way of asserting their rights within 40 days and thereby preventing the surviving spouse from having absolute power of the property. In the case of real property, the recording of a lis pendens affords this protection.

This is a basic policy question the Commission must decide.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

LAW OFFICES OF
**LELAND, PARACHINI, STEINBERG,
FLINN, MATZGER & MELNICK**
333 MARKET STREET-27TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2171
TELEPHONE: (415) 957-1800

NOV 15 1989

RECEIVED

DAVID B. FLINN

TELEX: 278941
TELECOPIER: (415) 974-1520

October 30, 1989

California Law Revision Commission
400 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Gentlemen:

I write this letter in comment on the tentative recommendation regarding miscellaneous Probate Code revisions, and specifically with relation to Probate Code Section 10006 relating to "sale of decedent's interest in co-tenancy."

A far more substantial concern regarding co-tenant interests is found in Section 13540 of the Probate Code, which purports to allow the surviving spouse to sell the entire property, without the consent of the co-tenant, unless the co-tenant within 40 days of the death of the deceased spouse records an objection thereto. In our experience, virtually no surviving spouses have awareness of this section, and indeed very few probate attorneys are even aware of it.

Our firm's first involvement with Section 13540 came in recent litigation where we were employed by the executors of an estate to file a partition action because the surviving spouse, who was adverse to the estate, would not cooperate in listing the property for sale. Riverside County Superior Court ruled that partition was not available to co-tenants against a surviving spouse, but the appellate court reversed the entire decision, holding that partition was available. In any event, the surviving spouse in the interim period simply sold the property pursuant to Section 13540 and retained all of the proceeds, claiming that the estate was "indebted" to her in a greater amount, which the estate denies. The matter will be hopelessly locked in litigation for an extended period of time.

My experience with this section has led me to conclude that it is wholly inappropriate law. The motivation of the section would be for a surviving spouse to stall or delay any contact with co-tenant owners or the estate executor if the decedent's half of the property is passing to other than the spouse, so that the 40 days will run and she will become in "total control." The section

LELAND, PARACHINI, STEINBERG,
FLINN, MATZGER & MELNICK

California Law Revision Commission
October 30, 1989
Page 2

also gives no help as to what happens when the 40 days has run and she simply decides "not to sell." It would seem that the deadlock could last forever.

Our recommendation would be that the 40-day requirement be changed to provide that the surviving spouse may dispose of the property at any time after 40 days following death up until such time as the co-tenant records an objection. In that manner, a bona fide purchaser will be protected after the 40-day time has elapsed but the co-tenants can protect their interests at any time by recording. The section should also provide that it is not a bar to a partition action by either party.

Sincerely,

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above the printed name.

David B. Flinn

DBF:js
11\DBF

cc: Phyllis Berenson

EXHIBIT 2

Prob. Code § 13540 (amended). Right of surviving spouse to
dispose of real property

13540. (a) Except as provided in Section 13541, after 40 days from the death of a spouse, the surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse has full power to sell, lease, mortgage, or otherwise deal with and dispose of the community or quasi-community real property, and the right, title, and interest of any grantee, purchaser, encumbrancer, or lessee shall be free of rights of devisees or creditors of the deceased spouse to the same extent as if the property had been owned as the separate property of the surviving spouse.

(b) Nothing in this section affects or limits the liability of the surviving spouse under Sections 13550 to 13553, inclusive, and Chapter 3.5 (commencing with Section 13560).

Comment. Subdivision (b) of Section 13540 is amended to include a cross-reference to Sections 13560 to 13564 (liability for property of deceased spouse).

Prob. Code § 13541 (amended). Recording notice of interest
in property

13541. (a) Section 13540 does not apply ~~if, within 40 days from the death of the spouse,~~ after a notice that satisfies the requirements of this section is recorded in the office of the county recorder of the county in which real property is located.

(b) The notice shall contain all of the following:

- (1) A description of the property in which an interest is claimed.
- (2) A statement that an interest in the property is claimed by a named person under the will of the deceased spouse.
- (3) The name or names of the owner or owners of the record title to the property.

(c) There shall be endorsed on the notice instructions that it shall be indexed by the recorder in the name or names of the owner or owners of record title to the property, as grantor or grantors, and in the name of the person claiming an interest in the property, as grantee.

(d) A person shall not record a notice under this section for the purpose of slandering title to the property. If the court in an action or proceeding relating to the rights of the parties determines that a person recorded a notice under this section for the purpose of slandering title, the court shall award against the person the cost of the action or proceeding, including a reasonable attorney's fee, and the damages caused by the recording.

Comment. Subdivision (a) of Section 13541 is amended to make clear that the right provided in Section 13540 does not apply after a notice under this section is recorded, whether before or after expiration of the 40-day period.

Subdivision (d) is comparable to Civil Code Section 880.360 (marketable record title), and makes clear that recordation of notice under this section is not privileged. Subdivision (d) does not affect the elements of the cause of action for slander of title and codifies the measure of recovery for slander of title, with the addition of reasonable attorney's fees. See 5 B. Witkin, Summary of California Law, Torts § 572 (9th ed. 1988).

Probate Code §§ 13560-13564 (added). Liability for property of deceased spouse

CHAPTER 3.5. LIABILITY FOR PROPERTY OF DECEASED SPOUSE

§ 13560. Definitions

13560. Unless the provision or context otherwise requires, the following definitions govern the construction of this chapter:

(a) "Fair market value" of property means the fair market value as of date of valuation excluding the amount of any liens and encumbrances on the property at that time.

(b) "Property" means the portion of the one-half of the community property and quasi-community property belonging to the decedent that passes to a successor of the decedent.

(c) "Successor" of the decedent means a person other than the surviving spouse having a superior right to property by testate succession from the decedent.

Comment. Section 13560 is new; it is intended for drafting convenience.

§ 13561. Liability to person having superior right

13561. (a) The surviving spouse is personally liable to the extent provided in Section 13563 for property passing to a successor of the decedent.

(b) An action to impose liability under this section is forever barred three years after the death of the decedent. The three-year period specified in this subdivision is not tolled for any reason.

Comment. Section 13561 is new; it is drawn from subdivisions (a) and (c) of Section 13205 (affidavit procedure for real property of small value).

§ 13562. Restitution if estate proceeding commenced

13562. (a) Subject to subdivisions (b), (c), and (d), if proceedings for the administration of the decedent's estate are commenced, the surviving spouse is liable for:

(1) The restitution to the decedent's estate of property passing to a successor of the decedent if the surviving spouse still has the property, together with (A) the net income the surviving spouse received from the property and (B) if the surviving spouse encumbered the property after the date of death, the amount necessary to satisfy the balance of the encumbrance as of the date the property is restored to the estate.

(2) The restitution to the decedent's estate of the fair market value of property passing to a successor of the decedent, valued as of the date of disposition, if the surviving spouse no longer has the property, together with (A) the net income the surviving spouse 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, valued as of the date of disposition.

(b) Subject to subdivision (c), if proceedings for the administration of the decedent's estate are commenced and the surviving spouse made a significant improvement to property passing to a

successor of the decedent in the good faith belief that the surviving spouse was entitled to the property, the surviving spouse 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 surviving spouse for (A) the amount by which the improvement increases the fair market value of the property restored, valued as of the time of restitution, and (B) the amount paid by the surviving spouse for principal and interest on any liens or encumbrances that were on the property at the time of the decedent's death.

(2) The restoration to the decedent's estate of the fair market value of the property, valued as of the time of the decedent's death, together with interest thereon at the rate payable on a money judgment running from the date of the decedent's death.

(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 surviving spouse to satisfy a liability under Chapter 3 (commencing with Section 13550).

(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 successors of the decedent.

(e) An action to enforce the liability under this section is forever barred three years after the death of the decedent. The three-year period specified in this subdivision is not tolled for any reason.

Comment. Section 13562 is new; it is drawn from Section 13206 (affidavit procedure for real property of small value). Section 13562 codifies the intent of existing law. See Comment to Section 13540 (right of surviving spouse to dispose of real property).

Under subdivision (a)(1), if the surviving spouse encumbered the property after the decedent's death, the surviving spouse is liable for the amount necessary to satisfy the balance of the encumbrance on the decedent's one-half interest as of the date the property is restored to the estate. This amount is in addition to the property and the net income the surviving spouse received from the property.

Restitution of property to the estate where the spouse still has the property may necessitate partition if the parties are unable to agree on possession or other matters. See Section 9823 (partition actions).

§ 13563. Limitation on liability under Section 13561

13563. (a) The surviving spouse is not liable under Section 13561 if proceedings for the administration of the decedent's estate are commenced and the surviving spouse satisfies the requirements of Section 13562.

(b) The aggregate of the personal liability of the surviving spouse under Section 13561 shall not exceed the fair market value of the property passing to successors of the decedent, valued as of the time of the decedent's death, together with the net income the surviving spouse received from the property and, if the property has been disposed of, interest from the date of disposition at the rate payable on a money judgment, on the fair market value of the property, valued as of the date of disposition.

Comment. Section 13563 is new; it is drawn from Section 13207 (affidavit procedure for real property of small value).

§ 13564. Other remedies not affected

13564. The remedies available under Sections 13561 to 13563, inclusive, are in addition to any remedies available by reason of any fraud or intentional wrongdoing.

Comment. Section 13564 is new; it is drawn from Section 13208 (affidavit procedure for real property of small value). This section makes clear that the remedies provided in this chapter for the decedent's estate and persons having a superior right to the property by testate succession do not limit any other remedies that are available by reason of fraud or intentional wrongdoing.