

Memorandum 99-90

Liability of Property Passing to Surviving Spouse for Debts of Decedent (Comments on Tentative Recommendation)

The Commission has circulated for comment its tentative recommendation to provide a mechanism for the surviving spouse to discharge the liability of property received from a decedent for debts of the decedent. We have received comments on this proposal from James R. Birnberg of Los Angeles and from the California Judges Association. Their letters are attached as Exhibits to Memorandum 99-83 (alternate beneficiary for unclaimed distribution). We also anticipate comments from the State Bar Probate Section, and will supplement this memorandum when they are received.

Under existing law, if a surviving spouse takes property of the decedent without probate, the decedent's creditors may recover against the surviving spouse for their claims. The proposed legislation is intended to enable the parties to avoid multiple actions where there are numerous creditors by making available the existing Probate Code procedure for returning property to the decedent's estate for discharge of spousal liability through a special proceeding.

Both Mr. Birnberg and CJA point out a technical problem with this proposal. The proposal incorporates existing procedural provisions that govern return of property received by a surviving spouse to the decedent's estate. Prob. Code §§ 13560-13564. However, that procedure does not provide a complete answer, since it addresses only the issue of persons who have a superior claim to the property; it does not address creditor issues. More would need to be done to have the statute operate effectively for discharge of debts.

The staff believes their analysis is correct, and the proposal requires further elaboration. We could add an optional provision for notice and discharge of debts, much as is done under trust law. Mr. Birnberg also raises that possibility.

The problem with doing something along those lines is that we would like simply to piggyback on existing procedures, rather than fabricating new procedures out of whole cloth. There is already too much procedure in the Probate Code. Moreover, CJA argues that in the ordinary case, a procedure like this is unnecessary; and in the extraordinary case, it could impose unwarranted

burdens on the personal representative. CJA would oppose the concept as a matter of policy.

This is a low priority issue that we had hoped could be addressed without the expenditure of much staff or Commission resources. **Given the additional work required to further develop the concept, the staff wonders whether this is a big enough problem in practice to merit further attention to it at this time.**

In this connection, CJA suggests an unrelated improvement in Probate Code Section 13657 to give the spousal property petition in rem effect. The staff will add this issue to our “probate back burner” for consideration on a low priority basis as Commission and staff resources permit.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary