

## Memorandum 87-97

Subject: Study L-2008 - Probate Code (Cleanup Bill for AB 708--marital deduction gifts/priority of federal and state claims)

Attached to this memorandum is a draft of the probate cleanup bill for the 1988 session. The draft includes matters previously approved by the Commission, as well as matters raised in this memorandum. We need to approve the cleanup bill for submission to the 1988 legislative session on an urgency basis. This memorandum will be supplemented from time to time by memoranda raising other points, which will be added to the cleanup bill when approved by the Commission.

Application of Marital Deduction Gift Legislation to Estate Trusts

The Commission has previously heard the suggestion of the State Bar Executive Committee that the provision making the marital deduction gift legislation inapplicable to "estate trusts" should be more narrow. The Commission requested the staff to obtain the advice of Bob Mills on this matter. The staff sent the following draft to Mr. Mills for review:

Prob. Code § 21521 (amended). Chapter inapplicable to estate trust

SEC. . Section 21521 of the Probate Code is amended to read:

21521. ~~This chapter does~~ Sections 21524 and 21526 of this chapter do not apply to a trust that qualifies for the marital deduction under Section 20.2056(e)-(2)(b) of the Code of Federal Regulations (commonly referred to as the "estate trust").

Comment. Section 21521 is amended to make its application more precise.

Mr. Mills agrees with this proposal. See Exhibit 1.

Priority of Federal and State Debts

Existing law, in establishing a priority system for payment of debts where the estate is insufficient to pay all demands, gives priority to debts having preference by the laws of the United States.

Prob. Code § 950(5). This statutory priority is lower, however, than expenses of administration, funeral expenses, expenses of last illness, and family allowance.

In revising the law, the Commission in AB 708 recognized that this statutory scheme is somewhat unrealistic. If federal law gives priority to federal debts, or if other state law gives priority to other state debts, those debts are entitled to the priority provided in those laws, notwithstanding the purported priority scheme of the Probate Code. Section 11420, as enacted by AB 708, therefor provides that, "Debts shall be paid in the following order of priority among classes of debts, except that debts owed to the United States or to this state that have preference under the laws of the United States or of this state shall be given the preference required by such laws."

Some federal and state statutes give certain federal and state tax obligations priority over "debts due from the deceased." Cases have interpreted this language to mean that the federal and state obligations are paid before debts incurred by the decedent during life, but not before expenses of administration and other charges against the estate that arise after death, since the expenses and charges are not "debts due from the deceased." See, e.g., Estate of Muldoon, 128 Cal. App. 2d 284, 275 P.2d 597 (1954) (federal preference); Estate of Jacobs, 61 Cal. App. 2d 152, 142 P.2d 454 (1943) (state preference). These cases are cited in the Commission's recommendation on this matter and in the Comment to Section 11421 (immediate payment of priority debts).

A potential problem arises under the scheme of AB 708, however, that Jim Quillinan has pointed out. See his letter at Exhibit 2. Federal and state statutes of the type described above that are keyed to "debts" could be affected by the fact that the new law defines debt for purposes of priority as including expenses and charges. See Section 11401:

11401. "Debt" means:

(a) A claim that is established under Part 4 (commencing with Section 9000) or that is otherwise payable in the course of administration.

(b) An expense of administration.

(c) A charge against the estate including, but not limited to, taxes, expenses of last illness, and family allowance.

It appears quite conceivable to the staff that a court could take this definition of "debt" and apply it to the federal and state priority statutes, with the result that the federal or state tax obligations would be given priority over expenses of administration and other charges as well as over the decedent's debts. Such a construction would be unfortunate, since as Mr. Quillinan points out, "it may be hard to find lawyers and fiduciaries willing to take on insolvent estates where taxes will wipe out the entire estate."

This problem did not arise in earlier Commission drafts, where the term "demand" against the estate, rather than "debt", was defined and used; "demand" had the connotation we wanted. However, lawyers were unhappy with this unfamiliar terminology, so we went to "debt", with its expanded definition.

At this point, how can the problem be cured most easily and simply? The staff suggests we meet the issue head on and add to the definition of "debt" in Section 11401 the following provision:

A reference in another statute to a "debt due from the deceased" or similar language is limited to a claim referred to in subdivision (a) and does not include an expense of administration or a charge against the estate referred to in subdivisions (b) and (c).

Comment. Section 11401 is amended in recognition of the fact that "debt" is defined here for drafting convenience in this part, and is not intended as a rule of construction for other statutes referring to debts of a decedent. See Section 11400 (application of definitions). References in other statutes intended to govern only debts incurred by the decedent during life are to be construed in a limited fashion notwithstanding the broad usage of the term "debt" prescribed in this section for purposes of this part. See, e.g., Rev. & Tax. Code § 6756 (priority of sales and use tax where estate insufficient to pay all debts due from the deceased). This preserves the effect of existing law. See, e.g., Estate of Jacobs, 61 Cal. App. 2d 152, 142 P.2d 454 (1943) (state preference); cf. Estate of Muldoon, 128 Cal. App. 2d 284, 275 P.2d 597 (1954) (federal preference).

Even a section such as this does not resolve the problem completely, however, since Section 11401 classifies expenses of last illness as a charge against the estate. The two cases cited above reach different results on this issue--expenses of last illness are a debt of the decedent for purposes of state priority but not for purposes of federal priority under identical state and federal language

referring to "debts due from the deceased." But since this issue is already resolved by the cases, the staff is not inclined to further fine-tune the statute on this point.

Respectfully submitted,

Nathaniel Sterling  
Assistant Executive Secretary

EXHIBIT 1

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October 13, 1987

CA LAW REV. COMM'N

OCT 14 1987

RECEIVED

Nathaniel Sterling  
Assistant Executive Secretary  
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303-4739

Re: Marital Deduction Gifts

Dear Nat:

Thanks for your October 8 letter. Silence, in this case, does mean assent. I think that there is no need to make the entire chapter inapplicable to estate trusts so long as Sections 21524 and 21526 do apply. Indeed, Section 21526 arguably does not apply anyway simply because of its content.

In summary, I agree with your new proposed Section 21521.

Best personal regards.

Sincerely,



Robert A. Mills

**ESTATE PLANNING, TRUST AND  
PROBATE LAW SECTION  
THE STATE BAR OF CALIFORNIA**



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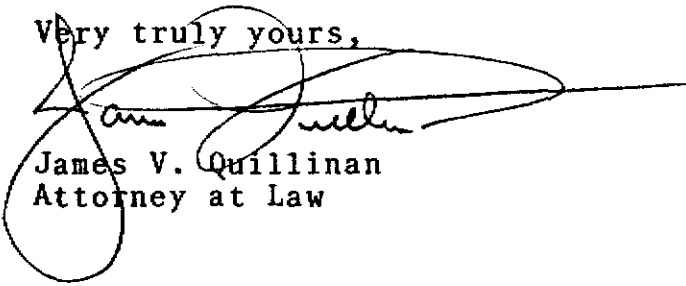
Re: LRC Memo: 87-78, Wartime Fiduciaries &  
AB 708 Clean-up Legislation

Dear John:

I have enclosed a copy of Study Team 2's technical report on Memo 87-78. The report represents the opinions of the team only. The Executive Committee has not reviewed the matter. The report is to assist in the technical and substantive review of those sections involved.

One additional comment to the AB 708 Clean-up about which I told you in Sacramento. At our section's presentation in San Francisco several lawyers brought a perceived problem with new section 11420, dealing with priority for payment of Federal and State claims. The section sets forth the law, but it should be made clear in the comment that the Federal and State cases that allow for payment of expenses of administration before payment of taxes is what is meant by the phrase "have preference under the laws of the United States and this state". Without such clarity it may be hard to find lawyers and fiduciaries willing to take on insolvent estates where taxes will wipe the entire estate. We discussed this at the LRC meetings and I think just a clarifying comment is all that is necessary. I am sorry I do not have the time to look up the applicable cases for you. I am sure they are in the old material.

Very truly yours,

  
James V. Quillinan  
Attorney at Law

JVQ/h1  
Encls.

cc: Chuck Collier      Jim Opel      Valerie Merritt  
     Keith Bilter      Jim Devine  
     Irv Goldring      Ted Cranston

Staff Draft  
Cleanup Bill for AB 708

An act to amend Sections 26827, 26827.4, and 26827.5 of the Government Code, and Sections 1143, 9052, 21520, and 21521 of the Probate Code, relating to probate law and procedure, and declaring the urgency thereof, to take effect immediately.

The people of the State of California do enact as follows:

Government Code § 26827 (amended). Fee for first papers in probate

SEC. . Section 26827 of the Government Code is amended to read:

26827. (a) The total fee for filing the first petition for letters of administration, a petition for special letters of administration, a petition for letters testamentary, a first account of a testamentary trustee of a trust that is subject to the continuing jurisdiction of the court pursuant to Chapter 4 (commencing with Section 17300) of Part 5 of Division 9 of the Probate Code, a petition for letters of guardianship, a petition for letters of conservatorship, a petition for compromise of a minor's claim, a petition pursuant to Section 13151 of the Probate Code, a petition pursuant to Section 13650 of the Probate Code (except as provided in Section 13652 of the Probate Code), or a petition to contest any will or codicil ~~shall be~~, is the sum fixed by resolution pursuant to Section 68090, which shall not exceed the following maximum amounts:

(1) In any county where a fee is collected for the court reporter fund, the total fees shall not exceed eighty-six dollars (\$86).

(2) In any county where a fee is not collected for the court reporter fund, the total fee shall not exceed sixty-one dollars (\$61).

(b) The fee set forth in subdivision (a) shall also be charged for filing any subsequent petition ~~for letters of administration, special letters of administration, letters testamentary, letters of guardianship, letters of conservatorship, or a first account of a testamentary trustee, or a petition to contest any will or codicil~~ of a

type described in subdivision (a) in the same proceeding, by a person other than the original petitioner. When the public administrator or an employee of the State Department of Mental Health in his or her official capacity is the petitioner, he or she shall be required to pay the fee only out of the assets of the estate coming into his or her possession.

Comment. Subdivision (a) of Section 26827 is revised to clarify the testamentary trust accountings that are subject to this provision. Subdivision (a) is also revised to include petitions under Probate Code Sections 13151 (order determining succession to real property) and 13650 (order determining or confirming property passing or belonging to surviving spouse). Subdivision (a) also recognizes the exception provided in Probate Code Section 13652, which excuses the fee otherwise applicable to a petition under Section 13650 if probate proceedings are already pending.

Subdivision (b) is revised to eliminate language repeated from subdivision (a). The provision relating to fees payable by a public administrator or the Department of Mental Health, formerly in subdivision (b), is generalized in Section 26827.5.

Government Code § 26827.4 (technical amendment). Fee for subsequent papers in probate

SEC. . Section 26827.4 of the Government Code is amended to read:

26827.4. (a) The fee for filing of a subsequent paper in a proceeding under the Probate Code which requires a court hearing shall be is fourteen dollars (\$14), except for papers for proceedings required by any of the following:

(1) Section ~~591.2~~ 10501 of the Probate Code.

(2) Accountings of trustees of testamentary trusts that are subject to the continuing jurisdiction of the court pursuant to Chapter 4 (commencing with Section 17300) of Part 5 of Division 9 of the Probate Code.

(3) Division 4 (commencing with Section 1400) of the Probate Code.

(b) Objections to any papers exempt from the fee imposed by this section ~~shall be~~ are subject to the filing fee of fourteen dollars (\$14). This section does not apply to petitions filed pursuant to subdivision (b) of Section 26827.

Comment. Subdivision (a)(1) of Section 26827.4 is revised to correct a cross-reference to petitions required under the Independent Administration of Estates Act.



Government Code § 26827.5 (added), Payment of fees by public administrator of State Department of Mental Health

SEC. . Section 26827.5 is added to the Government Code, to read:

26827.5. Where the public administrator or an employee of the State Department of Mental Health is the petitioner in an official capacity in a proceeding described in Section 26827 or 26827.4, the fee is payable only out of the assets of the estate coming into the official's possession or control.

Comment. Section 26827.5 is a new provision that generalizes a provision formerly set out in Section 26827(b). This section applies to all filing fees described in Sections 26827 and 26827.4, whereas the former provision appeared to apply only to part of Section 26827. In addition, this section refers to assets under the control of the official.

Prob. Code § 1143 (amended)

SEC. . Section 1143 of the Probate Code is amended to read:

1143. (a) Except as provided in subdivision (b), when a public administrator takes possession of the estate of a decedent as provided in this chapter, and it appears that the estate of the decedent meets the valuation criteria specified in Section 13100, the public administrator may apply to the superior court of his or her county or a judge thereof for an order permitting the public administrator summarily to sell any personal and real property belonging to the decedent, and to withdraw any money of the decedent on deposit with any bank, and to collect any indebtedness or claim that may be owing to the decedent. The money received from such a sale or collection shall be used to pay the statutorily permitted expenses of, and commissions to, the public administrator and to the attorney, if any, and to defray the expenses of the disposition of the decedent's remains and the expenses of the decedent's last illness. The balance, if any, shall be used to pay other claims presented to the public administrator within four months of the above order pursuant to Section 950 11420 and there shall be no administration upon the estate unless additional property is discovered. No notice of the application need be given. The application may be filed whether or not there is a will of the decedent in existence, if the executor named therein refuses to act, or if the will does not appoint an executor.

(b) When a public administrator takes possession of the estate of a decedent as provided in this chapter, and it appears that the total value of the estate of the decedent does not exceed ten thousand dollars (\$10,000), the public administrator may, instead of applying to the superior court or judge thereof for an order as provided in subdivision (a), collect all assets belonging to the decedent on the public administrator's statement, apply the money or the proceeds from the sale of any personal or real property towards the expense of the disposition of the decedent's remains, pay other proper claims presented within four months after the public administrator takes possession of the estate pursuant to Section 950 11420, and pay over the remaining funds to the heirs or legatees, or if none, deposit the balance with the county treasurer for use in the general fund after one year of deposit. Heirs, devisees, or beneficiaries of the decedent can claim funds on deposit with the county treasurer if the claim is made within one year from their deposit with the county treasurer.

(c) The commissions payable to the public administrator pursuant to this section and the attorney, if any, for the public administrator for the filing of the application provided for in subdivision (a) or the public administrator's statement specified in subdivision (b), and for the performance of any duty or service connected therewith, are those set forth in Sections 901, 902, and 910, except that, in all cases administered pursuant to this section, the public administrator shall be entitled to a minimum commission of three hundred fifty dollars (\$350).

(d) This section does not preclude the public administrator or the attorney, if any, from filing any petitions with the court pursuant to other sections of this code when the petition is necessary to the proper administration of the small estate.

Comment. Section 1143 is amended to correct section references.

Prob. Code § 9052 (amended)

SEC. . Section 9052 of the Probate Code is amended to read:  
9052. The notice shall be in substantially the following form:

NOTICE OF ADMINISTRATION OF  
ESTATE OF \_\_\_\_\_, DECEDENT

Notice to creditors:

Administration of the estate of \_\_\_\_\_ (deceased) has been commenced by \_\_\_\_\_ (personal representative) in Estate No. \_\_\_\_\_ in the Superior Court of California, County of \_\_\_\_\_. You must file your claim with the court and mail or deliver a copy to the personal representative within the last to occur of four months after \_\_\_\_\_ (the date letters were issued to the personal representative), or 30 days after the date this notice was mailed to you or, in the case of personal delivery, 30 days after the date this notice was delivered to you, ~~whichever is later~~, as provided in Section 9100 of the California Probate Code. A claim form may be obtained from the court clerk. For your protection, you are encouraged to file your claim by certified mail, with return receipt requested.

\_\_\_\_\_  
(Date of mailing  
this notice)

\_\_\_\_\_  
(Name and address of personal  
representative or attorney)

Comment. Section 9052 is revised for clarity.

Prob. Code § 11401 (amended)

SEC. . Section 11401 of the Probate Code is amended to read:  
11401. (a) "Debt" means:

{a} (1) A claim that is established under Part 4 (commencing with Section 9000) or that is otherwise payable in the course of administration.

{b} (2) An expense of administration.

{e} (3) A charge against the estate including, but not limited to, taxes, expenses of last illness, and family allowance.

(b) A reference in another statute to a "debt due from the deceased" or similar language is limited to a claim referred to in subdivision (a)(1) and does not include an expense of administration or a charge against the estate referred to in subdivisions (a)(2) or (a)(3).

Comment. Section 11401 is amended in recognition of the fact that "debt" is defined here for drafting convenience in this part, and is not intended as a rule of construction for other statutes referring to debts of a decedent. See Section 11400 (application of definitions). References in other statutes intended to govern only debts incurred by the decedent during life are to be construed in a limited fashion notwithstanding the broad usage of the term "debt" prescribed in this section for purposes of this part. See, e.g., Rev. & Tax. Code § 6756 (priority of sales and use tax where estate insufficient to pay all debts due from the deceased). This preserves the effect of existing law. See, e.g., Estate of Jacobs, 61 Cal. App. 2d 152, 142 P.2d 454 (1943) (state preference); cf. Estate of Muldoon, 128 Cal. App. 2d 284, 275 P.2d 597 (1954) (federal preference).

Prob. Code § 21520 (amended)

SEC. . Section 21520 of the Probate Code is amended to read:

21520. As used in this chapter:

(a) "Marital deduction" means the federal estate tax deduction allowed for transfers under Section 2056 of the Internal Revenue Code or the federal gift tax deduction allowed for transfers under Section 2523 of the Internal Revenue Code.

(b) "Marital deduction gift" means a transfer of property that is intended to qualify for the marital deduction.

Comment. Section 21520 is amended to restore a missing word.

Prob. Code § 21521 (amended). Chapter inapplicable to estate trust

SEC. . Section 21521 of the Probate Code is amended to read:

21521. ~~This chapter does~~ Sections 21524 and 21526 of this chapter do not apply to a trust that qualifies for the marital deduction under Section 20.2056(e)-(2)(b) of the Code of Federal Regulations (commonly referred to as the "estate trust").

Comment. Section 21521 is amended to make its application more precise.

Operative date

SEC. . Sections \_\_ to \_\_, inclusive, of this act shall become operative on July 1, 1988.

Urgency clause

SEC. . This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to facilitate and coordinate the implementation of Chapter 923 of the Statutes of 1987, relating to probate law and procedure, which will become operative July 1, 1988, it is necessary that this act go into immediate effect.