

Memorandum 90-47

Subject: Study L-3020 - Right of Surviving Spouse to Dispose of
Community Property (Comments on Tentative Recommendation)

The Commission in January 1990 circulated for comment its tentative recommendation relating to the right of the surviving spouse to dispose of community property. The tentative recommendation proposes two revisions in the law governing the ability of a surviving spouse to deal with community property outside of probate:

(1) The tentative recommendation would make clear that, if the surviving spouse disposes of community real property in which another beneficiary has an interest, the beneficiary may recover the value of the interest from the surviving spouse. This is a clarification and not a change in law.

(2) The tentative recommendation would provide that, if the surviving spouse disposes of community property securities registered in the name of the surviving spouse, the disposition is as effective as if the decedent had not died, notwithstanding any interest of another beneficiary in the securities.

We have received the 18 letters attached as Exhibits commenting on the tentative recommendation. Of these, 13 approve the tentative recommendation without qualification. These are:

Exhibit 1	Thomas R. Thurmond	Vacaville
Exhibit 2	Ruth E. Ratzlaff	Fresno
Exhibit 3	Allen J. Kent	San Francisco
Exhibit 6	Alvin G. Bucignani	San Francisco
Exhibit 8	Ernest Rusconi	Morgan Hill
Exhibit 9	Peter R. Palermo	Pasadena
Exhibit 10	Rawlins Coffman	Red Bluff
Exhibit 11	Frank M. Swirles	Rancho Santa Fe
Exhibit 13	Henry Angerbauer	Concord
Exhibit 14	Arnold F. Williams	Fresno
Exhibit 15	Patricia H. Jenkins	Los Angeles
Exhibit 16	Benjamin D. Frantz	Sacramento
Exhibit 18	John G. Lyons	San Francisco

The points made in the remaining 5 letters are discussed in Notes following the provisions to which they relate, incorporated in the copy of the tentative recommendation attached to this memorandum. Our objective is to review the tentative recommendation and make any changes that appear appropriate in light of the comments received, with the goal of a final recommendation for the next legislative session.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

THOMAS R. THURMOND

ATTORNEY AT LAW

419 MASON STREET, SUITE 118

VACAVILLE, CALIFORNIA 95688

(707) 448-4013

CLERK OF COURT

JAN 30 1990

RECEIVED

January 29, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Right of Surviving Spouse to Dispose of Community Property

I have reviewed the tentative recommendations dated January 19, 1990, on the above subject legislation. I approve the recommendation in its entirety.

Yours very truly,



Thomas R. Thurmond
Attorney at Law

TT/sr

RUTH E. RATZLAFF
Attorney at Law
925 "N" Street, Suite 150
P.O. Box 411
Fresno, California 93708
(209) 442-8018

CALIF. REV. COMM'N
JAN 31 1990
RECEIVED

January 28, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Commissioners:

I have reviewed your tentative recommendation related to the right of a surviving spouse to dispose of community property.

I commend the Commission for its ongoing efforts to clear up unintentional gaps in previously-enacted Probate Code revisions. Your tentative recommendation relating to disposition of real property appears to address the problem in that area.

I also commend the Commission for its efforts to recommend parallel procedures for handling real and personal property, such as those included in your tentative recommendation relating to the right of a surviving spouse to dispose of securities.

The recommended language appears to address the perceived problems, and I have no suggested changes or additions.

Sincerely,


Ruth E. Ratzlaff

RER/tih

JAN 31 1990

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DOOLEY, ANDERSON, JOHNSON & PARDINI

MATTHEW J. DOOLEY
(1999-1976)
J. A. PARDINI
(1999-1996)
DAVID M. DOOLEY*
JULIAN PARDINI
DONALD E. ANDERSON
JAMES T. JOHNSON
ALLEN J. KENT
THOMAS O. HARAN
MICHAEL M. LIPSKIN
*PROFESSIONAL CORPORATION

ATTORNEYS AT LAW
TRANSAMERICA PYRAMID, THIRTY-SECOND FLOOR
600 MONTGOMERY STREET
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OF COUNSEL
BERNARD R. KENNEALLY
WILLIAM W. WASHAUER
HAL WASHAUER

TELEPHONE
(415) 986-8000

TELECOPIER
(415) 788-0136

January 29, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Tentative Recommendations Relating to:

1. Commercial Real Property Leases
(Remedies for Breach of Assignment
or Sublease Covenant)
2. Commercial Real Property Leases
(Use Restrictions)
3. Right of Surviving Spouse To Dispose
of Community Property
4. Deposit of Estate Planning Documents
With Attorney

Greetings:

Please be advised that I approve of the tentative recommendations relating to the Right of Surviving Spouse To Dispose of Community Property, the Deposit of Estate Planning Documents With Attorney and Commercial Real Property Leases (Use Restrictions).

However, I believe some more thought should be given to the tentative recommendation relating to Commercial Real Property Leases (Remedies For Breach of Assignment or Sublease Covenant).

I do not believe that the tenant should have the right to terminate a lease if a landlord unreasonably withholds consent to a transfer in violation of the tenant's rights under the lease. Property owners often wish to have specific types of tenants in particular locations in a multi-tenant situation. Indeed, even in a single tenant situation, the landlord may wish to have a particular type of tenant. There are

DOOLEY, ANDERSON, JOHNSON & PARDINI

ATTORNEYS AT LAW

California Law Revision Commission

January 30, 1990

Page 2

also other considerations that a landlord utilizes in deciding what type of tenant it wishes to have in its leased premises.

For these reasons, I believe the right to terminate the lease by the tenant should not be made a part of this proposed legislation. I realize in saying so that the hypothesis stated is that the landlord has unreasonably withheld consent to a transfer. However, in my opinion, whether or not the right to terminate the lease exists should be a matter that is subject to negotiation between the parties and not created by legislative fiat.

Thank you for giving me the opportunity to review these very interesting tentative recommendations.

Very truly yours,



Allen J. Kent

AJK:eyr

skent/ajk/pers/303

JEROME SAPIRO
ATTORNEY AT LAW
BUTTER PLAZA, SUITE 608
1388 BUTTER STREET
SAN FRANCISCO, CA, 94109-5452
(415) 928-1515
Jan. 30, 1990

JAN 31 1990

RECEIVED

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA, 94303-4739

Hon. Commission Members:

Re: Tentative Recommendation L3020
Right of Surviving Spouse to
Dispose of Community Property

I have some reservations about the right of the surviving spouse to deal with and dispose of community real property if there is no notice of adverse interest recorded within 40 days after the decedent's death.

The existing and proposed 40 day period may be too short.

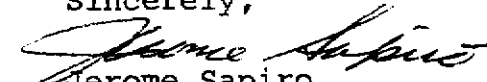
A spouse will normally know of the will provisions of the deceased spouse, and should be required to give notice under such circumstances to both devisee or devisees of the other community one-half interest and to the nominated executor under the will of the deceased spouse of intention to sell, dispose of or otherwise transfer the entire community property.

Sometimes the devisee(s) of the decedent's one-half may not know either the fact of death or the dispositive provision.

Perhaps, the 40 days should be increased to 60 or 90 days, whether or not you consider and decide to insert a notice requirement.

Liability provisions may prove to be inadequate protection if you have a disappointed, squandering and conniving surviving spouse.

Sincerely,


Jerome Sapiro

JS:mes

ROBERT K. MAIZE, JR.
A PROFESSIONAL LAW CORPORATION

1604 FOURTH STREET
POST OFFICE BOX 11648
SANTA ROSA, CALIFORNIA 95406
(707) 544-4462

January 30, 1990

JAN 31 1990

RECEIVED

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Right of Surviving Spouse to Dispose of Community
Property

Ladies/Gentlemen:

I am aware that there is a substantial interest in simplifying the probate procedure. However, allowing the surviving spouse to sell real property after 40 days from the deceased spouse's death if no notice has been filed is of little practical assistance to me and my clients. The reason for this is that the practice of the title companies in Sonoma County is that they will not issue a policy of title insurance without listing as an exception the interest of the deceased spouse's estate.

My concern in expanding similar provisions to marketable securities is that you may have similar problems with stock brokerage firms and the issuing companies.

Very truly yours,

ROBERT K. MAIZE, JR.,
A Professional Law Corporation

by:


ROBERT K. MAIZE, JR.

RKM:jas

ALVIN G. BUCHIGNANI
ATTORNEY AT LAW

FEB 02 1990

RECEIVED

ASSOCIATED WITH
JEDERLIN, GREEN, SPRAGUE & BISHOP
FAX (415) 421-5658

300 MONTGOMERY STREET, SUITE 450
SAN FRANCISCO, CA 94104-1906
(415) 421-5650

February 1, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

Re: Right of Surviving Spouse to Dispose of Community
Property

Ladies & Gentlemen,

I agree with the above tentative recommendation. I have never encountered any of these problems in my own practice, but I believe the new law is likely to provide helpful guidance in some situations.

Very sincerely,



Alvin G. Buchignani

AGB/pzg

Law Office
Irving Kellogg

FEB 08 1990

RECEIVED

821 Monte Leon Drive
Beverly Hills, CA 90210-2629
(213) 278-3415

January 29, 1990

John DeMouly
California Law Revision Commission
4000 Middlefield Road Suite D-2
Palo Alto, Calif. 94303-4739

Re: Proposed Section 13545 - Right of Surviving Spouse to dispose of securities

Dear John:

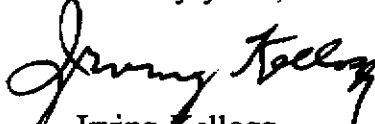
This section gives the surviving spouse the right to dispose of community property and quasi-community property securities registered in the name of the surviving spouse alone.

I believe there remains a serious deficiency in the proposed section for those securities registered in the names of both spouses as community property. In my opinion, more and more married couples are putting their securities in both their names for various reasons, one of which is the desire of the married woman to have her name recorded in the title designation of all assets. In my practice I counsel married clients to put all assets in the names of Husband and Wife as Community Property.

I understand the desire of the Commission, as expressed in the 3rd paragraph of page 3, to allow the surviving spouse to dispose of securities immediately when the securities are registered in the surviving spouse's name. But the same urgency applies to all securities that are community property including those securities registered in the decedent's name or in both husband's and wife's names.

Therefore, I suggest that the section authorize some kind of summary proceeding in which the surviving spouse can get immediate confirmation of the status of the securities as community property. Why should a surviving spouse be exposed to market risk only because title on the certificate was not in only the surviving spouse's name or was in the decedent spouse's name?

Sincerely yours,


Irving Kellogg

FEB 08 1990

RECEIVED

RUSCONI, FOSTER, THOMAS & PIPAL

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

30 KEYSTONE AVENUE

POST OFFICE BOX 10

MORGAN HILL, CALIFORNIA 95038

(408) 779-2108

ERNEST RUSCONI
J. ROBERT FOSTER
GEORGE P. THOMAS, JR.
DAVID E. PIPAL
SUSAN M. VICKLUND-WILSON

HOLLISTER OFFICE
380 TREE PINES RD. C-6
POST OFFICE BOX 859
HOLLISTER, CALIFORNIA 95024
(408) 987-6151

February 7, 1990

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Recommendations of Right of Surviving
Spouse To Dispose of Community Property

Gentlemen:

I have read the above recommendations dated January 1990. I concur with your recommendations, which I think are needed, clarifying the sections involved.

The addition of Probate §13545 on the Right to Dispose of Securities should make stock brokers happy as well as practicing attorneys.

Sincerely,

RUSCONI, FOSTER, THOMAS & PIPAL

Ernest Rusconi
ERNEST RUSCONI

ER:bjb

Memo 90-47

EXHIBIT 9
LAW OFFICES

Study L-3020

FEB 13 1990

J. HAROLD BERG *
FRED W. SOLDWEDEL *
PETER R. PALERMO *

PHILIP BARBARO, JR.
* A PROFESSIONAL CORPORATION

PARKER, BERG, SOLDWEDEL & PALERMO
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
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AREA CODE: 618-793-5196
AREA CODE: 213-681-7225

RECEIVED
HARVEY M. PARKER
OF COUNSEL

JAY D. RINEHART
1891-1964
RALPH T. MERRIAM
1892-1968
RONALD D. KINCAID
1941-1980

January 30, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-10
Palo Alto, California 94303-4739

Re: Right of Surviving Spouse to Dispose of
Community Property

Dear Gentlepersons:

I am in favor of the above proposal as recommended
by the commission and look forward to its passage.

Sincerely,


PETER R. PALERMO

PRP/dml

Memo 90-47

EXHIBIT 10Study L-3020 **FEB 15 1990**

POST OFFICE BOX 151

RAWLINS COFFMAN
ATTORNEY AT LAW
RED BLUFF, CALIFORNIA 96080
February 13, 1990

RECEIVED
TELEPHONE 527-2021
AREA CODE 916

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: TENTATIVE RECOMMENDATION #L-3020

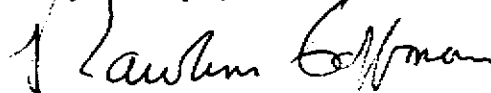
Ladies and Gentlemen:

With respect to your TENTATIVE RECOMMENDATION #L-3020:

I approve your recommendation entitled:

RIGHT OF SURVIVING SPOUSE TO DISPOSE OF COMMUNITY PROPERTY.

Very truly yours,



RAWLINS COFFMAN

RC:mb

FRANK M. SWIRLES
LAW CORPORATION

FEB 22 1990
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February 20, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Tentative Recommendations on

Right of Surviving Spouse to Dispose of Community
Property

and

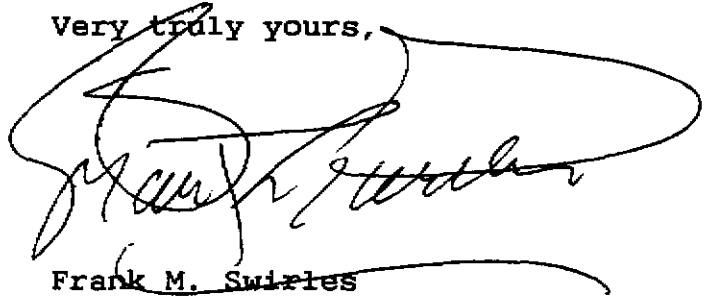
Deposit of Estate Planning Documents with Attorney

Gentlemen:

Your tentative recommendations regarding the right of the surviving spouse to dispose of community property appears to be sound.

I have some questions regarding the recommendation for the deposit of estate planning documents with an attorney, however. In section 710, how would you define "or other secure place"? In section 711 (a), what is "ordinary care"? In section 724, how is the attorney to know of the death of a former client? For example, I have a former client who now lives in Italy. He must be about 90 years old by this time, if he is still alive. Will I have to keep his documents forever?

Very truly yours,



Frank M. Swirles

P.O. BOX 1490
RANCHO SANTA FE, CALIFORNIA 92067
(619) 756-2080

Memo 90-47

EXHIBIT 12

Study L-3020

FEB 26 1990**RECEIVED**

John C. Hoag
Vice President and
Senior Associate Title Counsel

February 23, 1990

John M. DeMouilly, Esq.
Executive Secretary
California Law Revision Committee
4000 Middlefield Road, Ste. D-2
Palo Alto, CA 94303-4739

Re: Tentative Recommendation On Right of Surviving
Spouse To Dispose of Community Property

Dear Mr. DeMouilly:

Page 6 of the tentative recommendation, section 4 appears to me to take away from bona fide purchasers and /or encumbrancers protection even if a notice is recorded more than 40 days after the death of a spouse because 13541(a) states: 'Section 13540 does not apply'. That broad statement means to me all of section 13540. I would make it explicit in 13541 that bona fide purchasers and lenders are protected if notice of an interest is recorded more than 40 days after the death of a spouse; or, alternatively if a conveyance occurs and no notice is recorded, 13540 bona fide purchaser protection remains in place.

If there is no 40 day cut-off period for recording a notice of interest and it is at least unclear that bona fide purchasers and encumbrancers are protected against the consequences of recording a notice after 40 days (as it is unclear to me), then the amendment to 13541 will not work in the real estate marketplace. Conveyances of community real property could not intelligently be insured by title insurers free of the potential outcome of a notice of interest even if the notice recorded following the effective date of a title policy. The probable outcome of recording a notice of interest following close of a sale of real property and title insurance to a buyer would be a lengthy suit.

I think a good approach is to be explicit about bona fide purchaser protection in 13541 even though that protection exists elsewhere in the statutory scheme.

John H. DeMouilly, Esq.
February 23, 1990
Page #2.

The second comment I have is you may want to add the words 'and convey' following the word 'sell' at line 15 on page 6 in section 3 of the tentative recommendation since 'sell' doesn't mean, necessarily, 'convey' and this section in part concerns conveyance of real property by a surviving spouse.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Hoag", followed by a long horizontal flourish line.

JCH:j

cc: L. Kaminsky, Esq.

MAR 13 1990

HENRY ANGERBAUER, CRA
4401 WILLOW GLEN CT.
CONCORD, CA 94525

RECEIVED

3/11/90

California Law Revision Commission:

I have reviewed your Tentative Recommendation relating to "Right of Surviving Spouse to Dispose of Community Property." I am in agreement with your findings and conclusions and ask you to make your proposal to the legislature so that the provision may be put into law. Thank you for ~~allowing~~ permitting me to make my views known on this issue.

Sincerely
HA

MAR 15 1990

DOWLING, MAGARIAN, PHILLIPS & AARON
INCORPORATED
ATTORNEYS AND COUNSELORS AT LAW
6051 NORTH FRESNO STREET, SUITE 200
FRESNO, CALIFORNIA 93710

RECEIVED
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(209) 432-4500
FACSIMILE
(209) 432-4590

OUR FILE NO. _____

MICHAEL D. DOWLING
JAMES M. PHILLIPS
BRUCE S. FRASER
RICHARD M. AARON
STEVEN E. PAGANETTI
KENT F. HEYMAN
JOHN C. GANAHL
SHEILA M. SMITH
JEFFREY D. SIMONIAN
DAVID O. FLEWALLEN
WILLIAM J. KEELER, JR.
ADOLFO M. CORONA
ARNOLD F. WILLIAMS
JAY B. BELL
WILLIAM L. SHIPLEY
GERALD M. TOMASSIAN
RICHARD E. HEATTER
DONALD J. MAGARIAN
DANIEL K. WHITEHURST
MORRIS M. SHERR
OF COUNSEL

March 13, 1990

The California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Tentative Recommendations Relating to Probate Law
and Procedure; Right of Surviving Spouse to Dispose
of Community Property

Gentlemen:

With regard to the above-referenced recommendation, I see
no serious problems in its implementation and commend its extension to securities.

Very truly yours,

**DOWLING, MAGARIAN,
PHILLIPS & AARON**



Arnold F. Williams

AFW:ped



COUNTY OF LOS ANGELES
OFFICE OF THE COUNTY COUNSEL
648 HALL OF ADMINISTRATION
500 WEST TEMPLE STREET
LOS ANGELES, CALIFORNIA 90012

MAR 15 1990

RECEIVED

DE WITT W. CLINTON, COUNTY COUNSEL

March 13, 1990

TELEPHONE
(213) 974-1940

TELECOPIER
(213) 687-8822


CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303

Re: Tentative Recommendations

Dear Sir/Madam:

I support the tentative recommendations with respect to
Deposit of Estate Planning Documents with Attorney and Right of
Surviving Spouse to Dispose of Community Property.

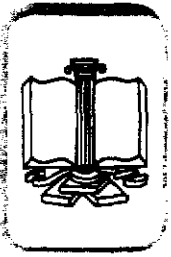
Very truly yours,


Patricia H. Jenkins
Attorney at Law
Probate Division

PHJ:cb

MAR 22 1990

RECEIVED



COMMUNITY LEGAL SERVICES

McGEORGE SCHOOL OF LAW

March 21, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Attention: Mr. John H. DeMouilly, Executive Secretary

Dear Mr. DeMouilly:

I concur with the recommendation on the RIGHT OF SURVIVING SPOUSE
TO DISPOSE OF COMMUNITY PROPERTY.

Sincerely,

Benjamin Frantz
Professor of Law

BF/sk



Fidelity National Title

INSURANCE COMPANY

Larry M. KaminskyVice President
Assistant General Counsel

March 21, 1990

CA LAW REV. COMM'N

MAR 23 1990

RECEIVED

John M. DeMouilly, Esq.
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303

RE: Tentative Recommendation On Right of Surviving
Spouse To Dispose of Community Property

Dear Mr. DeMouilly,

On behalf of the California Land Title Association Forms & Practices Committee, the following comments are offered on the above referenced tentative recommendation.

The proposed legislation seems to take away certain protections available to bona fide purchasers or encumbrancers which is inferred from the current statute. We believe that such purchasers or encumbrancers should be protected if no notice by a creditor is recorded within 40 days after death, and whether or not it is recorded after 40 days. From a title insurance point of view, without such protection, conveyances out of a surviving spouse after the forty days (the purpose of the statute) could not be insured in light of the potential risk.

Also, many title insurers have a problem with a potential "gap" in the record chain of title to the subject property where the surviving spouse disposes of community real property after forty days, where there is no disposition of the decedent's interest of record. Many of our member companies have created a form entitled "Affidavit of Death of Spouse" in which the affiant states various facts which meet the statutory criteria for the disposition of property under the 40-day rule. Some of us are uncomfortable in that there is no specific statutory authorization for the recording of such a form.

We urge the Commission to consider a statutory provision authorizing the recording of such an Affidavit. I have attached a sample for your consideration.

Thank you for your consideration.

Sincerely,
FIDELITY NATIONAL TITLE INSURANCE
COMPANY

A handwritten signature of Larry M. Kaminsky in dark ink.
Larry M. Kaminsky
Vice President
Assistant General Counsel

AFFIDAVIT — DEATH OF SPOUSE

STATE OF CALIFORNIA
COUNTY OF _____

} ss.

, being first duly sworn, deposes and says:

That he/she was validly married to _____ immediately prior to the latter named party's death, and that the affiant in conjunction with the decedent held title as "husband and wife" or as "husband and wife as community property" to the following described property:

That the affiant and the above-named decedent were married on _____ and affiant is the widow/widower of decedent; and

That _____ died on _____ as evidenced by a certified copy of the Certificate of Death attached hereto; and

That the affiant has carefully examined all of the decedent's personal possessions, letters, papers, effects, and belongings, and is certain that either

- 1) no will was executed or otherwise declared by the decedent, based not only on affiant's failure to discover a will, but because affiant was never informed of decedent having executed or declared a will, and affiant is certain that he/she would have been consulted, or would at least have had knowledge of that fact if a testamentary disposition were attempted; or
- 2) If a will is present that it is the last complete will (with codicils and/or other amendments) and that this will devised the subject property to the affiant; and

That the above-described property has been at all times since acquisition considered the community property of decedent and affiant and that any and all contributions to said property from whatever source were also considered by decedent and affiant to be community in nature; and

That, with respect to the above-described property, there has not been nor will there be an election filed pursuant to Probate Code Sections 13502 or 13503 in any probate proceedings in any court of competent jurisdiction; and

That this affidavit is made for the protection and benefit of the grantee or grantees of the subject property, in conjunction with the successors, assigns and personal representatives of the grantee or grantees and all other parties hereafter dealing with or who may acquire an interest in the property herein described, and particularly for the benefit of First American Title Insurance Company which is preparing to insure the title to said property in reliance upon the assurances of affiant contained in this affidavit and otherwise; and

That affiant will testify, declare, depose, or certify before any tribunal, officer, or person, in any case now pending or which may hereafter be instituted, to the truth of the particular facts hereinabove set forth.

Dated _____

SUBSCRIBED AND SWORN TO before me, the undersigned, a Notary Public in and for said State,

this _____ day of _____

WITNESS my hand and official seal.

Signature _____

[This area for official notarial seal]

LAW OFFICES OF
VAUGHAN, PAUL & LYONS
1418 MILLS TOWER
220 BUSH STREET
SAN FRANCISCO 94104
(415) 392-1423

CA LAW REV. COMM'N

MAR 27 1990

RECEIVED

FAX: (415) 392-2308

March 26, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

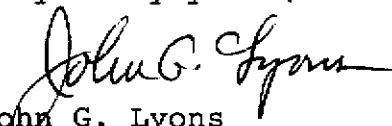
Re: # L-3020
Recommendation relating to Right
of Surviving Spouse to Dispose of
Community Property

Gentlemen:

I approve of the recommendation.

One small item: Three lines from the bottom of
Page 6, "located" should read "situated." As presently
worded, Section 13451(a) uses the word "situated."

Very truly yours,


John G. Lyons

JGL:car

Tentative Recommendation
relating to
RIGHT OF SURVIVING SPOUSE TO DISPOSE OF COMMUNITY PROPERTY

When a married person dies leaving the person's one-half interest in community property and quasi-community property to the surviving spouse, the surviving spouse takes the decedent's share free of the necessity of probate administration.¹ The Law Revision Commission recommends changes in the statute governing this matter to fill two gaps in it that have come to the attention of the Commission.

Right of Surviving Spouse to Dispose of Real Property

The statute 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.² Thus if the decedent leaves the decedent's share of 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.³

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 the value of the beneficiary's interest in the

1. Prob. Code §§ 13500-13660.

2. Prob. Code § 13540.

3. Although the 40-day recording statute is not the main subject of the present recommendation, the Commission also recommends the addition of clarifying language to remedy two technical defects in that statute:

(1) A notice recorded by a beneficiary after expiration of the 40-day period should still be effective if the surviving spouse has not yet disposed of the property.

(2) Recordation of the notice should not be privileged if done for the purpose of slandering the surviving spouse's title.

property from the surviving spouse.⁴ The Comment to Probate Code Section 13540 states that the beneficiary may obtain a judgment to enforce the beneficiary's rights against the surviving spouse,⁵ but this is nowhere expressly stated in the statute.

The omission of clear statutory provisions governing the matter is inadvertent. The Commission recommends that express provisions be added to the statute to govern the liability of the surviving spouse to a beneficiary.⁶

Right of Surviving Spouse to Dispose of Securities

Whereas the surviving spouse may freely dispose of community real property if 40 days has elapsed after the decedent's death and no notice has been recorded, the rule does not extend to personal property. Thus a potential transferee of personal property may be unwilling to enter into a transaction for fear that the surviving

4. Cf. *Knego v. Grover*, 208 Cal. App. 2d 134, 147-48, 25 Cal. Rptr. 158 (1962).

5. See Comment to Prob. Code § 13540 in *Recommendation Proposing New Probate Code*, 20 Cal. L. Revision Comm'n Reports 1001, 1846 (1990):

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.

Sections 13550-13553, referred to in the Comment, relate only to the decedent's debts and not to rights of the decedent's devisees.

6. The recommended provisions are drawn from comparable provisions in Probate Code Sections 13205-13208 governing liability to a beneficiary of a person who takes a small estate by affidavit.

spouse may not have full power to dispose of the property due to a possible devise of the decedent's share to a beneficiary other than the surviving spouse. A person who wants to be secure in accepting a transfer of personal property may refuse to consummate the transaction until the surviving spouse obtains a court order confirming the surviving spouse's ownership of the property.⁷

As a practical matter, this is only a problem for transfer of personal property of a type whose title is evidenced by documentation, such as securities. Most tangible personal property is untitled and of relatively low value, and its transferability by the possessor is not ordinarily questioned.

The ability of the surviving spouse to transfer securities is critical, since securities may fluctuate rapidly in value. Moreover, the market system for securities depends on the assurance to a purchaser that a transaction made by the registered owner passes good title to the purchaser notwithstanding an undisclosed cloud on the title of the registered owner.

Statutes governing the usual securities transfer enable the person in whose name securities are registered to dispose of the securities in the ordinary course of business without impediment.⁸ These provisions should not be compromised by the possibility that the securities are community property or quasi-community property and that the spouse of the registered owner has died and has made an undisclosed devise of the spouse's community property interest to a person other than the

7. See Prob. Code §§ 13650-13660 (determination or confirmation of property passing or belonging to surviving spouse).

8. 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.

surviving spouse. A purchaser should be able to take a transfer of securities from the registered owner free of the need to make inquiry concerning the community character of the securities, the death of the owner's spouse, and the contents of the decedent's will, if any. Any other rule could compromise every securities transfer by a natural person, since a prudent transferee would require assurance of the marital status of the transferor, the health of the transferor's spouse, and the like.

For these reasons the Law Revision Commission recommends that the statute make clear that the death of the spouse of a registered owner of securities does not affect the ability of the registered owner to pass good title. The laws governing the security of such transactions should apply with equal force before or after the death of the registered owner's spouse.

The Commission's recommendations would be implemented by enactment of the following measure.

An act to amend Sections 13207, 13540, and 13541 of, and to amend the heading of Chapter 2 (commencing with Section 13540) of Part 2 of Division 8 of, to add Section 13545 to, and to add Chapter 3.5 (commencing with Section 13560) to Part 2 of Division 8 of, the Probate Code, relating to disposition of property after death.

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

Prob. Code § 13207 (amended). Limitation on liability under Sections 13204 and 13205

SECTION 1. Section 13207 of the Probate Code is amended to read:

13207. (a) A person designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 is not liable under Section 13204 or 13205 if proceedings for the administration of the decedent's estate are commenced and the person satisfies the requirements of Section 13206.

(b) Except as provided in subdivision (b) of Section 13205, the aggregate of the personal liability of a person under Sections 13204 and 13205 shall not exceed the sum of the following:

(1) The fair market value at the time of the issuance of the certified copy of the affidavit under Section 13202 of the decedent's property received by that person under this chapter, less the amount of any liens and encumbrances on the property at that time,~~together with the .~~

(2) The net income the person received from the property and,~~if .~~

(3) If the property has been disposed of, interest on the fair market value of the property from the date of disposition at the rate payable on a money judgment. For the purposes of this subdivision~~paragraph~~, "fair market value of the property" has the same meaning as defined in paragraph (2) of subdivision (a) of Section 13206.

Comment. Section 13207 is amended to make a technical, nonsubstantive clarification.

Prob. Code § 13540-13542 (chapter heading). Right of surviving spouse to dispose of property

SEC. 2. The heading of Chapter 2 (commencing with Section 13540) of Part 2 of Division 8 of the Probate Code is amended to read:

CHAPTER 2. RIGHT OF SURVIVING SPOUSE TO DISPOSE OF REAL PROPERTY

Comment. The heading of Chapter 2 (commencing with Section 13540) is amended to reflect the expansion of the chapter to include Section 13545 (right of surviving spouse to dispose of securities).

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

SEC. 3. Section 13540 of the Probate Code is amended to read:

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).

Note. (1) John Hoag of Ticor Title Insurance (Exhibit 12) suggests that the statute make clear the surviving spouse has "full power to sell, convey, lease mortgage, or otherwise deal with and dispose of" the property. He points out that a sale doesn't necessarily involve a conveyance. The staff agrees, and would make the suggested change.

(2) Robert K. Maize, Jr., of Santa Rosa (Exhibit 5) notes that this provision is of little practical assistance to him and his clients. "The reason for this is that the practice of the title companies in Sonoma County is that they will not issue a policy of title insurance without listing as an exception the interest of the deceased spouse's estate." The staff has heard comments like this in the past; it might be helpful to add a provision that the transferee takes "free of the rights of the estate of the deceased spouse or of devisees or creditors of the deceased spouse". Also, the change proposed in Note (3) below may be useful.

(3) Larry M. Kaminsky of the California Land Title Association Forms & Practices Committee (Exhibit 17) offers an explanation for the title insurers' difficulty with this section. He notes a potential "gap" in the record chain of title between the community property ownership of the decedent and the surviving spouse's subsequent disposition of the property. He suggests that the gap be filled with an affidavit by the surviving spouse. The Affidavit of Death of Spouse is used by some title insurers, in which the affiant states various facts that meet the statutory criteria for disposition of the property under this section; a sample affidavit is attached to Mr. Kaminsky's letter. The title insurers would be happier with specific statutory authority to record such an affidavit.

The staff has no problem with this suggestion, especially if it will overcome the reluctance of the title companies to insure title without a court order. We would add a new subdivision that provides:

(c) The surviving spouse may record, together with the instrument that makes a disposition of property under this section, an affidavit of the facts that establish the right of the surviving spouse to make the disposition.

(4) Jerome Sapiro of San Francisco (Exhibit 4) questions the wisdom of allowing the surviving spouse to dispose of community real property 40 days after the decedent's death if no adverse interest is recorded. He believes 40 days may be too short; the decedent's devisees may not know of either the fact of death or the devise within 40 days after death. He suggests an increase to 60 or 90 days may be advisable. Also, the surviving spouse might be required to notify the devisees and executor named in the decedent's will of the spouse's intention to dispose of the community property. "Liability provisions may prove to be inadequate protection if you have a disappointed, squandering and conniving surviving spouse."

The staff is not sure a requirement that the surviving spouse notify interested persons would do any good against a conniving, etc., spouse. If the spouse ignores the requirement, liability remains as the ultimate remedy. An extension of time to 60 or 90 days could be effective, however. Have there been documented abuses under the 40 day rule? It sounds like Mr. Sapiro may experienced a problem. Absent indications of more widespread abuse under the 40 day provision the staff would be reluctant to change it.

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

SEC. 4. Section 13541 of the Probate Code is amended to read:

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 waiting period provided in Section 13540.

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).

Note. (1) John G. Lyons of San Francisco (Exhibit 18) notes that the word "located" should read "situated" at the end of subdivision (a). He is correct. However, we have drafted this recommendation on the assumption that the new Probate Code will be enacted when this recommendation goes to the Legislature, and the new Probate Code uses the word "located".

(2) John Hoag of Ticor Title Insurance (Exhibit 12) and Larry M. Kaminsky of the California Land Title Association Forms & Practices Committee (Exhibit 17) are concerned about an ambiguity they perceive in this section. They are worried that the section could be read to mean that a transferee from the surviving spouse is not entitled to protection if a notice of interest in the property is recorded after the transfer. This of course is not intended, and the matter could be clarified by revising subdivision (a) to state that "Section 13540 does not apply to a disposition of the property made after a notice that satisfies the requirements of this section is recorded."

Prob. Code § 13545 (added). Right of surviving spouse to dispose of securities

SEC. 5. Section 13545 is added to the Probate Code, to read:

13545. (a) After 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, assign, pledge, or otherwise deal with and dispose of community or quasi-community property securities registered in the name of the surviving spouse alone, and the right, title, and interest of any purchaser, assignee, encumbrancer, or other transferee shall be free of the rights of devisees or creditors of the deceased spouse to the same extent as if the deceased spouse had not died.

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

Comment. Section 13545 is drawn from Section 13540 (right of surviving spouse to dispose of real property).

Subdivision (a) makes clear that the right of a surviving spouse to deal with community and quasi-community property securities is not affected by the death of the other spouse. Thus, the fact that there may be a person having a superior right by testate succession to the decedent's share of securities does not impair the ability of the surviving spouse in whose name the securities are registered to make binding transactions affecting the securities just as if the deceased spouse had not died. See, e.g., Corp. Code § 420 (immunity of corporation and agents for executing properly indorsed securities transfer, including community property securities); Comm. Code § 8302 (bona fide purchaser for value in good faith and without notice of adverse claim takes security free of adverse claim).

Subdivision (b) makes clear that this section does not affect or limit the liability of the surviving spouse under Sections 13550-13553 (liability for debts of deceased spouse) and 13560-13564 (liability for property of deceased spouse). Although Section 13545 may preclude a devisee or creditor from enforcing his or her rights against a purchaser, assignee, encumbrancer, or other transferee or against the property interest transferred to the purchaser, assignee, encumbrancer, or other transferee, the section does not relieve the surviving spouse of any liability under Sections 13550-13553 and 13560-13564. 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 13545) that is subject to the enforcement of a judgment.

Note. (1) Robert K. Maize, Jr., of Santa Rosa (Exhibit 5) wonders whether this section will be any use--stock brokerage firms and issuing companies may be unwilling to transfer stock without recognizing the

interest of the deceased spouse's estate. He bases this concern on his experience with transfer of real property by the surviving spouse, where, despite the statute, the practice of the title companies in Sonoma County is to not issue a policy of title insurance without listing as an exception the interest of the deceased spouse's estate. The staff does not believe this will be a problem here since, unlike the real property statute, this section is limited to stock registered in the name of the surviving spouse alone.

(2) The limitation to stock registered in the name of the surviving spouse alone is criticized by Irving Kellogg of Beverly Hills (Exhibit 7). He points out that the names of both spouses are being added to community property titles as a matter of routine, and the need of the surviving spouse to promptly dispose of securities so titled may be just as great. He suggests that the section authorize some kind of summary proceeding in which the surviving spouse can get immediate confirmation of the status of the securities as community property. "Why should a surviving spouse be exposed to market risk only because title on the certificate was not in only the surviving spouse's name or was in the decedent spouse's name?"

A summary proceeding of the type suggested by Mr. Kellogg is already available in Probate Code Sections 13650-60. This may be done on 15 days notice under Section 13655. Fifteen days is not immediate, but it is fairly expeditious.

An alternate approach could be use of an affidavit. The surviving spouse would give an affidavit to the transfer agent, similar to the affidavit given by a successor under the small estate affidavit procedure. This would enable us to expand the scope of the section beyond securities registered in the name of the surviving spouse alone. Of course, we would need to build in protections for the transfer agent acting in reliance on the affidavit and liabilities for unreasonably refusing to honor the affidavit. In short, we would need a statutory structure that parallels the small estate affidavit statute. This could be quite useful, but again the staff is reluctant to proceed too far absent a showing of real problems in existing practice.

Prob. Code §§ 13560-13564 (added). Liability for decedent's property

SEC. 6. Chapter 3.5 (commencing with Section 13560) is added to Part 2 of Division 8 of the Probate Code, to read:

CHAPTER 3.5. LIABILITY FOR DECEDENT'S PROPERTY

§ 13560. "Decedent's property" defined

13560. For the purposes of this chapter, "decedent's property" means the one-half of the community property that belongs to the decedent under Section 100 and the one-half of the quasi-community property that belongs to the decedent under Section 101.

Comment. Section 13560 is included for drafting convenience.

§ 13561. Liability to person having superior right

13561. (a) If the decedent's property is in the possession or control of the surviving spouse at the time of the decedent's death, the surviving spouse is personally liable to the extent provided in Section 13563 to any person having a superior right by testate succession from 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 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 the decedent's property if the surviving spouse still has the decedent's property, together with (A) the net income the surviving spouse received from the decedent's property and (B) if the surviving spouse encumbered the decedent's property after the date of death, the amount necessary to satisfy the balance of the encumbrance as of the date the decedent's property is restored to the estate.

(2) The restitution to the decedent's estate of the fair market value of the decedent's property if the surviving spouse no longer has the decedent's property, together with (A) the net income the surviving spouse received from the decedent's 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 decedent's property. For the purposes of this paragraph, the "fair market value of the decedent's property" is the fair market value of the decedent's property, valued as of the time of the disposition of the decedent's property, excluding the amount of any liens and encumbrances on the decedent's property at the time of the decedent's death.

(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 the decedent's property in the good faith belief that the surviving spouse was the successor of the decedent to the decedent's property, the surviving spouse is liable for whichever of the following the decedent's estate elects:

(1) The restitution of the decedent's 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 decedent's 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 decedent's property at the time of the decedent's death.

(2) The restoration to the decedent's estate of the fair market value of the decedent's property, valued as of the time of the decedent's death, excluding the amount of any liens and encumbrances on the decedent's property at that time, together with interest on the net amount 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 heirs, devisees, and creditors 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 drawn from Section 13206 (affidavit procedure for real property of small value).

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 sum of the following:

(1) The fair market value at the time of the decedent's death, less the amount of any liens and encumbrances on the decedent's property at that time, of the portion of the decedent's property that passes to any person having a superior right by testate succession from the decedent.

(2) The net income the surviving spouse received from the portion of the decedent's property that passes to any person having a superior right by testate succession from the decedent.

(3) If the decedent's property has been disposed of, interest on the fair market value of the portion of the decedent's property that passes to any person having a superior right by testate succession from the decedent from the date of disposition at the rate payable on a money judgment. For the purposes of this paragraph, "fair market value" is fair market value, valued as of the time of the disposition of the decedent's property, excluding the amount of any liens and encumbrances on the decedent's property at the time of the decedent's death.

Comment. Section 13563 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 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.