Study L-100 November 18, 1999

# Memorandum 99-83

## Alternate Beneficiary for Unclaimed Distribution (Comments on Tentative Recommendation)

The Commission has circulated for comment its tentative recommendation to provide an alternate beneficiary for an unclaimed distribution. Attached as an Exhibit are comments received on this proposal.



We have also requested comment on the proposal from the State Controller and from the State Bar Probate Section, but have not yet received their responses. We will supplement this memorandum with their responses when received.

Under the tentative recommendation the court, when ordering distribution to a person whose whereabouts is unknown, must name an alternate beneficiary for the distributee's share. If the distributee fails to claim the share within three years, the alternate beneficiary would be entitled to that share. This procedure would effectuate the presumed intent of a decedent that the property go to beneficiaries rather than escheat to the state.

The proposal would add the following provision to Probate Code Section 11603 (court order for distribution of the decedent's estate):

> (c) If the whereabouts of a distributee is unknown, the order shall name alternate beneficiaries and the share to which each is entitled. The alternate beneficiaries shall be the persons who would be entitled under the decedent's will or under the laws of intestate succession if the distributee had predeceased the decedent. If the distributee does not claim the distributee's share within three years after the date of the order, the distributee is deemed to have predeceased the decedent for the purpose of this section and the alternate beneficiaries are entitled to the distributee's share as provided in the order.

**Policy of Recommendation**

Mr. Birnberg argues against the policy of the recommendation in the situation where the missing distributee is a devisee named in the decedent's will (as opposed to a missing intestate heir). "[A]dministrative convenience should not override a testator's intent that the devisee receive the property and it should be kept for that devisee." Exhibit p. 1

Of course, there is more than administrative convenience at stake here. The question is really whether the property ultimately goes to the decedent's heirs or escheats to the state. We don't have any statistics on it, but we would guess that most property escheated to the state because a distributee is missing is never claimed by the distributee.

The California Judges Association believes the intent of the proposal is consistent with California public policy. "In many cases, the result of this proposal would be far more in line with the decedent's intent than the operation of the escheat recovery as currently interpreted by the appellate courts." Exhibit p. 4. (They point out that once property has escheated, the first person who claims and proves any relationship, no matter how distant, is immediately entitled to the entirety, with no notice to any other relatives.)

**Determination of Alternate Beneficiaries**

If the missing distributee is a beneficiary named in a will, we ordinarily can ascertain with some assurance who the testator would have wanted to benefit in that person's stead, since a will ordinarily includes a residuary clause for principal beneficiaries. The residuary devisee would ordinarily be named as alternate distributee if the specific devise fails (except where the anti-lapse statute is implicated).

CJA points out, however, that there will be instances where the alternate beneficiaries are not readily determinable. For example, suppose a decedent with no known family members leaves everything by will to a friend, whose whereabouts is unknown. Or, it may simply be impracticable to determine who remote heirs of the decedent may be; the share of a remote heir may be too small to warrant the cost of determining possible alternates.

What sort of search should the personal representative make in order to ascertain the identities and entitlements of alternate beneficiaries? CJA asks whether it should be limited to "known" facts, or whether it is required to be "in good faith", "reasonable", "diligent", or subject to some other standard?

The staff sees no reason to depart here from the general rule in probate that the personal representative must act only on the basis of known or reasonably ascertainable information. When a probate is opened, potential beneficiaries are notified directly if known or reasonably ascertainable; otherwise published notice suffices. Prob. Code §§ 8100, 8110. It is up to potential beneficiaries to look out for their interests.

The staff agrees with CJA's observation that the draft should not be phrased in a mandatory and unconditional manner. **We would qualify the alternate beneficiary requirement with the limitation that alternate beneficiaries must be named only to the extent known or reasonably ascertainable.**

In this connection, CJA points out that potential alternate beneficiaries should receive notice of a petition for an order of distribution of the decedent's estate. See Prob. Code § 11601. If the personal representative is in doubt as to the appropriate alternate beneficiaries, the statutory procedure for determination of persons entitled to distribution would be available. See Prob. Code §§ 11700. These statutes both require notice to known heirs and devisees. **The staff would refer to these statutes in the Comment to new Section 11603(c)**:

> If a beneficiary's whereabouts is unknown, potential alternate beneficiaries under subdivision (c) are entitled to notice pursuant to Section 11601 (known heir or devisee whose interest would be affected). Moreover, the personal representative, or a person claiming to be entitled as an alternate beneficiary under subdivision (c), may petition the court pursuant to Article 2 (commencing with Section 11700) for a determination of persons entitled to distribution.

**Beneficiary Who Dies Before Distribution**

The California Judges Association raises the question of a beneficiary who survives the decedent but dies before the order of distribution is made. Should an alternate beneficiary be named in that case as well? CJA notes that this is a relatively common situation; they argue that, "If the properly determined successors of the beneficiary do not claim within three years it is likely that the decedent would prefer that the beneficiary's interest pass to the other beneficiaries." Exhibit p. 4. They suggest the addition of something along the following lines:

> For purposes of this section, a beneficiary's whereabouts shall be deemed unknown if the beneficiary is deceased and the identities

or whereabouts of the legal successors to the beneficiary's interest are unknown.

**The staff thinks this suggestion present a close call as a matter of policy.** As a matter of inheritance theory, the beneficiary has survived the decedent by the required length of time and is entitled to the property; why should the decedent's successors rather than the beneficiary's successors be next in line? On the other hand, there's some attraction to the concept that the decedent's, rather than the beneficiary's, heirs should benefit in these circumstances. Ultimately, the staff wonders whether it is worth complicating the statute for the relatively infrequent cases where this factual situation will occur.

**Charitable Beneficiaries**

If there is a bequest to a charity but the charity cannot be located or is no longer in existence, is it right that the property should go to alternate beneficiaries? Probably cy pres ought to apply in this situation, and the property distributed for a comparable charitable purpose. **The new law should make clear that it does not override existing provisions protecting a testamentary disposition for charitable purposes.** See, e.g., Prob. Code §§ 8111 (notice to Attorney General of charitable devise), 11703 (authority of Attorney General to petition for determination of persons entitled to distribution); Gov't Code §§ 12580-12599.5 (Uniform Supervision of Trustees for Charitable Purposes Act).

... This subdivision does not apply to a devise for a charitable purpose.

**Comment.** ...

In case of a devise for a charitable purpose without a designated trustee or identified beneficiary, the alternate beneficiary provisions of subdivision (c) do not apply. Instead, the Attorney General should ensure that there is an appropriate alternate charitable distribution. Cf. Prob. Code §§ 8111 (notice to Attorney General of charitable devise), 11703 (Attorney General petition to determine persons entitled to distribution); Gov't Code §§ 12580-12599.5 (Uniform Supervision of Trustees for Charitable Purposes Act).

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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October 28, 1999

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Attn: Nathaniel Sterling

Re: Tentative Recommendation L-100, L-1031

Dear Nat:

In the September, 1999 Tentative Recommendation for Probate Law Revisions, the Commission has proposals for two sets of changes, both of which I believe deserve some comment and possible revision.

1. Alternate Beneficiary for Unclaimed Distribution. I think that the result suggested is overly broad. I can see using this approach with interstate distribution, since the beneficiaries are determined under state law. I do not think it is appropriate where the named beneficiary is a devisee, since administrative convenience should not override a testator's intent that the devisee receive the property and it should be kept for that devisee.

2. Liability of Property Passing to Spouse for Debts. In this instance, the concept is appropriate but the language of the proposed statutory change requires more careful analysis. Referencing Chapter 3.5 (commencing with Section 13560) appears to be inaccurate at best since the provisions for liability of the spouse are in Chapter 3 (commencing with Section 13550). My preliminary reaction is that what appears to be necessary is an exception to finality under Section 13657 for the decedent's debts, which would be handled in the same manner as though the order were not entered under Chapter 3. That alone would be easy to draft but would leave the problem of multiplicity of suits by creditors (which exists where there property passes to the spouse without the spousal property order). The liability of the spouse under Sections 13550 is a larger problem, and--this is only a random thought—perhaps some procedure could be created to permit the spouse to "administer" the estate only to

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permit a unified procedure for creditors applicable whether or not a spousal property petition was filed. While it is not ordinarily used, it might be possible to model a procedure on the trust creditor notification procedures. It seems that much more thought is needed before this proposal should go forward.

Sincerely,

James R. Birnberg

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# FAX

**Date:** Tuesday, November 16, 1999

**# of pages including cover sheet:** 4

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**REMARKS:** ☐ Urgent ☑ For your review ☐ Reply ASAP ☐ Please comment

**Attached is the California Judges Association's recommendation on the tentative probate law revisions. We realize that this is being sent after the November 15 deadline and apologize for the delay. Should you have any questions, please contact me at the number listed above.**

**California Judges Association**

**Recommendation for California Law Revision Commisssion's Tentative Recommendation for Probate Law Revisions**

Recommendation approved by the CJA Executive Board on November 13, 1999.

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ALTERNATE BENEFICIARY OF UNCLAIMED DISTRIBUTION

The intent of this proposal is consistent with California public policy, as articulated by the cases interpreting the statutes on escheat recovery, to avoid inheritances escheating to the state. In many cases, the result of this proposal would be far more in line with the decedent's intent than the operation of the escheat recovery as currently interpreted by the appellate courts. (Once property has escheated, the first person who claims and proves any relationship, no matter how distant, is immediately entitled to the entirety, with no notice to any other relatives.)

The statute as proposed presents some difficulties which need to be addressed. The first concern is the phrase "whereabouts of a distributee is unknown." We believe this needs to be clarified as to its application in the relatively common situation where a beneficiary survives a decedent, acquiring an interest as a beneficiary in the decedent's estate, and then dies. Would the whereabouts of that beneficiary be considered unknown? Such a consideration would be consistent with the intent of the proposal. If the properly determined successors of the beneficiary do not claim within three years it is likely that the decedent would prefer that the beneficiary's interest pass to the other beneficiaries. This problem might be solved by adding the sentence "For purposes of this section, a beneficiary's whereabouts shall be deemed unknown if the beneficiary is deceased and the identities or whereabouts of the legal successors to the beneficiary's interest are unknown."

In most probates where a distributee's whereabouts are unknown, it would be fairly simple to determine the alternate beneficiaries as provided in the proposal. In other cases it would be difficult or impossible, so the mandatory and unconditional phrasing of the proposal ("... the order shall name alternate beneficiaries and the share ....") will be quite problematical for the court. Consider, for example, the following scenario: The decedent dies with no known family members, with a simple will leaving everything to a close friend who survives the decedent but whose whereabouts are unknown at the time of the distribution. There would be no way to determine alternate beneficiaries in that situation.

It may also not be practicable to determine the identities of alternate beneficiaries. For example, consider the possibility of a modest estate, passing to several children of the decedent, one of whom cannot be located. The alternate beneficiaries for the share of the missing child would be the child's issue, if any. Determining whether the missing child has living issue, and their identities, may be a very burdensome and expensive task.

This problem might be solved by recognizing that in many situations it will not be practicable to determine the identities of the alternate beneficiaries. This problem might be resolved by changing the first sentence of proposed subdivision (c) to read: "If the

whereabouts of a distributee is unknown, the order shall name alternate beneficiaries and the share to which each is entitled, IF THIS CAN BE DETERMINED WITH REASONABLE CERTAINTY FROM THE INFORMATION BEFORE THE COURT." (proposed addition in all capitals). Consideration should also be given by the Law Revision Commission to defining the effort a personal representative must give to trying to determine the identities and entitlements of the alternates. Would the personal representative's standard be merely "known" facts, or would a search be required, in "good faith", "reasonable", "diligent", or some other standard?4

This issue then raises one additional problem – notice to persons who may not have received any notice of the probate proceeding. Suppose that the alternate beneficiaries are grandchildren of the decedent (children of an unlocated child of the decedent). Although Probate Code 1202 may apply to require notice to those grandchildren, that could easily be overlooked in this situation. This could be addressed by adding the following sentence "Notice of the hearing at which the alternate beneficiaries will be determined shall be given as provided in Section 1220 to the proposed alternate beneficiaries."

## LIABILITY OF PROPERTY PASSING TO SURVIVING SPOUSE FOR DEBTS OF DECEDENT

Chapter 3.5 (commencing with Section 13560) deals only with the recovery from the surviving spouse by the personal representative of the decedent's ½ community property and disposable ½ quasi-community property which was devised to some third party. The proposed addition to PrC 13657 will not accomplish the purpose proposed, which is the require the personal representative to recover assets from the spouse for payment of the decedent's creditors who filed claims.

No exception to PrC § 13657 is needed in regard to the provision of PrC §§ 13560 et seq. An order under PrC §§ 13656 determines that specific assets did not pass to any third party so there would be no basis for the personal representative to re-litigate that issue under PrC §§ 13560 et seq.

The provisions for dealing with payment of creditors, as between the decedent's estate and the surviving spouse, are dealt with sufficiently in Part 9, Chapter 3, beginning with PrC § 11440. A fair reading of PrC § 13657 deals only with determination of what the spouse has inherited and not with subsequent payment of the decedent's liabilities. In other words, PrC §§ 13650 et seq. provide no impediment to proper resolution of issues regarding payment of decedent's liabilities as between a personal representative and the surviving spouse.

In our experience, there is no need for any change in the law in this area. The interface between formal administration and property passing directly to a spouse may be problematical for a creditor but in the vast majority of those cases where there is also a formal administration, the creditors are paid by the spouse with no need of any additional court action. The premise of this proposal is that it presents "A simpler and more economical procedure ...." In considering the situations where any changes (as proposed conceptually) would be likely to apply, we believe the proposal may produce substantial inequity.

A common scenario in which there is a personal representative and a surviving

spouse involves a dispute as to whether assets are separate property in which the decedent's children will share. One of the children may be appointed as personal representative with general powers, and litigation ensues under a spousal property petition filed by the spouse. (Note the spouse may not have priority for appointment as administrator, since anything inherited by the spouse passed without administration so may not be considered part of the "estate." See PrC sections 8462 and 13500).

Concurrently with this litigation, creditor claims may be filed, allowed or rejected and litigated. Suppose that the spouse is ultimately successful in proving that almost all of the assets were community property and all that is subject to administration is some tangible property. The proposal would appear to further impose on the personal representative the obligation to act as uncompensated agent for the creditors in securing assets for the payment of the creditor claims. Recovery of the assets from a spouse intent on concealing them can be very difficult. Failure may result in a surcharge petition by a creditor, alleging the personal representative was negligent for not securing assets. Conversely, the personal representative may be forced into litigation with a creditor over the validity of a reasonably questioned claim. No matter the outcome of the litigation, there will be no funds to pay for the personal representative and the attorney for the personal representative. If the creditor is successful in the suit, the personal representative would appear to have the obligation to act on behalf of the creditor to recover the payment from the spouse. Further, unless the spouse were joined in the litigation, the spouse would not be bound by the result and could contest the obligation to pay the debt so the issue would be litigated twice.

We would oppose this proposal.

(We would urge, instead, that the California Law Revision Commission consider studying the purported in rem scope of PrC § 13657 where only mailed notice to specified persons is required. If it is desirable for these orders to be binding on the world, consideration should be given to requiring, or allowing, published notice. There was at one time a requirement for publication if the spousal property petition was brought concurrently with a petition for probate. This made no sense, since it imposed this burden based on the arbitrary fact of timing in relation to a petition for probate, so that requirement was repealed.)