

Memorandum 2018-62

**Disposition of Estate Without Administration:
Creditor Claims**

In this study, the Commission¹ is considering a number of technical issues that relate to certain Probate Code provisions that allow the disposition of a decedent's estate without administration (hereafter "probate avoidance procedures"). The provisions discussed here address personal property of small value,² real property of small value,³ and property received by a surviving spouse.⁴

This memorandum raises a new issue, relating to liability for a decedent's unsecured debts.

Unless otherwise indicated, all statutory references in this memorandum are to the Probate Code.

OVERVIEW

Ordinarily, property that would pass by will or intestacy would be administered in a probate proceeding. However, in certain circumstances, existing law permits such property to pass to a devisee of a will or an heir under intestate succession rules without probate administration. **For convenience of reference, the remainder of this memorandum will use the term "successor" to mean a person who receives property from a decedent under one of the probate avoidance procedures.**

In probate, a decedent's estate is used to pay the decedent's debts (and certain expenses) before it is distributed to devisees or heirs. If property passes outside

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. Prob. Code §§ 13100-13116.

3. Prob. Code §§ 13200-13210.

4. Prob. Code §§ 13500-13660.

of probate, it passes outside of that creditor satisfaction procedure. To avoid unfairness to creditors, the probate avoidance procedures make the successor personally liable for the decedent's unsecured debts, up to the value of the property received.⁵

A successor is also personally liable if another person establishes a superior claim to the property by will or intestate succession (i.e., the other person, and not the purported successor, was actually the devisee or heir of the property).⁶

In addition to the rules establishing personal liability, the probate avoidance procedures also include what this memorandum will call "property return provisions." Those are provisions that allow the decedent's personal representative to require a successor to return transferred property (or its value) to the probate estate for use in paying creditor claims or transferring the property to a person with a superior right.⁷

If the property return provisions are invoked and the property received by the successor (or its value) is returned to the estate as required, the successor's personal liability is terminated.⁸

For ease of reference, the discussion that follows will only cite to the provisions that govern the disposition of real property of small value. Those provisions are set out in the Exhibit. Except as otherwise indicated, it should be assumed that the discussion of those provisions has similar application to the other procedures at issue in this study (the special Probate Code procedures for disposition of personal property of small value and disposition of property to a surviving spouse).

SHOULD THE APPLICATION OF PROPERTY RETURN REMEDY BE NARROWED?

With a significant exception discussed later in the memorandum, the property return provisions can be applied in two distinctly different situations:

- (1) The property is needed to pay the decedent's unsecured debts.⁹
- (2) The property should be transferred to a person with a superior right to the property by will or intestacy (i.e., the person who took

5. Sections 13109, 13204. The rules for liability of a surviving spouse are significantly different. See Sections 13550-13551. The relevant point of difference is discussed *infra*.

6. Sections 13110, 13205, 13561.

7. Sections 13111, 13206, 13562.

8. Sections 13112, 13207. The rules for liability of a surviving spouse are significantly different. See Section 13563. The relevant point of difference is discussed *infra*.

9. See Section 13204 (personal liability of successor for unsecured debts of decedent).

the property is not actually the person who should have received it).¹⁰

It seems entirely proper to require the return of the property to the estate in the second scenario. The decedent intended that the property go to another person; it should go to that person. There will be situations in which the decedent's intentions could not be completely fulfilled by the transfer of an equivalent amount of money. The point of the gift was to convey a specific item, not cash (e.g., an heirloom wedding ring gifted to a particular child). For that reason, it makes sense to continue the availability of the property return remedy for use when a purported successor takes property to which another person has a superior right.

The staff believes that the property return remedy is *not* needed to address the first scenario — return of the property for use in paying the decedent's unsecured debts. In that scenario, it is not necessary that a particular item of property be returned to the estate. In order to pay decedent's debts all that is required is money. In this situation, the property return remedy could impose unnecessary burdens.

Suppose that decedent's will left an heirloom wedding ring to a particular child. The child takes the ring under the probate avoidance procedure that governs property of small value. Later, it is determined that part of the value of the ring is required to pay decedent's unsecured debts. What result? Would the personal representative take the ring, sell it, use part of the proceeds to pay the debts and return the rest of the money to the child?

The existing statute does not expressly permit an obvious and reasonable alternative — the child pays the estate an amount of money equal to the liability assigned to the gift and keeps the ring.

It may be that the personal representative and successor could achieve the same result informally, if they both behave reasonably. The personal representative could inform the successor of the amount that the successor needs to pay to satisfy the successor's share of the overall liability of the estate and the successor could then make a payment in that amount to one of the decedent's unsecured creditors. The property return provisions make clear that "[t]he property and amount required to be restored to the estate under this section shall be reduced by any property or amount paid by the person to satisfy a

10. See Section 13205 (personal liability of successor to person with superior right to property by will or intestacy).

liability....”¹¹ Under that rule, there would be no need to pull the property back into the estate once the successor had made sufficient payments to the decedent’s creditors. Presumably, the personal representative’s determination that the successor’s obligation was satisfied in that scenario would be sufficient to trigger the end of the successor’s personal liability.¹²

The staff believes that it would be an improvement to address the matter expressly, by adding a provision that allows a successor to request a determination of the successor’s share of the decedent’s unsecured debts. On payment of that amount to the estate, the successor’s personal liability for those debts would end. It would be helpful for that alternative to be clear and available to the successor as a matter of legal right (rather than depending on the reasonableness of the personal representative).

Such a reform would be very similar to the reform proposed in Memorandum 2018-58, which would govern the liability of a beneficiary of a revocable transfer on death deed (“RTODD”). The language proposed in that memorandum,¹³ while tailored to the context of an RTODD, can be used to illustrate the concept that the staff has in mind:

5676. (a) If proceedings for the administration of the transferor’s estate are commenced, a beneficiary may submit a written request to the personal representative for a determination of the beneficiary’s liability for the unsecured debts of the transferor.

(b) On receipt of a request pursuant to subdivision (a), the personal representative shall determine the share of liability for the decedent’s unsecured debts that should be allocated to the property that was transferred to the beneficiary by revocable transfer on death deed.

(c) In making a determination under subdivision (b), the following rules shall be applied:

(1) The abatement rules provided in Part 4 (commencing with Section 21400) of Division 11 shall be applied as if the property that was transferred to the beneficiary by revocable transfer on death deed were part of the decedent’s estate.

(2) The value of the property received by the beneficiary pursuant to the revocable transfer on death deed shall be deemed to be the fair market value of the property at the time of the transferor’s death, less the amount of any liens and encumbrances on the property at that time.

11. See, e.g., Section 13206(d).

12. See, e.g., Section 13207(a).

13. Memorandum 2018-58, pp. 5-6.

(3) The property received by the beneficiary pursuant to the revocable transfer on death deed shall be deemed to be a specific gift.

(d) The personal representative shall provide a written determination of liability to the beneficiary, which states the amount that must be paid to the estate to satisfy the share of the decedent's unsecured debts that was allocated to the property transferred by revocable transfer on death deed.

(e) The reasonable cost of proceeding under this section shall be reimbursed as an extraordinary service under Sections 10801 and 10811. [The beneficiary is liable for the payment of that cost, which shall be separately identified in the written determination of liability.]

As noted above, the staff believes that a reform of this type would only be appropriate with regard to liability for the decedent's unsecured debts. If a purported successor has liability to a person who has a superior right to a particular asset, that asset should be returned to the estate. The person who took it has no right to any part of it, and treating the gift as fungible could defeat the transferor's intentions to make a specific gift (rather than gifting an equivalent amount of money).

Is the Commission interested in further developing a reform of this type? If so, the staff will conduct further analysis and prepare language for presentation at a future meeting.

EXCEPTION

As indicated earlier, the staff sees an important exception that is worth briefly discussing now. It appears, based on a close reading of the statutes, that the property return provision that governs property that passes to a surviving spouse is not applicable to creditor claim liability.¹⁴ It seems to only apply to the scenario where another person has a superior right.

If that interpretation is correct, then the reform discussed in this memorandum would not need to be made for the surviving spouse provisions. The property return remedy should continue to apply to superior right claims, for the reasons discussed above.

The staff would greatly appreciate public comment on the question of whether Section 13562 (the property return provision that governs passage of property to surviving spouse) can be used to return property that is needed to

14. See Section 13562(a) (property return provision only terminates successor's liability for superior right claims).

pay the decedent's unsecured debts. The staff would like to know whether experts read the statute as the staff does (and if not, why).

Respectfully submitted,

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Executive Director

PROBATE CODE

DIVISION 8. DISPOSITION OF ESTATE WITHOUT
ADMINISTRATION

PART 1. COLLECTION OR TRANSFER OF
SMALL ESTATE WITHOUT ADMINISTRATION

CHAPTER 5. AFFIDAVIT PROCEDURE FOR REAL PROPERTY OF
SMALL VALUE

§ 13200. Affidavit

13200. (a) No sooner than six months from the death of a decedent, a person or persons claiming as successor of the decedent to a particular item of property that is real property may file in the superior court in the county in which the decedent was domiciled at the time of death, or if the decedent was not domiciled in this state at the time of death, then in any county in which real property of the decedent is located, an affidavit in the form prescribed by the Judicial Council pursuant to Section 1001 stating all of the following:

- (1) The name of the decedent.
- (2) The date and place of the decedent's death.
- (3) A legal description of the real property and the interest of the decedent therein.
- (4) The name and address of each person serving as guardian or conservator of the estate of the decedent at the time of the decedent's death, so far as known to the affiant.
- (5) "The gross value of all real property in the decedent's estate located in California, as shown by the inventory and appraisal attached to this affidavit, excluding the real property described in Section 13050 of the California Probate Code, does not exceed fifty thousand dollars (\$50,000)."
- (6) "At least six months have elapsed since the death of the decedent as shown in a certified copy of decedent's death certificate attached to this affidavit."
- (7) Either of the following, as appropriate:
 - (A) "No proceeding is now being or has been conducted in California for administration of the decedent's estate."
 - (B) "The decedent's personal representative has consented in writing to use of the procedure provided by this chapter."
- (8) "Funeral expenses, expenses of last illness, and all unsecured debts of the decedent have been paid."

(9) “The affiant is the successor of the decedent (as defined in Section 13006 of the Probate Code) and to the decedent’s interest in the described property, and no other person has a superior right to the interest of the decedent in the described property.”

(10) “The affiant declares under penalty of perjury under the laws of the State of California that the foregoing is true and correct.”

(b) For each person executing the affidavit, the affidavit shall contain a notary public’s certificate of acknowledgment identifying the person.

(c) There shall be attached to the affidavit an inventory and appraisal of the decedent’s real property in this state, excluding the real property described in Section 13050. The inventory and appraisal of the real property shall be made as provided in Part 3 (commencing with Section 8800) of Division 7. The appraisal shall be made by a probate referee selected by the affiant from those probate referees appointed by the Controller under Section 400 to appraise property in the county where the real property is located.

(d) If the affiant claims under the decedent’s will and no estate proceeding is pending or has been conducted in California, a copy of the will shall be attached to the affidavit.

(e) A certified copy of the decedent’s death certificate shall be attached to the affidavit. If the decedent’s personal representative has consented to the use of the procedure provided by this chapter, a copy of the consent and of the personal representative’s letters shall be attached to the affidavit.

(f) The affiant shall deliver pursuant to Section 1215 a copy of the affidavit and attachments to any person identified in paragraph (4) of subdivision (a).

§ 13201. Fee

13201. Notwithstanding any other provision of law, the total fee for the filing of an affidavit under Section 13200 and the issuance of one certified copy of the affidavit under Section 13202 is as provided in subdivision (b) of Section 70626 of the Government Code.

§ 13202. Filing and recording

13202. Upon receipt of the affidavit and the required fee, the court clerk, upon determining that the affidavit is complete and has the required attachments, shall file the affidavit and attachments and shall issue a certified copy of the affidavit without the attachments. The certified copy shall be recorded in the office of the county recorder of the county where the real property is located. The county recorder shall index the certified copy in the index of grantors and grantees. The decedent shall be indexed as the grantor and each person designated as a successor to the property in the certified copy shall be indexed as a grantee.

§ 13203. Protection of bona fide purchaser

13203. (a) A person acting in good faith and for a valuable consideration with a person designated as a successor of the decedent to a particular item of property in a certified copy of an affidavit issued under Section 13202 and recorded in the county in which the real property is located has the same rights and protections as the person would have if each person designated as a successor in the recorded certified copy of the affidavit had been named as a distributee of the real property in an order for distribution that had become final.

(b) The issuance and recording of a certified copy of an affidavit under this chapter does not preclude later proceedings for administration of the decedent's estate.

§ 13204. Personal liability of successor for decedent's unsecured debts

13204. Each person who is designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 is personally liable to the extent provided in Section 13207 for the unsecured debts of the decedent. Any such debt may be enforced against the person in the same manner as it could have been enforced against the decedent if the decedent had not died. In any action based upon the debt, the person may assert any defense, cross-complaint, or setoff that would have been available to the decedent if the decedent had not died. Nothing in this section permits enforcement of a claim that is barred under Part 4 (commencing with Section 9000) of Division 7. Section 366.2 of the Code of Civil Procedure applies in an action under this section.

§ 13205. Personal liability of successor to person who has superior right

13205 (a) Except as provided in subdivision (b), each person who is designated as a successor of the decedent in a certified copy of any affidavit issued under Section 13202 is personally liable to the extent provided in Section 13207 to any person having a superior right by testate or intestate succession from the decedent.

(b) In addition to any other liability the person has under this section and Sections 13204, 13206, and 13207, if the person fraudulently executed or filed the affidavit under this chapter, the person is liable to the person having a superior right for three times the fair market value of the property. For the purposes of this subdivision, the "fair market value of the property" is the fair market value, determined as of the time the certified copy of the affidavit was issued under Section 13202, of the property the person liable took under the certified copy of the affidavit to which the other person has a superior right, less any liens and encumbrances on the property at that time.

(c) An action to impose liability under this section is forever barred three years after the certified copy of the affidavit is issued under Section 13202, or three years after the discovery of the fraud, whichever is later. The three-year period specified in this subdivision is not tolled for any reason.

§ 13206. Property return

13206. (a) Subject to subdivisions (b), (c), (d), and (e), if proceedings for the administration of the decedent's estate are commenced, or if the decedent's personal representative has consented to use of the procedure provided by this chapter and the personal representative later requests that the property be restored to the estate, each person who is designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 is liable for:

(1) The restitution to the decedent's estate of the property the person took under the certified copy of the affidavit if the person still has the property, together with (A) the net income the person received from the property and (B) if the person encumbered the property after the certified copy of the affidavit was issued, the amount necessary to satisfy the balance of the encumbrance as of the date the property is restored to the estate.

(2) The restitution to the decedent's estate of the fair market value of the property if the person no longer has the property, together with (A) the net income the person received from the property prior to disposing of it and (B) interest from the date of disposition at the rate payable on a money judgment on the fair market value of the property. For the purposes of this paragraph, the "fair market value of the property" is the fair market value, determined as of the time of the disposition of the property, of the property the person took under the certified copy of the affidavit, less the amount of any liens and encumbrances on the property at the time the certified copy of the affidavit was issued.

(b) Subject to subdivision (d), if the person fraudulently executed or filed the affidavit under this chapter, the person is liable under this section for restitution to the decedent's estate of three times the fair market value of the property. For the purposes of this subdivision, the "fair market value of the property" is the fair market value, determined as of the time the certified copy of the affidavit was issued, of the property the person took under the certified copy of the affidavit, less the amount of any liens and encumbrances on the property at that time.

(c) Subject to subdivision (d), if proceedings for the administration of the decedent's estate are commenced and a person designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 made a significant improvement to the property taken by the person under the certified copy of the affidavit in the good faith belief that the person was the successor of the decedent to that property, the person is liable for whichever of the following the decedent's estate elects:

(1) The restitution of the property, as improved, to the estate of the decedent upon the condition that the estate reimburse the person making restitution for (A) the amount by which the improvement increases the fair market value of the property restored, determined as of the time of restitution, and (B) the amount paid by the person for principal and interest on any liens or encumbrances that were on the property at the time the certified copy of the affidavit was issued.

(2) The restoration to the decedent's estate of the fair market value of the property, determined as of the time of the issuance of the certified copy of the affidavit under Section 13202, less the amount of any liens and encumbrances on the 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 issuance of the certified copy of the affidavit.

(d) 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 person to satisfy a liability under Section 13204 or 13205.

(e) An action to enforce the liability under this section may be brought only by the personal representative of the estate of the decedent. Whether or not the personal representative brings an action under this section, the personal representative may enforce the liability only to the extent necessary to protect the interests of the heirs, devisees, and creditors of the decedent.

(f) An action to enforce the liability under this section is forever barred three years after the certified copy of the affidavit is issued under Section 13202, or three years after the discovery of the fraud, whichever is later. The three-year period specified in this subdivision is not tolled for any reason.

§ 13207. Limitation on personal liability

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, or if the decedent's personal representative has consented to use of the procedure provided by this chapter and the personal representative later requests that the property be restored to the estate, 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.

(2) The net income the person received from the property.

(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 paragraph, "fair market value of the property" has the same meaning as defined in paragraph (2) of subdivision (a) of Section 13206.

§ 13208. Remedies not exclusive

13208. The remedies available under Sections 13204 to 13207, inclusive, are in addition to any remedies available by reason of any fraud or intentional wrongdoing.

§ 13209. Application of procedure

13209. The procedure provided by this chapter may be used only if one of the following requirements is satisfied:

(a) No proceeding for the administration of the decedent's estate is pending or has been conducted in this state.

(b) The decedent's personal representative consents in writing to use of the procedure provided by this chapter.
