

First Supplement to Memorandum 2019-39

Disposition of Estate Without Administration (Draft Tentative Recommendation)

Memorandum 2019-39 presents a draft of a tentative recommendation for this study.¹ It proposes improvements to the laws that govern the liability of a person who takes property from a decedent's estate without administration (under a statute that authorizes such action when the value of the estate or property is below a specified amount — hereafter the “disposition without administration” statutes).

In preparing the tentative recommendation, the staff spotted some new issues that the Commission should consider. They are discussed below.

In this memorandum, the person who takes property from the decedent's estate shall be referred to as the “transferee” and the property taken shall be referred to as the “transferred property.” A “person with a superior right” to a particular item of property is the actual heir or devisee with regard to that item, despite the fact that the transferee took the asset from the decedent's estate. In that situation, the transferee is not the person who should have received the item.

All statutory references in this memorandum are to the Probate Code.

APPLICATION OF PROPERTY RETURN PROVISIONS

Each of the statutes included in the tentative recommendation provide that a transferee is personally liable to (1) the decedent's unsecured creditors,² and (2) to a person who has a superior right.³

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. Sections 13109, 13204.

3. Sections 13110, 13205.

Each statute also contains what the staff has, for convenience, been calling a “property return provision.”⁴ Under those provisions, the decedent’s personal representative can require the return of transferred property (or its value, if the transferee no longer has the property) to the estate.

However, the property return provisions also contain language that appears to limit the scope of the restitution liability. For example:

[T]he personal representative may enforce the liability only to the extent necessary to protect the interests of the heirs, devisees, and creditors of the decedent.⁵

Because a transferee is only personally liable to the decedent’s unsecured creditors and those with a superior right, the staff assumed that the property return provisions had the same scope of application. In other words, the property return mechanism was just another way of enforcing the transferee’s already existing liability to creditors and superior right claimants. Under that reading, the reference to “heirs, devisees, and creditors” in the language quoted above would be read as referring to superior rights claimants (who are necessarily heirs or devisees) and unsecured creditors.

That understanding is baked into the draft tentative recommendation. When the Commission decided to limit the property return provisions to the enforcement of superior right claims (thereby precluding their use for creditor claims or any other purpose), the resulting gap was filled with new provisions that would enforce the transferee’s liability for unsecured creditor claims.⁶

Taken together, those revised and added provisions would provide the estate with enforceable remedies for unsecured debts and superior right claims, but nothing else.

Having taken a fresh look at the property return provisions, the staff is no longer certain of their intended scope. Did the Legislature intend that those provisions only be used to satisfy unsecured creditor claims and superior right claims, as originally assumed? Or might the provisions have been intended to have a broader application, allowing the returned property to be used for other debts of the estate (e.g., funeral expenses, expenses of last illness, family

4. Sections 13111, 13206.

5. Section 13206(e). See also Section 13110(d).

6. See proposed Sections 13109.5, 13204.5.

allowance, wage claims, and expenses of administration)?⁷ The latter possibility is discussed below.

History of the Limiting Language

The disposition without administration provisions were enacted on the Commission's recommendation.⁸ The recommendation did not include the limiting language discussed above. That language was added later, as part of the Commission's recodification of the Probate Code as a whole.

The limiting language was drafted by the Commission, in response to a point raised by the Executive Committee of the Probate Section of the Los Angeles County Bar Association:

The Section believes that [the property return provision] should be discretionary with the Court. The Section can foresee instances where a creditor could open an estate for a relatively small debt and the various heirs or beneficiaries will have to return up to \$60,000.00 worth of property. The Section does not understand how any public policy could be served by this potentially painful disgorgement of assets when the Court can be granted the equitable authority by statute to fashion such orders that may be required. The Section also believes that the statute could be open to abuse by disgruntled family members who would open an estate for the unfortunate purpose of requiring other family members to return property previously collected. Once again, discretion with the Court to fashion such orders that may be required will protect creditors and beneficiaries that may have been hurt by the collection procedure while at the same time avoiding abuses that would be possible under § 13111.⁹

The staff saw merit in that point and recommended that "the substance of this suggestion be adopted" with the insertion of the following language:

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 may give a judgment enforcing the liability only to the extent necessary to protect the interests of the heirs, devisees, and creditors of the decedent.¹⁰

7. See Section 11420 (debt priority).

8. *Disposition of Estate Without Administration*, 18 Cal. L. Revision Comm'n Reports 1005 (1986).

9. Memorandum 1986-033, Exhibit p. 2.

10. *Id.* at 3.

Thus, it appears that the limiting language was not meant to limit the kinds of obligations that the procedure could be used to pay. Rather, it was meant to limit the use of the provision at all, in circumstances where its use would be inequitable (e.g., the value of the transferred property is grossly disproportionate to the debt to be paid; the remedy is being invoked by disgruntled relatives to harass the transferee).

The limiting language was amended again, on the Commission's recommendation, as part of the revocable transfer on death deed statute.¹¹ The point of the second amendment was to make clear that the limiting language applies even if the personal representative is not seeking court enforcement (i.e., "where the beneficiary conveys the property to the transferor's estate voluntarily, under threat of litigation.").¹² Thus:

~~In an action to enforce the liability under this section, the court's judgment~~ 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 creditors of the transferor.¹³

That amendment simply broadened the scope of the limiting language's application, to include cases where the personal representative is acting without direct judicial involvement.

In light of that history, the staff does not believe that the limiting language has any relevance to the kinds of estate obligations that a personal representative can satisfy with property returned to the estate under one of the property return provisions. That seems to negate one bit of evidence that implied a narrow reading of the property return provisions. It is possible that the provision was intended to apply more broadly.

Policy

Regardless of the proper interpretation of the limiting language, it seems worthwhile to consider the policy implications of making a transferee liable for all of the obligations of a decedent's estate.

Under existing law, a transferee is made personally liable for the decedent's unsecured debts, up to the value of the transferred property. This ensures that

11. *Revocable Transfer on Death (TOD) Deed*, 36 Cal. L. Revision Comm'n Reports 103 (2006).

12. Memorandum 2006-38, p. 27.

13. *Id.* at 28.

taking property without administration does not immunize the transferred property from liability for the decedent's unsecured debts.

This suggests that the overarching purpose of the disposition without administration statutes was to simplify the process of obtaining small gifts from a decedent's estate. There was no intention to change the general rule that a decedent's property be used to pay the decedent's debts before being distributed as gifts to heirs or devisees.

If that is true for unsecured debts, the staff sees no good reason for different treatment of funeral expenses, expenses of last illness, and wage claims. If transferred property were instead left in the estate, it could be liable for a share of those kinds of obligations. Allowing property to be taken without administration does not seem to justify shielding it from such obligations.

Moreover, there are considerations that weigh in favor of making transferred property liable for a share of such obligations. First, if the transferred property is not liable, that liability would instead be shared between the other heirs or devisees. That might be contrary to the transferor's intentions (and the default statutory order of abatement). Second, if all of a decedent's assets are taken without administration, there might be nothing left in the estate to pay for those other obligations.

The family allowance and expenses of administration involve different considerations than those applicable to funeral expenses, expenses of last illness, and wage claims.

A family allowance is only granted during administration, as a way of providing for the "maintenance" of surviving family members while administration is ongoing.¹⁴ For that reason, one could view the family allowance as an appurtenant part of administration, the cost of which should *not* be borne by those who have been allowed to take property outside administration.

Expenses of administration are clearly an important part of what the law permits a transferee to avoid by taking property without administration. In general, it would seem contrary to the purpose of the statutes at issue here to impose the costs of administration on such property.

However, the staff does see one exception. If taking property outside of administration actually *increases* administration expenses, then it might be fair to charge those *additional* expenses to the transferee.

14. See Section 6540.

That is the approach taken in the proposed law. If the personal representative is required to calculate a transferee's share of liability for unsecured creditor claims, the cost of doing so would be paid by the transferee.¹⁵

Possible Action

The staff see three ways that the Commission could address the matter discussed above:

- (1) *Make no change.* If the Commission believes that the staff's original, narrow interpretation of the property return provisions was correct and achieves a good policy result, it could leave the matter alone.
- (2) *Ask for comment without changing the proposed law.* If the Commission is unsure of the best way to resolve the issues discussed above, it could add a Note or language in the narrative part of the tentative recommendation asking for Comment.
- (3) *Revise the proposed law.* If the Commission provisionally concludes that a transferee should be liable for more than just unsecured debts and superior right claims, it could revise the proposed legislation accordingly. If the Commission takes this approach, it will need to decide which obligations of the estate to include within the scope of the transferee's liability (e.g., funeral expenses, expenses of last illness, wage claims, family allowance, expenses of administration). The Commission would also need to decide whether liability for those other kinds of obligations should only arise under the property return provisions, or should also be part of the transferee's personal liability (e.g., even without administration being open, a transferee would be personally liable for the decedent's funeral expenses, up to the value of the transferred property). Finally, the Commission could choose to combine the statutory changes with an express request for public comment.

How would the Commission like to proceed on this matter?

In addition, the staff sees a related point that is worth discussing. With the changes to the property return provisions that the Commission is already proposing, it is not clear that the limiting language discussed above is still needed.

The tentative recommendation would revise the property return provisions so that they can only be used to enforce superior right claims. With that limited use, it is difficult to see a situation in which compelling the return of the property

15. See proposed Sections 13110.5(e), 13204.5(e).

(or its value) to the estate would be inequitable. If there is a person with a superior right, the transferee has no legitimate interest in the property. It should be returned.

The staff recommends adding notes to the tentative recommendation, along these lines:

☞ Staff Note. With the amendments proposed to Section 13111, it is not clear that subdivision (d) should be continued. The original purpose of that provision appears to have been to make clear that Section 13111 should not be enforced where it would be inequitable to do so (e.g., where the value of the property to be returned is grossly disproportionate to the small size of the debts to be paid or where the process is being abused to harass the transferee). See CLRC Memorandum 1986-033, Exhibit p. 2. If, as the Commission proposes, Section 13111 were limited to the enforcement of superior right claims, those kind of problems should not arise. **The Commission requests public comment on this issue.**

TREBLE DAMAGES FOR FRAUD

Under existing law, a transferee who takes property fraudulently is liable for damages equal to three times the fair market value of the property. That liability is in addition to any other liability that the transferee has (e.g., liability to creditors or superior rights claimants).

In the statutes at issue, the fraud liability is stated separately in two locations. First, it is stated in each provision that establishes a transferee's personal liability to a person with a superior right to the transferred property. For example:

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. ...¹⁶

Second, the treble damages liability is stated in each of the property return provisions. For example:

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. ...¹⁷

16. Section 13205(b). See also Section 13110(b).

17. Section 13206(b). See also Section 13111(b).

On working further with those provisions, the staff sees two questions that may not be answered clearly enough (or properly) by existing law. They are discussed below.

Overlapping Application

Treble damages is a harsh remedy. It sends a strong signal to potential transferees that the option to take property outside of administration, without judicial supervision, should not be abused.

Even though the treble damages rule is stated twice in each statute, the staff believes that the best reading of existing law is that the treble damages penalty would only be imposed once per asset that is fraudulently taken. If damages were awarded under one of the provisions, they would not be imposed under the other. However, the law on that point is not quite as clear as it could be.

Each property return provision states that the liability imposed under the provision shall be reduced by any liability that the transferee has satisfied under the provision that imposes personal liability for a superior right claim.¹⁸ This seems to mean that a transferee who paid treble damages under the superior right provision would have no liability (including treble damages liability) under the property return provision.

However, each property return provision also expressly states that the treble damages imposed under that section is “in addition to” any liability imposed under the superior right provision.¹⁹ That muddies the water as to whether treble damages could be imposed under both the superior right provision and the property return provision.

The staff recommends that the law be revised to eliminate any uncertainty on that point. Treble damages should only be imposed once per fraudulently taken asset.

Recipient of Treble Damages

It is common for punitive damages to be paid to a plaintiff, not because they are necessary to compensate the plaintiff for harms, but because there is no more appropriate choice.

18. See Sections 13111(d), 13206(d)

19. See Sections 13111(b), 13206(b).

That seems to be what happens when treble damages are awarded under one of the provisions that make a transferor personally liable to a person with a superior right. *Treble damages are awarded to the person with the superior right.*²⁰

That makes sense, because the provision on personal liability to a superior right claimant would probably only be enforced when there is no active probate proceeding. In that case, the superior right claimant would be the only person who could receive the treble damages.²¹

The property return provisions seem to provide a different rule. *In those provisions, the treble damages are paid "to the decedent's estate."*²² It is not clear what the estate would do with those funds. It seems possible that the money would be transferred to the person with the superior right, but there is no law requiring that result. It seems more likely that the estate would simply absorb the treble damage award and use it to pay obligations, with any remainder distributed as gifts according to the decedent's will or the rules of intestate succession.

As a matter of policy, the staff is not sure why the superior right claimant should receive the damage award in one scenario, but not the other. Perhaps, the preferred policy result is for the damages to go to the estate whenever possible, but that result is only possible when an administration is open? Or perhaps the inconsistency is a drafting oversight, obscuring an implicit expectation that treble damages recovered by the estate should be distributed to the person who was most harmed by the fraud (i.e., the superior right claimant)?

The distinction described above was part of the 1986 Commission recommendation on which existing law was based.²³ Unfortunately, the narrative part of that recommendation does not explain the reason for the distinction.

Possible Action

The staff recommends that the law be revised to make clear that the treble damages penalty should never be applied to the same asset twice. If the Commission agrees, the staff will draft implementing revisions to the tentative recommendation and present them to the Chair for approval before including anything in the tentative recommendation.

20. Sections 13110(b), 13205(b).

21. The staff has doubts that any transferee would acquiesce to paying treble damages without a court order, which would most likely be issued in the context of administration, but existing law provides for such liability outside of administration.

22. Sections 13111(b), 13206(b).

23. See *Disposition of Estate Without Administration*, *supra* note 8.

Regarding the issue of who should receive a treble damage award, the most prudent course would be to simply add a Note to the tentative recommendation asking for input on that issue. It would be helpful to know how stakeholders understand the provision and to get their input on the underlying policy. Also, the staff suspects that a reform as significant as changing the allocation of the treble damage award would be hard to enact unless there is substantial agreement among interested persons on the correct result.

If the Commission decides to revise the rules on allocation of the treble damage award or simply add a Note asking for input, the staff would draft implementing language for the Chair's approval before including anything in the tentative recommendation. **How would the Commission like to proceed?**

APPLICATION OF LIABILITY RULES WHERE TRANSFEREE TAKES MULTIPLE ASSETS

Typically, statutes are drafted in the singular number, without expressly addressing the application of the statute to more than one thing at a time. That is true of the proposed law.

The staff now wonders whether the law might be easier to understand if some of its provisions were revised to take into account their application to situations where a transferor takes more than one item of property without administration.

Specifically, there are a number of provisions in the proposed law that foreclose liability under one provision if liability for the same obligation is satisfied under a different provision. For example, proposed Section 13109(c) provides:

A transferee is not liable under this section if the transferee has satisfied the requirements of Section 13109.5, 13110.5, or 13111.

Section 13109 is the provision that makes a transferee personally liable to a decedent's unsecured creditors when taking personal property from a small estate. That liability would be extinguished if the transferee paid the estate the appropriate share of liability for unsecured debts (Section 13109.5), voluntarily returned the transferred property to the estate for administration (Section 13110.5), or was compelled to return the transferred property to the estate (Section 13111).

What result under Section 13109 if the transferee took *two* items of personal property and later decided to voluntarily return *one* of them to the estate for administration, while keeping the other? Would the transferee be completely excused from *any* liability under Section 13109 because the transferee satisfied “the requirements of Section 13110.5?” Or would the transferor only be excused from liability as to the value of the returned item, while continuing to be liable for the value of the item that was kept?

As a matter of policy, it seems clear that the latter result is the proper one. The only question raised here is whether the language of Section 13109(c) is clear enough to avoid any uncertainty on the point.

If the Commission believes that the language could be misconstrued, the problem could perhaps be avoided by revising Section 13109(c) (and the equivalent language in the other affected provisions) along the following lines:

A transferee is not liable under this section, for a particular item of transferred property, if the transferee has satisfied the requirements of Section 13109.5, 13110.5, or 13111 with regard to that item.

Thus, in the example discussed above, the transferee would remain liable to the decedent’s unsecured creditors, up to the value of the item that was retained. The transferee would not be liable for the value of the returned item, because the transferee would have satisfied Section 13110.5 with regard to that item.

If the Commission decides to make a change along those lines (or address the issue in some other way), the staff will prepare implementing language for the Chair’s consideration, before adding anything to the tentative recommendation.
How would the Commission like to proceed?

Respectfully submitted,

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