

## Second Supplement to Memorandum 2019-39

### **Disposition of Estate Without Administration: Liability (Draft Tentative Recommendation)**

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In this study, the Commission<sup>1</sup> has been considering reforms that would improve certain aspects of existing Probate Code procedures that permit property to be taken from a decedent's estate without administration.

The Commission has examined three such procedures. The first two allow a devisee or heir to take property of relatively small value, through the use of an affidavit or declaration.<sup>2</sup> The third procedure governs the passing of a decedent's property to the decedent's surviving spouse.<sup>3</sup>

Memorandum 2019-39 presents a draft tentative recommendation that would address the first two of those procedures. The third, which governs the decedent's surviving spouse, is sufficiently different in substance from the others that the staff thought it would be best to consider it separately. That is the purpose of this supplement. It discusses whether it would make sense to apply the reforms addressed in the tentative recommendation to the surviving spouse procedure.

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." For convenience, those terms are used to refer to a surviving spouse and property that passes to a surviving spouse, even though, as explained below, the surviving spouse statute may not technically involve a "transfer" of property.

All further statutory references in this supplement are to the Probate Code.

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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](http://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 (personal property), 13200-13210 (real property).

3. Prob. Code §§ 13500-13660.

## BACKGROUND

Before discussing the specific reforms proposed in this study, it would be helpful to briefly highlight some of the most salient differences between the surviving spouse procedure and the other procedures that permit a decedent's property to be taken without administration:

- (1) *Application not limited.* Unlike the first two statutes, the surviving spouse statute is not limited to property of small value. It applies without regard to the value of the decedent's estate or the value of the property taken. Consequently, it seems likely that the statute would be one of the main ways to transfer property from a decedent's estate to the decedent's surviving spouse.
- (2) *Default result.* Unlike the first two procedures, which require a transferee to take specified actions in order to take possession or acquire title to items of decedent's property without administration,<sup>4</sup> under the surviving spouse statute the decedent's property simply "passes" to the surviving spouse without administration.<sup>5</sup> That is the default result; the property will not be administered unless the surviving spouse elects to have it administered.<sup>6</sup>
- (3) *Scope of liability for debts.* The scope of a transferee's liability for a decedent's unsecured debts under the first two statutes is very different from the liability of a surviving spouse. In the first two cases, the liability is limited to the value of the transferred property. In the case of a surviving spouse, liability for the decedent's debts is much broader. In addition to liability for property that "passes" from the decedent, the surviving spouse's own share of the community property<sup>7</sup> may be liable (unless the property is administered or is exempt under the enforcement of judgments law).<sup>8</sup>

An important limitation on such liability is that the debt must be "chargeable" against property, in order for that property to be liable. That concept appears to relate to community property rules that distinguish between "separate" debts and "community" debts.

The staff did not find clear authority on the exact nature of separate and community debts, but the concept is also present in

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4. See Sections 13101 (personal property), 13200 (real property of small value).

5. Section 13500. The property that passes under this process is property that would pass to the surviving spouse by intestacy or pursuant to the decedent's will. But see Section 13501, listing certain exceptions.

6. Section 13502.

7. The liability also extends to quasi-community property. For drafting convenience, this memorandum omits any further discussion of the treatment of quasi-community property.

8. Section 13551.

the existing rules on allocation of debts between separate and community property<sup>9</sup> and in the Family Code.<sup>10</sup>

- (4) *Existing procedure for allocation of debts.* If a deceased spouse's estate is being administered, there is a procedure that can be used to allocate the decedent's debts between the property of the deceased spouse and the surviving spouse.<sup>11</sup>
- (5) *Judicial Confirmation of Ownership.* There is a relatively straightforward procedure that can be used, by the surviving spouse or the decedent's personal representative (if any), to determine which property in the decedent's estate should pass to the surviving spouse.<sup>12</sup>

The implications of those differences, as they relate to the reforms proposed in this study, are discussed below.

#### PROPERTY RETURN PROVISION

As discussed in prior materials, each of the statutes examined in this study includes a provision that authorizes the decedent's personal representative to require that transferred property be returned to the estate.<sup>13</sup>

There are two proposed reforms that relate to the property return provisions. They are discussed below.

#### Scope of Application

Under the processes that govern property of small value, it is clear that the property return provisions can be used to take back property that is needed to

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9. See Section 11444 (generally providing that a separate debt is first chargeable against the debtor's separate property).

10. The Family Code rules on the liability of separate and community property for separate and community debts are complicated. See, e.g., Fam. Code §§ 910 ("Except as otherwise expressly provided by statute, the community estate is liable for a debt incurred by either spouse before or during marriage, regardless of which spouse has the management and control of the property and regardless of whether one or both spouses are parties to the debt or to a judgment for the debt."), § 911(a) ("The earnings of a married person during marriage are not liable for a debt incurred by the person's spouse before marriage. After the earnings of the married person are paid, they remain not liable so long as they are held in a deposit account in which the person's spouse has no right of withdrawal and are uncommingled with other property in the community estate, except property insignificant in amount."), 913(b)(1) ("Except as otherwise provided by statute ... [t]he separate property of a married person is not liable for a debt incurred by the person's spouse before or during marriage.").

11. Section 11440 ("If it appears that a debt of the decedent has been paid or is payable in whole or in part by the surviving spouse, or that a debt of the surviving spouse has been paid or is payable in whole or in part from property in the decedent's estate, the personal representative, the surviving spouse, or a beneficiary may, at any time before an order for final distribution is made, petition for an order to allocate the debt.").

12. Sections 13650-13660.

13. See Sections 13111 (personal property), 13206 (real property), 13562 (surviving spouse).

pay the decedent's unsecured debts or to transfer the property to a person who has a superior right.

As discussed in the draft tentative recommendation, the Commission has proposed that the property return provisions be revised so that they only apply to superior right claims; they could not be used to collect property for the payment of debts.

**The staff does not believe that it is necessary to make such a reform to the property return provision in the surviving spouse statute.** As discussed in an earlier memorandum, there is good reason to believe that the existing property return provision in the surviving spouse statute is already limited in that way.<sup>14</sup>

When the Commission last considered this point, it decided to ask the Executive Committee of the Trusts and Estates Section of the California Lawyers Association for comment on whether that is the correct understanding of the application of the surviving spouse property return provision.<sup>15</sup> **The staff now recommends that the request for comment be framed as a Note in the tentative recommendation.** Once the Commission has comment on that issue, it can decide whether the statute needs to be revised to address this point.

### **Adjustment of Value**

The proposed law includes a number of minor reforms to existing rules that operate to adjust the value of the property that must be returned under the property return provisions. For example, if the transferee made payments toward the decedent's debts before being required to return the transferred property, the transferee would be reimbursed for those payments.<sup>16</sup> Conversely, if a transferee encumbered the transferred property before returning it, the transferee would be liable for the additional amount necessary to pay off the encumbrance.<sup>17</sup>

When the Commission examined the existing adjustment provisions, it found a number of ways in which they could be improved. The draft tentative recommendation includes those recommendations.<sup>18</sup>

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14. Memorandum 2018-62, pp. 5-6.

15. Minutes (Dec. 2018), p. 10.

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

17. See, e.g., Section 13206(a)(1)(B).

18. See proposed amendments to Sections 13111, 13206; proposed Sections 13112, 13207.

**At this time, the staff is not prepared to recommend that the same reforms be made to the surviving spouse statute. The application of those reforms would be very complicated and the staff is not yet sure of the full implications.**

The basic concept of the reforms is that a transferee who returns transferred property to the estate should get credit for any increase that the transferee made to the value of the returned property (e.g., by making a valuable improvement to the property), or for any decrease that the transferee made to the estate's obligations (e.g., by paying off the estate's debts). Conversely, a transferee should have additional liability if the transferee reduced the value of the property (e.g., by damaging it) or increased the estate's obligations (e.g., by encumbering the property).

The complications that the staff sees in applying those principles to the surviving spouse statute derive from the differing rules governing the liability of a transferee for the decedent's debts. The problem is most obvious in the context of a transferee who pays a decedent's unsecured debt before returning transferred property to the estate.

The result is straightforward in the situations addressed by the first two statutes. If a person takes property outside of administration under those statutes, that person is liable for the decedent's debts, up to the value of the property. That liability is a *consequence* of having taken the property. If the property is later returned to the estate, the transferee's liability for the decedent's debts is *extinguished*.<sup>19</sup>

If the transferee had paid any of the decedent's debts before returning the transferred property to the estate, those payments would be a windfall to the estate, because the transferee would no longer have any liability for the debts that were paid. Those debts should instead be paid by the estate. For that reason, it makes sense to reimburse the transferee.

The situation is more complicated under the surviving spouse statute. Recall that a surviving spouse's liability for a deceased spouse's debts is *not entirely dependent on the value of the property received from the deceased spouse*. The surviving spouse is also liable for the decedent's debts up to the value of the surviving spouse's own share of community property (if the debt is "chargeable" against that property). This means that the return of property received from the decedent's estate does not necessarily extinguish the surviving spouse's entire

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

basis of liability for the decedent's debts. Thus, it will not always be the case that the surviving spouse's payment of a debt will be a windfall to the estate when transferred property is returned. In some cases, the payment will have been based on the surviving spouse's own independent liability. In that situation, there is no clear reason for the estate to "reimburse" the surviving spouse for the payment of the decedent's debt.

Thus, to figure out whether a surviving spouse's payment of a decedent debt should be reimbursed when returning property to the estate, it would first be necessary to determine whether the debt was chargeable against the surviving spouse's share of community property. That would seem to require a determination of whether the debt is a "separate" or "community" debt. If the debt is chargeable against community property, then there may be an independent basis for the surviving spouse's liability and reimbursement may not be warranted. Resolving such questions could be even more complicated if there are a number of different debts and different pieces of potentially liable property.

**The staff does not recommend tackling this matter in this study.**

#### PERSONAL LIABILITY TO THE ESTATE

Because the proposed law would make the property return provisions in the first two statutes unavailable for use in paying the decedent's debts, the Commission decided to add a new provision on the transferee's liability to the estate for the decedent's debts.

The new provisions would make the transferee personally liable to the estate for the transferee's *share* of the liability for unsecured debts.<sup>20</sup> That share of liability would be calculated by applying the normal abatement rules to the estate, as if the transferred property were still a part of the estate.<sup>21</sup>

Should such a provision be added to the surviving spouse statute? **The staff recommends against doing so.**

As noted above, existing law already includes a procedure that can be used to allocate the decedent's debts between the property of the deceased and surviving spouses. In effect, that procedure could be used to do much the same thing as the provision that the Commission proposes adding to the other two statutes — it

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20. See proposed Sections 13109.5, 13204.5.

21. *Id.*

could be used to determine the surviving spouse's share of liability for the decedent's debts (and ensure that the estate pays what it owes). That existing mechanism seems more than adequate.

#### VOLUNTARY PROPERTY RETURN

The proposed law would also add a new provision to the first two statutes that would allow a transferee to voluntarily return transferred property to the estate for administration.<sup>22</sup> This would effectively allow the transferee to rescind the decision to take the property without administration. Doing so would negate all of the special liability rules that apply to property taken without administration. That is the point of the new provision. It allows a transferee to unwind their decision to take property without administration, if they decide it would be more advantageous to have it administered.

**The staff sees no need for such a provision in the surviving spouse statute.**

As noted above, the surviving spouse statute provides for property to pass without administration *as the default result*. If the surviving spouse decides that it would be more advantageous to have the property administered, existing law already permits that choice.<sup>23</sup>

#### PERSONAL LIABILITY TO DECEDENT'S UNSECURED CREDITORS

Under existing law, a transferee is personally liable for the decedent's unsecured debts, up to the value of the transferred property.<sup>24</sup> The statutory rules for calculating the value of the property include, in some instances, income derived from the property and interest on the property's fair market value (if the transferee no longer has the property).

The proposed law would delete the income and interest elements from those provisions.

**It is not necessary to make a parallel change in the surviving spouse statute's provision on personal liability for the decedent's unsecured debts.** The existing provision on a surviving spouse's liability for the deceased spouse's debts makes no mention of income or interest. Thus, there is no need to delete such language.

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22. See proposed Sections 13110.5, 13205.5.

23. Section 13502.

24. Sections 13109, 13204.

## CONCLUSION

If the Commission decides to include a reform of any aspect of the surviving spouse statute in the staff draft tentative recommendation, the staff would draft implementing language in both the proposed legislation and preliminary part of the recommendation for the Chair's approval, before revising and distributing the tentative recommendation.

**How does the Commission wish to proceed?**

Respectfully submitted,

Brian Hebert  
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