

Memorandum 2020-4

**Disposition of Estate Without Administration
(Comment on Tentative Recommendation)**

In July 2019, the Commission¹ released a tentative recommendation that proposes reforms to two existing statutory procedures that permit the disposition of a decedent's property without administration (i.e., they allow the transfer of a decedent's property outside of the probate process).² Those statutes govern the following types of property:

- (1) Personal property in an estate of small value.
- (2) Real property of small value.

The reforms proposed in the tentative recommendation were focused on the rules that govern the liability of a person who takes property under those procedures.

The Commission received comment on the tentative recommendation from the Executive Committee of the Trusts and Estates Section of the California Lawyers Association (hereafter "TEXCOM"). The letter from TEXCOM is attached as an exhibit. As always, the staff is grateful to TEXCOM for its valuable contributions to the Commission's study of estate planning topics.

The use of the "☞" symbol in the heading of an issue signals the staff's intention to treat that issue as a presumed consent item. Unless a Commissioner objects, the staff will presume unanimous approval of the staff's recommendation, without presentation of the issue.

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

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. See Tentative Recommendation on *Disposition of Estate Without Administration: Liability* (July 2019) (hereafter "tentative recommendation").

BACKGROUND

Existing Law

Ordinarily, a decedent's estate must be administered in court before the decedent's property can be distributed to a devisee³ or heir.⁴ As part of administration, the decedent's property is first used to pay the decedent's debts and other obligations.

However, there are procedures that allow a decedent's property to pass to a devisee or heir without administration, in limited circumstances. One such procedure allows the devisee or heir to take personal property from an estate of small value.⁵ Another allows the devisee or heir to take real property of small value.⁶

Those procedures do not immunize the transferred property from being used to satisfy the decedent's debts. In both cases, the person who takes the property (hereafter the "transferee") becomes liable for the decedent's unsecured debts, up to the value of the property taken. In addition, the transferee is liable to a person with a "superior right" to the transferred property.⁷ Furthermore, if the transferee took the property fraudulently, the transferee is also liable for a penalty of three times the value of the property.

Under existing law, the transferee's liability can be enforced in three ways:

- (1) *Personal liability to creditors.* The transferee is personally liable to the decedent's unsecured creditors. Those creditors may enforce their claims directly against the transferee.⁸
- (2) *Personal liability to person with superior right.* The transferee is personally liable to a person with a superior right to the property. That person can enforce the liability (including the treble damages for a fraudulent transfer) directly against the transferee.⁹

3. See Section 34(a) ("Devisee' means any person designated in a will to receive a devise."), 32 ("Devise,' when used as a noun, means a disposition of real or personal property by will, and, when used as a verb, means to dispose of real or personal property by will.").

4. See Section 44 ("Heir' means any person, including the surviving spouse, who is entitled to take property of the decedent by intestate succession under this code."). Intestate succession is a set of rules used to distribute the property of a decedent who died without a will or other dispositive instrument. See Sections 6400-6455.

5. See generally Sections 13100-13116.

6. See generally Sections 13200-13210.

7. If the transferee was not actually the person who should have received the property, the actual devisee or heir is a person with a "superior right" to the property.

8. See Sections 13109, 13204.

9. See Sections 13110, 13205.

- (3) *Restitution liability.* If the decedent's estate is being administered, the decedent's personal representative can require that the transferred property be returned to the estate, for use in paying creditors or for distribution to a person with a superior right. If the property was taken fraudulently, the personal representative can also enforce treble damages liability.

Proposed Reforms

The most significant reforms proposed in the tentative recommendation are summarized below.

Limit Application of Restitution Liability

The proposed law would limit the situations in which a transferee can be required to return property to the estate.¹⁰ Restitution would no longer be required for payment of the decedent's creditors.

That proposed change was based on a concern that return of the transferred property to the estate could be unduly burdensome where the transferee has sufficient liquid assets to simply pay the transferee's share of the decedent's debt. The transferee might prefer to simply pay that debt, rather than go to the expense and trouble of transferring the asset to the estate, which might then sell it to obtain the funds needed to pay the decedent's debts.

Establish Personal Liability to the Estate for Creditor Claims

The proposed law would replace restitution liability for unsecured debts with a new provision that would make the transferee liable to the estate for a calculated share of the decedent's unsecured debts.¹¹ This would allow the transferee to keep the transferred property and simply pay the estate the amount owed.

Authorize Voluntary Return of Transferred Property

Finally, the proposed law would allow a transferee to voluntarily return transferred property to the estate, for probate administration.¹² This would not affect the transferee's right to receive the property as a devisee or heir; it would simply unwind the decision to take the property outside of probate. It would restore the status quo ante, as if the property had never been taken out of the estate.

10. See Tentative Recommendation, p. 2.

11. *Id.*

12. See Tentative Recommendation, p 3.

This would be helpful in situations where the transferee does not have sufficient liquid assets to pay the transferee's share of the decedent's unsecured debts and needs to return the property for use in paying those debts.

Improve and Standardize Adjustments to Value of Property

Under existing law, certain kinds of adjustments can be made to the value of property that is returned to the estate. For example, if the transferee had made any payments toward the decedent's debts, those payments could be credited to the transferee by the estate. Conversely, if the transferee had encumbered the returned property, the transferee would be liable for paying off the encumbrances. The existing adjustment rules are inconsistent and incomplete. The proposed law would replace them with a comprehensive set of rules, that would address any kind of increase or decrease in the value of transferred property that was caused by the transferee.

Requests for Comment

The tentative recommendation also asked for public comment on some issues that were not addressed in the proposed legislation:

- (1) *Scope of Liability.* The Commission asked whether the transferee's liability for the "unsecured debts" of the decedent should include the decedent's funeral expenses, expenses of last illness, expenses of administration, family allowance, and wage claims.¹³
- (2) *Recipient of Treble Damage Award.* The Commission noted that existing law is not consistent as to who would receive the award of treble damages when the transferee takes property fraudulently.¹⁴ If the damages are awarded in an action brought by a person with a superior right, that person receives the award. If instead, the damages are awarded after the personal representative has required the return of property to the estate, it appears that the damages are awarded to the estate. The Commission asked whether those were the correct results.
- (3) *Application of restitution provision to property transferred to surviving spouse.* One of the statutes that permits a decedent's property to be taken without administration applies to property that is taken by the decedent's surviving spouse.¹⁵ It is not entirely clear whether that statute's restitution provision applies to creditor claims, or only to property that is returned for transfer to a person with a

13. *Id.*

14. See Tentative Recommendation, p. 5.

15. The statute that governs property received by a surviving spouse is not addressed in the proposed legislation.

superior right. The tentative recommendation asks for comment on that issue.¹⁶

CONTENT OF MEMORANDUM

TEXCOM divided its letter into three parts:

- General Observations and Comments.
- Comments on Specific Aspects of the Tentative Recommendation
- Comments in Response to Requests for Comment

This memorandum will use the same organization in discussing TEXCOM's comments. After that discussion, the memorandum addresses a narrow technical point.

GENERAL OBSERVATIONS AND COMMENTS

As a general matter, TEXCOM is "very appreciative" of the Commission's work on this study.¹⁷ In particular, TEXCOM believes that the changes that the Commission has proposed regarding a transferee's liability to the decedent's estate (limiting the application of the restitution provisions and adding provisions to making the transferee liable to the estate for a calculated share of the decedent's debts) are "well thought out and fair"¹⁸ and would be a "significant improvement."¹⁹

As an aside, TEXCOM notes that the restitution provisions "appear to be little used in practice" and that this may be because the statutes at issue only apply to small estates.²⁰ This may limit the "incentives and resources" to pursue those remedies.²¹ The staff suspects that TEXCOM is correct. However, that may be changing, given the recent enactment of the Commission's recommendation to increase the dollar limits on the use of those statutes (including an automatic cost of living adjustment, to keep pace with inflation).²²

16. See Tentative Recommendation, p. 6.

17. See Exhibit p. 2.

18. *Id.*

19. See Exhibit p. 4.

20. See Exhibit p. 2.

21. *Id.*

22. See *Disposition of Estate Without Administration: Dollar Amounts*, 45 Cal. L. Revision Comm'n Reports 387 (2018); 2019 Cal. Stat. ch. 122.

Terminology

The proposed law addresses two different statutes. One governs the transfer of personal property in an estate of small value. The other governs the transfer of real property of small value.

In the first of those statutes, the proposed law would create the defined term “transferee” to refer to the person who takes property under the statute.²³ In the second, the defined term “designated successor” would be used to refer to a person who takes property.²⁴

Those proposed definitions roughly parallel the terminology of existing law. In the first statute, the term “transferee” would be used to replace repeated references to a “person to whom payment, delivery, or *transfer* of property is made.” In the second statute, the term “designated successor” would replace repeated references to “a person *designated as a successor* of the decedent in a certified copy of an affidavit issued under Section 13202.”

TEXCOM commented on those proposed definitions:

TEXCOM is concerned that using different defined terms for the recipient of property under the 13100 procedure versus the 13200 procedure could be needlessly confusing. Further, the term “designated successor” suggests, at least intuitively, that a recipient under the 13200 procedure was somehow affirmatively designated by the decedent to receive the property, which may rarely be the case. For these reasons, TEXCOM recommends using the term “transferee” for both the 13100 and 13200 procedures.²⁵

The proposed definitions were added for drafting convenience and to make the statutes easier to read and understand. Those benefits would be undermined if the new definitions were to create confusion.

While there is an internal logic to using shorthand terms that parallel the language that the terms would replace (e.g., “designated successor” in place of “person designated as successor in the affidavit”), TEXCOM may be correct that it would be better to use a single term (“transferee”) in both of the affected statutes. **If the Commission agrees, the staff would make that change in a draft of a final recommendation and present it for review at a future meeting.**

23. See proposed Section 13100.5(a).

24. See proposed Section 13202.5(a).

25. See Exhibit p. 2.

Valuation of Transferred Property

Transferee Liability to Estate

Under the proposed law, a transferee would be personally liable to the decedent's estate for a calculated share of the decedent's unsecured debts. The rules for calculating the transferee's share would be as follows:

(b) In calculating the transferee's share of liability under subdivision (a), the abatement rules provided in Part 4 (commencing with Section 21400) of Division 11 shall be applied, using all of the following assumptions:

(1) Transferred property shall be treated as if it had remained in the estate for administration.

(2) The value of the transferred property shall be deemed to be the fair market value of the property at the time the property is received by the transferee, less the amount of any liens and encumbrances on the property at that time.

(3) Any unsecured debts of the decedent that were paid by the transferee pursuant to Section 13109 shall be treated as if they were claims made against the decedent's estate.²⁶

TEXCOM points out that the valuation date used in paragraph (b)(2) — the date when the property is received by the transferee — is different from the valuation date generally used in probate and trust administration — the date of the decedent's death.²⁷

The general policy underlying the proposed new provision is that the transferee should be liable for the same share of the decedent's debts that the transferee would have owed if the transferred property had remained in the estate. That policy is concisely expressed in paragraph (b)(1).

However, as TEXCOM's comment reveals, the proposed rule in (b)(2) could lead to a different result.

An example will help to illustrate the problem:

Decedent dies owning two pieces of personal property, each valued at \$20,000 at the time of her death. By will, she leaves one asset to her Son, the other to her Daughter. There are \$10,000 in creditor claims against the decedent's estate.

If the entire estate were administered, the liability for the \$10,000 in debts would be *divided equally between the siblings*. That is because (1) the gifts would be in the same abatement class (i.e., they are both specific gifts to relatives),²⁸ and (2) within abatement

26. Section 13109.5(b) (personal property). See also Section 13204.5(b) (real property).

27. See Exhibit p. 3. See also Section 8802.

28. See Section 21402(a)(6).

classes, liabilities are to be divided pro rata.²⁹ Because the two gifts are of equal value, a pro rata allocation of liability between Daughter and Son would result in a 1:1 split of liability for the debts. Each sibling would owe \$5,000, leaving each a net gift of \$15,000.

Suppose instead that Son took his gift out of the estate without administration, under Section 13100. Later, Daughter opens an administration and is appointed personal representative.

Acting under proposed Section 13109.5, Daughter informs Son that he will be liable for a calculated share of their mother's debts. In calculating that share of liability, the general rules of abatement would be applied. As noted above, both gifts would be in the same abatement class (specific gifts to relatives). Consequently, the liability would be allocated pro rata between them. Thus, the share of each sibling's liability will depend on the value of their gifts.

Daughter's gift would be valued as of the time of the decedent's death, but Son's gift would be valued at a later point in time — when he transferred the property out of the estate.

If the value of Son's gift were to change in the interval between his mother's death and the date that he took the property out of the estate, then Son's and Daughter's gifts would have different values and the ratio for pro rata allocation would be different.

Suppose that the value of Son's gift dropped sharply to \$10,000 before he took it out of the estate. In that situation, the ratio between the value of Son's and Daughter's gifts would be 1:2, and Daughter would be liable for 2/3 of her mother's debts.

Alternatively, suppose that the value of Son's gift had doubled to \$40,000. Now the ratio would be 2:1 and Son would owe 2/3 of the debt.

Those results would be contrary to the general policy principle discussed above, that the transferred property should be treated as if it had remained in the estate. It would also be odd for the calculation of pro rata liability to take into account a change in the value of Son's property, without also taking account of a change in the value of Daughter's property. That could lead to inequitable results.

For those reasons, the staff recommends that the proposed law be revised to delete Sections 13109.5(b)(2) and 13204.5(b)(2). The date of valuation would then be determined under paragraph (b)(1) of those provisions, which provides generally that transferred property shall be treated as if it had remained in the estate for administration. Consequently, it would be subject to the same valuation rules as other property in the estate.

29. See Section 21403(a).

Transferee Liability to Creditor or Person with a Superior Right

There are other provisions of the proposed law that govern the valuation of transferred property for the purpose of determining a transferee's liability. In the provisions listed below, all of which continue the substance of existing law, transferred property is valued as of the date of the transfer, rather than the date of the decedent's death:

- Sections 13109 and 13204 provide that a transferee's personal liability to the decedent's creditors is capped at the value of the transferred property.
- Sections 13110(a) and 13205(a) provide that a transferee's personal liability to a person with a superior right to the transferred property is based on the value of the transferred property.
- Sections 13110(b) and 13205(b) provide that a transferee's treble damages liability for a fraudulent transferred is based on the value of the transferred property.

Those provisions do not present the same problem that is described in the preceding discussion, but they could lead to a different problem that was noted by TEXCOM. In some situations, it might be necessary to have the transferred property appraised twice — once for the provisions listed above (using the date of transfer as the valuation date) and then again for the purposes of estate tax allocation or other administration-related matters³⁰ (using the date of the transferor's death as the valuation date).

Requiring a second appraisal would increase the expense and inconvenience associated with taking property without administration. Those burdens could be avoided if the provisions listed above were revised to use the same valuation date that is used for other related purposes.

However, there is a consideration that might justify the added expense and inconvenience of having the property appraised twice. As a general rule, the transferee's liability to creditors and a person with a superior right to the property is based on the value of the gift that the transferee received. That limitation makes sense, because the transferee should not incur a net loss as a result of receiving a gift.

The connection between the value of the gift and the scope of liability could become strained if the property were valued as of the date of the transferor's death. Any subsequent change in the value of the property, before it is

30. See Exhibit pp. 2-3.

transferred out of the estate, could lead to a mismatch between the transferee's liability and the value that the transferee *actually* received. For example, suppose that the transferor willed personal property to transferee that is valued at \$20,000 at the time of the transferor's death. A month later, the transferee takes the property out of the estate without administration. At the time of that transfer the property is valued at \$30,000. Should the transferee's liability be capped at \$20,000 (value at death) or \$30,000 (value actually received)? What if instead the value of the property declined to \$10,000 at the time of the transfer? Should the transferee be liable for up to \$20,000 (value at time of death) or only the \$10,000 that was actually received?

The staff would appreciate hearing further comment from TEXCOM on this issue. In particular, it would be helpful to know how this works in probate. Is the liability of devisees and heirs calculated always based on the value of estate property at the time of the decedent's death? Or is there a way to adjust the pro rata allocation of liability to account for changes in the value of decedent's property during the administration process?

Property No Longer in Possession of Transferee

Finally, there is a special rule, drawn from existing law, that is used to value property that the transferee no longer possesses. In that situation, the property is valued based on the proceeds of the sale of the property.³¹ TEXCOM suggests that this rule might be appropriate:

One instance where it could make sense to use a separate valuation date would be where the transferee subsequently disposes of transferred property that is subject to a claim of superior right, in which case the date of disposition value could be relevant for determining the transferee's restitution liability to the rightful recipient.³²

That rule may be appropriate in this context because restitution to a person with a superior right is akin to disgorgement. The transferee never actually had a right to take the transferred property. That property should have gone to the person with the superior right to it. In that situation, the transferee should simply turn over whatever it is that the transferee received.

Valuing the property based on its sale price ensures that any change in value based on market fluctuation would be realized by the person with a superior

31. See proposed Sections 13110(a)(3), 13111(a)(2), 13205(a)(3), 13206(a)(2).

32. See Exhibit p. 3.

right, rather than the transferee. If the market rose before the property was sold, the person with a superior right would receive the increase in value. Conversely, if the market fell before the property was sold, the person with a superior right would suffer the loss in value. Presumably, that is the same result that would occur if the property had remained in the estate and its market value changed before it was distributed.

What if the value of the transferred property has increased or decreased due to the actions of the transferee, rather than changes in the market? The proposed law would expressly address that situation by assigning the increase or decrease in value to the transferee.³³ In other words, if the transferee's own action or inaction led to a decrease in the value of the property (e.g., by encumbering the property), the transferee would be liable to the person with a superior right for that loss in value. Conversely, if the transferee's action or inaction caused an increase in the value of the property (e.g., by paying down a secured debt), the transferee would be credited for the increase.

Note also that using the sale price as the value of the transferred property in this situation would not require two appraisals of the property. The sale price would be known to the seller, without the need for a formal appraisal.

TEXCOM has not asked for a change to the way that the proposed law would address this issue. Nor has the staff found any compelling reason to deviate from the Commission's proposed treatment of the matter. **The staff recommends against making any change to the valuation rule discussed above.**

Income Derived from Transferred Property

Some of the sections that are addressed in this study provide that the value of transferred property includes "net income" that the transferee "received from the property." That is true of the provisions that govern a transferee's personal liability to a person with a superior right³⁴ and the procedures that require property to be returned to the estate.³⁵

In the latter case, the Commission proposed new language to more precisely prescribe the kind of income that should be included in the value of the property. As the tentative recommendation explained:

33. See proposed Sections 13112, 13207.

34. See proposed Sections 13110(a)(2), 13205(a)(2).

35. See proposed Section 13206.

The Commission also recommends that the rules requiring restitution of income derived from transferred property be limited to income that would have been received by the estate if it had retained possession and control of the property.³⁶ This differentiates between income that is an innate part of an asset (e.g., dividends paid to shares of stock) from income that was created by the transferee's own initiative (e.g., income derived from using the property as part of the transferee's business). The former should probably be returned to the estate; the latter should not.³⁷

In accord with that principle, the restitution provisions of the proposed law would only require the return of income derived from transferred property "if that income would have accrued to the estate had the property not been transferred to the transferee."³⁸

TEXCOM points out that the same principle was not applied to the provisions that govern a transferee's personal liability to a person with a superior right.³⁹

That seems problematic. There is no obvious policy reason to treat income that is received from transferred property differently in the two different situations. The staff does not recall any discussion of that difference in treatment, either in staff memoranda or at a Commission meeting. It appears to have been an oversight.

The staff recommends that the more refined treatment of income that is used in the restitution provisions also be applied to the provisions that govern a transferee's personal liability to a person with a superior right. In other words, Section 13110(b)(2) and 13207(b)(2) should be revised along these lines:

(2) The ~~net~~ income the transferee received from the transferred property, if that income would have accrued to the estate had the property not been transferred to the transferee.

COMMENTS IN RESPONSE TO REQUESTS FOR PUBLIC COMMENT

As noted above, the tentative recommendation asked for comment on three specific issues. TEXCOM's responses are discussed below.

36. See proposed Prob. Code §§ 13112(b)(2) (transfer of personal property), 13207(b)(2) (transfer of real property), *infra*.

37. Tentative recommendation, p. 4.

38. See proposed Sections 13112(b)(2), 13207(b)(2).

39. See Exhibit p. 3.

☞ **Return of Property Taken by Surviving Spouse**

This study proposes reforms to two different statutes that allow a decedent's property to be taken without administration. There is a third. It governs property that transfers to the decedent's surviving spouse without administration.⁴⁰

The Commission decided against addressing the surviving spouse statute in this study, but it did see one question that might be worth answering. As explained in the tentative recommendation:

Existing law also provides a procedure that can be used by a surviving spouse to receive property from a deceased spouse, without administration. The scope of the surviving spouse's liability under that procedure is very different from the liability of a transferee under the procedures discussed above. For that reason, the Commission does not recommend applying the reforms described above to the surviving spouse procedure.

However, there may be an ambiguity in the surviving spouse procedure that could be addressed by the Commission. Like the two procedures at issue in this tentative recommendation, the surviving spouse procedure includes a provision that can be used to require the return of property to a decedent's estate: Probate Code Section 13562. The location and language of that provision suggest that the provision can only be used to recover property for transfer to a person with a superior right to the property (i.e., the returned property cannot be used to pay the decedent's debts or other obligations). **The Commission requests public comment on whether that is the correct interpretation of the provision.**⁴¹

TEXCOM responded as follows:

TEXCOM has no particular knowledge or insight into how Section 13562 is, or may be, currently interpreted by the courts, or in practice, and has not convened a study group to consider this issue. As such, no comment is provided on this issue at this time.⁴²

The staff recommends against pursuing the matter further at this time, so as not to hold up the parts of this study that are close to completion. Instead, the matter could be revisited at another time.

Scope of Liability for "Unsecured Debts of Decedent"

The tentative recommendation also requested public comment on whether a transferee's liability for "unsecured debts" of the decedent is understood to

40. Sections 13500-13660.

41. Tentative recommendation, p. 6 (footnotes omitted).

42. See Exhibit p. 3.

include liability for certain types of obligations that are paid by a decedent's estate (i.e., funeral expenses, expenses of last illness, wage claims, expenses of administration, and the family allowance). If not, should the law be changed to make a transferee liable for those obligations?⁴³

TEXCOM expresses no opinion on existing law on that issue.⁴⁴

However, TEXCOM does believe that, once administration has opened, transferred property should be treated the same way as property that remained in the estate. Therefore, TEXCOM supports revising the law to make clear that a transferee is liable to the estate for a share of the deceased transferor's funeral expenses, expenses of last illness, and expenses of administration.⁴⁵

TEXCOM does not specifically comment on whether the transferee should be liable for wage claims or a family allowance.⁴⁶ Nor does TEXCOM address whether a transferee's personal liability to a decedent's creditors should include the obligations discussed above.⁴⁷

All of those issues are discussed below.

Funeral Expenses and Expenses of Last Illness

TEXCOM's general position is that transferred property should be treated in the same way as property that remained in the estate, with respect to liability for decedent obligations. Consistent with that general position, TEXCOM expressly supports making clear that a transferee's liability to the estate should include liability for the decedent's funeral expenses and expenses of last illness.

The staff agrees. Absent a good reason for different treatment, transferred property should have the same liability as estate property.

Although TEXCOM did not directly address the issue, the staff believes that the same principle should be applied to a transferee's personal liability to the decedent's creditors. In other words, the transferee should be liable for funeral and medical expenses, regardless of whether that liability is enforced directly by a creditor or indirectly by the decedent's estate.

43. See Tentative Recommendation, p. 3.

44. Exhibit p. 3.

45. *Id.*

46. *Id.*

47. *Id.*

The staff's recommendations would be consistent with the Commission's treatment of the same issues in its recommendation on the revocable transfer on death deed.⁴⁸

Wage Claims

The principles discussed above also weigh in favor of making a transferee liable for any wage claims made against the decedent after death. Such claims should be treated like any other debt of the decedent. Estate property is liable for wage claims; **transferred property should also be liable**. Again, this would parallel the treatment of the same issue in the recommendation on revocable transfer on death deeds.⁴⁹

Expenses of Administration

TEXCOM believes that transferred property should be liable for a share of the expenses of administration, to the same extent as estate property.⁵⁰

The staff disagrees. There *does* seem to be a good reason for treating transferred property differently than estate property with regard to the expenses of administration. One of the main purposes of allowing property to be taken without administration is to avoid the cost of administering the property. That purpose would be defeated if transferred property were made liable for the same share of administration expenses that would have been imposed had the property remained in the estate. Moreover, the transferred property would not be administered and therefore would not contribute to or benefit from the expense of administration.

There is one exception to that last point, which the proposed law would address. The proposed law would make transferred property liable for the extraordinary expense that the estate would bear as a consequence of the property being taken out of the estate. Specifically, the cost of calculating the transferee's share of liability for the estate's obligations would be assessed against the transferee.⁵¹

Thus, property taken without administration would not be liable for the *general* expenses of administration, but would be liable for the *extraordinary*

48. See Pre-Print Recommendation on *Revocable Transfer on Death Deed: Follow-Up Study*, pp. 23-24 (Nov. 2019).

49. *Id.*

50. See Exhibit p. 3.

51. See proposed Sections 13109.5(e), 13204.5(e).

expenses that result from taking the property out of the estate. The staff believes that is the best way to preserve the value of taking property without administration, without imposing any extra burden on the estate. **For that reason, the staff recommends against making a transferee liable for a share of the general cost of administration.** This too would be consistent with the Commission’s recommendation on revocable transfer on death deeds.⁵²

Family Allowance

The “family allowance” is a payment from the estate to the decedent’s surviving spouse, minor children, or dependent adult children for their “maintenance” during the administration of the estate.⁵³

The family allowance serves to keep the family afloat while waiting for the conclusion of administration and a final distribution of the decedent’s estate. As such, the family allowance is closely tied to the process of administration, and could be seen as a cost of that process.

The question of whether transferred property should be liable for a share of the family allowance depends on how one sees the family allowance. If the family allowance is seen as a debt that the decedent owes to surviving family members, then it might make sense to make the transferred property liable for a share of that debt. But if instead the family allowance is seen as part of the cost of administration, then the transferred property should probably not be liable for a share of that cost. As discussed above, one of the purposes of the procedures at issue in this study is to allow property to be taken from the estate without being burdened by the general cost of administration.

In the staff’s view, the family allowance is more like an expense of administration than a debt. The family allowance can only be established by the court, as part of the administration process, and the duration (and therefore the cost) of the allowance depends on how long administration takes to complete. It is therefore an inextricable part of the administration process, rather than a separate obligation that would exist even if there is no administration.

In its follow-up study of the revocable transfer on death deed, the Commission decided that the beneficiary of a revocable transfer on death deed

52. Pre-Print Recommendation on *Revocable Transfer on Death Deed: Follow-Up Study*, pp. 23-24 (Nov. 2019).

53. Section 6540.

should not be liable for a share of a family allowance, despite the beneficiary being liable for other obligations of the estate.⁵⁴

The staff recommends that the same treatment be given to transferred property. It should not be liable for a share of a family allowance.

Treble Damages

As noted above, a transferee who fraudulently takes property out of the estate under one of the procedures at issue in this study is liable for three times the value of the property (in addition to being liable for return of the property or its value).

If that liability arises in an action brought by a person with a superior right, the treble damages are awarded to that person.⁵⁵

If the liability arises in an action brought by the decedent's estate, for return of the property to the estate, it appears that the treble damages are awarded to the estate.⁵⁶

The tentative recommendation asked for comment on whether those rules were appropriate. TEXCOM replied:

TEXCOM believes this distinction makes sense in view of the person(s) harmed by fraudulent use of the 13100 or 13200 procedures. In cases of superior right, the rightful recipient is the person harmed by the fraud and, therefore, should be the person entitled to treble damages. In cases of transferee liability, the decedent's estate, and by extension, the residuary beneficiaries of the estate, are the person(s) harmed by the fraud and would seem to be the appropriate payee of a treble damages award.⁵⁷

As a general principle, it makes sense that the treble damages should be awarded to the person who is most directly harmed by the fraud.

The application of that principle is straightforward in the case where a person with a superior right brings an action to recover the transferred property (or its value). In such an action, the only party harmed by the fraud is the superior right claimant. Under the notion that the treble damages should go to the person harmed by the fraud, those damages should be awarded to the person with the superior right. That is what existing law provides.

54. See Minutes (Sept. 2019), p. 10.

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

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

57. See Exhibit p. 4.

It is less obvious how that principle should be applied when the estate brings an action for restitution of the property to the estate. In that case, existing law seems to provide that the treble damages are awarded to the estate. Because those damages could not have been anticipated in the decedent's will, it seems likely that the treble damages would be distributed under the will's residuary clause. If there is no will, the treble damages would be lumped together with all other estate assets and distributed according to the rules of intestate succession.

TEXCOM suggests that result would be appropriate because, in "cases of transferee liability, the decedent's estate, and by extension, the residuary beneficiaries of the estate, are the person(s) harmed by the fraud...."⁵⁸

That would make sense if transferred property were returned to the estate solely to satisfy "transferee liability" for the decedent's unsecured debts. In that situation, the entire estate would be harmed by removal of the property from the estate, because the transferred property would then be unavailable for use in paying obligations. This would leave the other heirs or devisees owing a larger share of those obligations. That burden would fall hardest on the residuary devisees, because their gifts would be the first used to pay the obligations.⁵⁹

However, transferee liability for decedent debts is not the only reason that property can be returned to the estate under the restitution provisions. It can also be returned for distribution to a person with a superior right to the property.⁶⁰

In that situation, it is the person with the superior right who is most directly harmed by the fraud. In fact, if property is returned to the estate for distribution to a person with a superior right, it is not clear that the estate and residuary beneficiaries would suffer any significant harm. If the property is returned for distribution to the rightful heir or devisee, it would then be available to the estate for the payment of the decedent's obligations.

The only harm suffered by the estate in that situation is the cost associated with the enforcement of the restitution mechanism. That cost would come out of the estate, reducing the property available for the payment of other obligations. If the Commission is concerned about that cost to the estate, the law could be revised to require payment of that cost out of the treble damage award, with the remainder going to the person with the superior right.

58. See Exhibit p. 4.

59. Section 21402(a)(1)-(2).

60. In fact, under the proposed law, restitution could *only* be used to retrieve property for distribution to a person with a superior right. See proposed Sections 13111(a), 13206(a).

The Commission needs to decide whether it wishes to recommend any changes to existing law on the distribution of the treble damage awards. Further public comment on the issue would be helpful.

☞ **Possibly Superfluous Language**

The tentative recommendation includes Notes following Sections 13111(d) and 13206(e). The first of those Notes, which are substantively identical, reads as follows:⁶¹

Note. The second sentence of existing Section 13111(d) provides that the personal representative may enforce the section “only to the extent necessary to protect the interests of the heirs, devisees, and creditors of the decedent.” The Commission’s research suggests that this language was intended to make clear that enforcement of the section is not mandatory; there may be situations in which the liability should not be enforced because it would be inequitable to do so (e.g., where a debt to be paid is much smaller than the value of the property to be returned or where the process is being misused to harass the transferee). See First Supplement to CLRC Staff Memorandum 2019-39, pp. 3-4. **The Commission requests public comment on whether the same concerns would exist if the provision were to be limited to the satisfaction of superior right claims, as proposed. If not, could the second sentence of subdivision (d) be deleted as superfluous?**

TEXCOM believes that the proposed limitation on the application of the restitution provisions, limiting them to superior right claims, would make the language at issue unnecessary.⁶² TEXCOM also points out that the proposed law would require that the personal representative make a determination that there is a person with a superior right to transferred property, before initiating action to require the return of the property to the estate.⁶³ That should help to avoid misuse of the restitution power.

Given that input, the staff recommends that the second sentences of the identified subdivisions be deleted. For example, existing Section 13111(d) could be revised as follows:

(d) 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~~

61. See Tentative Recommendation, pp. 13, 20.

62. See Exhibit p. 4.

63. *Id.*

~~the liability only to the extent necessary to protect the interests of the heirs, devisees, and creditors of the decedent.~~

NEW TECHNICAL ISSUE

The tentative recommendation proposes to repeal existing Sections 13112 and 13207. It would then re-use the numbers of the repealed sections as the numbers for two new sections.

The staff has had second thoughts about that approach. It seems likely that reusing the section numbers would create needless confusion (e.g., an ongoing need to differentiate between which version of the section number is at issue, when discussing either of them).⁶⁴

The same issue came up in connection with the study of revocable transfer on death deeds and the Commission decided against reusing the number of a repealed section. **The staff recommends that the same approach be used here. Proposed Sections 13112 and 13207 should be assigned new section numbers, rather than using recycled numbers from the repealed provisions.**

NEXT STEPS

Once the Commission has decided the issues discussed above, the staff will prepare a draft of a final recommendation for consideration at a future meeting.

Respectfully submitted,

Brian Hebert
Executive Director

64. Minutes (Dec. 2019), p. 5.

TRUSTS AND ESTATES



[CALAWYERS.ORG/TRUSTS](https://calawyers.org/trusts)

October 14, 2019

VIA E-MAIL AND U.S. MAIL

California Law Revision Commission
Attn: Mr. Brian Hebert
c/o UC Davis School of Law
400 Mrak Hall Drive
Davis, California 95616
E-mail: bhebert@clrc.ca.gov

Re: Tentative Recommendation – Disposition of Estate Without Administration: Liability
(#L-4130.3)

Dear Commissioners:

This letter contains comments on the above-referenced Tentative Recommendation, issued July 2019 (“Tentative Recommendation”), on behalf of the Executive Committee of the Trusts and Estates Section of the California Lawyers Association (“TEXCOM”). The Tentative Recommendation proposes extensive revisions to the statutes governing the so-called “small estate affidavit” procedures under Probate Code Sections 13100 et seq., applicable to personal property, and 13200 et seq., applicable to real property (the “13100 and 13200 procedures,” respectively).¹ Specifically, the Tentative Recommendation overhauls the so-called “property return provisions” that apply when property transferred without probate pursuant to the 13100 or 13200 procedure is subsequently (a) needed to satisfy creditors’ claims against the decedent’s estate or (b) subject to the claim of another person having a superior right to the transferred property.

This letter is organized in three parts: part A contains general observations and comments regarding the Tentative Recommendation; part B contains unsolicited comments on a few specific aspects of the Tentative Recommendation; and part C contains comments in response to those issues for which the Tentative Recommendation expressly requests public comment.

¹ Unless otherwise noted, all statutory references in this letter are the Probate Code, as amended by the Tentative Recommendation.

A. General Observations and Comments.

First and foremost, TEXCOM is very appreciative of the careful thought and effort the Commission and its staff have invested in the Tentative Recommendation and the numerous memoranda leading up thereto. TEXCOM acknowledges that the existing property return provisions under the 13100 and 13200 procedures contain numerous inconsistencies and ambiguities as detailed in the Commission's predecessor memoranda.

In general, TEXCOM thinks the Tentative Recommendation's proposed amendments to the property return provisions under the 13100 and 13200 procedures are well thought out and fair. In particular, TEXCOM approves the two-part approach allowing a transferee of property under a 13100 or 13200 affidavit to pay his or her share of liabilities against the decedent's estate without having to return the transferred property and limiting restitution liability to claims of superior right.

By way of context, it should be noted that the property return provisions under the 13100 and 13200 procedures appear to be little used in practice. In informal polls of TEXCOM members, only one member reported having had any experience dealing with those provisions in their individual practices. This may be attributable to the fact that, by definition, the 13100 and 13200 procedures are limited to small estates; as such, those estates may not involve significant claims and/or the parties interested in those estates may have limited incentive or resources to pursue these property return remedies. This may also account for the dearth of case law interpreting the property return provisions.

B. Comments on Specific Aspects of the Tentative Recommendation.

1. Definition of Transferee. A person who acquires personal property under the 13100 procedure is defined in Section 13100.5(a) as the "transferee," whereas a person who acquires real property under the 13200 procedure is defined in Section 13202.5(a) as the "designated successor." TEXCOM is concerned that using different defined terms for the recipient of property under the 13100 procedure versus the 13200 procedure could be needlessly confusing. Further, the term "designated successor" suggests, at least intuitively, that a recipient under the 13200 procedure was somehow affirmatively designated by the decedent to receive the property, which may rarely be the case. For these reasons, TEXCOM recommends using the term "transferee" for both the 13100 and the 13200 procedures.

2. Valuation Date. The Tentative Recommendation includes numerous instances where the transferred property is to be valued as of the date of receipt by the transferee.² (See, e.g., §§ 13109.5(b)(2) and 13204.5(b)(2).) This could lead to situations where the transferred property must be valued twice: once as of date of death and again as of date of receipt. This is especially true under the 13200 procedure because there, unlike the 13100 procedure, the transferee is required to obtain an appraisal of the subject property from a probate referee. (§ 13200(c).) Further, for purposes of post-death administration of decedent's trusts or estates,

² Under the 13200 procedure, this is the date of issuance by the court clerk of a certified copy of the affidavit under Section 13202

including related tax consequences, assets are generally valued as of the date of the decedent's death. As presently drafted, the Tentative Recommendation could lead to situations where assets included in the decedent's probate estate are valued as of date of death, but assets transferred under a 13100 or 13200 affidavit are valued as of date of receipt, potentially disadvantaging either the transferee of the property or the decedent's estate.

One instance where it could make sense to use a separate valuation date would be where the transferee subsequently disposes of transferred property that is subject to a claim of superior right, in which case the date of disposition value could be relevant for determining the transferee's restitution liability to the rightful recipient. This could be addressed, however, by including a subdivision under Sections 13111 and 13206, respectively, calling for the value of the transferred property to be adjusted (up or down) based on any gain or loss realized by the transferee upon the sale of the property.

3. Scope of Personal Liability for Claims of Superior Right. In the case of claims of superior right to the transferred property, Sections 13110(a) and 13205(a), respectively, provide that the transferee is personally liable to the rightful recipient for the fair market value of the property, as well as any net income the transferee received from the property. TEXCOM observes that, unlike Sections 13112 and 13207, no attempt is made to distinguish between income intrinsic to the property itself, versus income generated through the efforts of the transferee.

C. Comments in Response to Requests for Public Comment.

1. Potential Ambiguity under Section 13562. Although Section 13562 is unaffected by the proposed statutory changes in the Tentative Recommendation, the Tentative Recommendation requests public comment on a potential ambiguity under that statute, namely, whether the restitution remedy in Section 13562 is limited to claims of superior right, or whether it might be interpreted as applying to claims against the decedent's estate as well. TEXCOM has no particular knowledge or insight into how Section 13562 is, or may be, currently interpreted by the courts, or in practice, and has not convened a study group to consider this issue. As such, no comment is provided on this issue at this time.

2. Scope of Liability for "Unsecured Debts of Decedent". The Tentative Recommendation requests public comment on whether the provisions of the 13100 and 13200 procedures imposing transferee liability for "unsecured debts of the decedent" are currently interpreted to include last illness and funeral expenses and expenses of administration, and if not, whether the statutes should be broadened to include such expenses. TEXCOM expresses no opinion on whether the 13100 and 13200 procedures are presently interpreted as including such expenses; however, TEXCOM's view is that, if a probate is opened for the decedent's estate, assets transferred pursuant to a 13100 or 13200 affidavit should be treated no differently from other assets included in the decedent's estate, subject to applicable abatement rules. Accordingly, TEXCOM would be in favor of clarifying the statutes to extend liability to include last illness and funeral expenses and expenses of administration, in addition to unsecured debts.

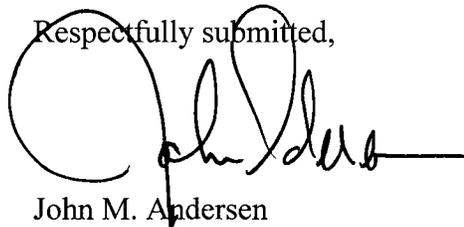
3. Distinction in Liability for Treble Damages between Debts of the Decedent and Claims of Superior Right. The Tentative Recommendation notes a distinction in the person entitled to treble damages in the event of a fraudulent use of the 13100 or 13200 procedures, namely, for claims of superior right, treble damages are payable to the rightful recipient of the property (§§ 13110(b) and 13205(b)), whereas for claims of transferee liability for unsecured debts of the decedent, treble damages are payable to the decedent's estate (§§ 13111(b) and 13206(b)). The Tentative Recommendation requests public comment on the policy merits of this distinction. TEXCOM believes this distinction makes sense in view of the person(s) harmed by fraudulent use of the 13100 or 13200 procedures. In cases of superior right, the rightful recipient is the person harmed by the fraud and, therefore, should be the person entitled to treble damages. In cases of transferee liability, the decedent's estate, and by extension, the residuary beneficiaries of the estate, are the person(s) harmed by the fraud and would seem to be the appropriate payee of a treble damages award.

4. Drafting Question under Sections 13111 and 13206. The Notes under Sections 13111 and 13206 request public comment on whether the sentence in subdivisions (d) and (e), respectively, of those sections – providing that a personal representative who elects to exercise the restitution remedy under those sections may only do so to the extent necessary to protect the interests of the person with a superior right to the transferred property – may be omitted as superfluous now that the restitution remedy is being limited to claims of superior right. In TEXCOM's view, that language is no longer necessary and could be omitted. TEXCOM further observes that subdivision (a) of Sections 13111 and 13206 now provides that a personal representative must first make a determination that another person has a superior right to the transferred property before exercising the restitution remedy.

Conclusion.

Again, TEXCOM commends the work of the Commission and its staff in producing the Tentative Recommendation, which appears to be a significant improvement to the exiting property return provisions under the 13100 and 13200 procedures.

Respectfully submitted,



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