

After Death Workbook—No Probate Needed

For Successor Trustee's and Others Who Are
Handling an Estate

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CHAPTER 1 – INTRODUCTION

This Workbook is designed to assist anyone who has the responsibility of taking care of the affairs of someone who has passed on without the aid of Probate proceedings.

IS PROBATE REQUIRED?

We will discuss in more detail much of this information, but we provide a summary here so that you can quickly determine whether it is likely that the estate must be probated. If a probate proceeding is likely, we urge you to seek legal counsel to assist you in that process.

What is probate?

Probate refers to a court proceeding which requires the filing of numerous forms and documents and is meticulously supervised by the courts. The probate of an estate will usually last more than six months and may take years. During that time, property you owned together will be tied up and you may have restricted or no access to important funds and accounts. The sale of property may be complicated by the need for court approval of the terms of sale.

Probate can be expensive

Both the executor and the attorney for the estate are entitled to be paid fees for their work during a probate. While their fees are regulated by the state, they can be considerable and unnecessary.

For example, the fees in an uncomplicated estate that is worth \$150,000 will be about \$4,150 for the executor and the same amount for the attorney.

The table on the next page sets forth the statutory fee schedule for the Executor of the estate *and* the attorney for the estate. A fairly modest estate of a home, automobile, furniture and accounts, can easily reach \$400,000 in value. The probate fees for each the executor and the attorney will be \$11,500 if there are no complications.

GROSS VALUE OF ESTATE	PROBATE FEES
Up to \$100,000	4% of value
Next \$100,000	3% of value
Next \$800,000	2% of value
Next \$15 million	1% of value

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ALL PROPERTY IN A LIVING TRUST

Where all the decedent's estate has been transferred to a living trust prior to death, no Probate proceedings are required. If you know there is such a trust, you will have to gather all the information you can about the decedent's assets to determine whether all have been effectively transferred to the trust. (See Chapter 8 -- Duties of Successor Trustee). For any assets that were not transferred to the trust, the normal rules apply. If such property is not exempt from Probate under the rules stated here and amplified in Chapter 7 -- below.

ESTATES OF LESS THAN \$150,000 (SEE CHAPTER 7 -- SMALL ESTATES)

If the estate is below \$150,000 and there is no real estate, there is a simplified procedure for handling the estate after death. Automobiles do not count in the \$150,000 limit and there are several other exclusions that make this a useful approach for many estates. There is an affidavit (California Probate Code §13100) to complete and much of your property can be transferred in this way.

REAL PROPERTY LESS THAN \$50,000

If the real property is worth less than \$50,000, it may avoid probate and can be transferred by a "Affidavit Re Real Property of Small Value" (California Probate Code §13200) (This is a state printed form).

MOTOR VEHICLES

Where there is no other property that needs to be probated, a person named in a Will or an heir of a deceased person can complete a declaration and submit it to the Department of Motor Vehicles in order to transfer title to a registered motor vehicle from the deceased to themselves.

A form for this purpose is available from the DMV. You will have to present the registration form as well. See Chapter 7 -- below

MOBILE HOMES

The procedure to transfer title to a registered mobile home is similar to that for a motor vehicle. The form to do so is available from the California Department of Housing and Community Development. You must wait for 40 days after death for this procedure. See Chapter 7 -- below

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CHAPTER 2 – IMMEDIATE PROBLEMS

DISPOSITION OF REMAINS:

Regardless of the nature or size of the estate involved, there are always questions involving decedent's funeral and disposition of the body. These issues include the possibility of an inquest, decedent's possible donation of body parts, and effectuating funeral directions, if any. All of these matters must be addressed in close consultation with the decedent's survivors, both from a psychological and legal perspective.

AUTOPSY OR CORONER'S INQUEST

If granted the requisite authority (see below), a cemetery authority or licensed funeral director, or a licensed hospital or its authorized personnel, may permit or assist, and a physician may perform, an autopsy of decedent's remains.

There is no implied authority to order an autopsy, regardless of the reason. Rather, an autopsy may be performed only as follows

1. When authorized by decedent's will or by a written instrument executed by decedent before death;
or
1. When authorized by writing or telegram from, or recorded telephone conversation with (a) The surviving spouse; (b) A surviving child or parent; (c) A surviving brother or sister; (d) Any other kin or person who has acquired the right to control the disposition of the remains; (e) A public administrator; (f) A coroner or any other duly authorized public officer.

In limited circumstances, the authority to perform an autopsy derives from other statutes:

1. Incident to a coroner's inquest;
2. Under the Workers' Compensation Act, which permits judges in workers' comp. proceedings to order an autopsy where death benefits are sought and the cause of death is disputed. However, under these circumstances, decedent's survivors have an unqualified right to veto the autopsy (although their veto would trigger a rebuttable presumption against the right to workers' comp. benefits).
3. Incident to California Insurance Code Sec. 10350.10, which requires disability insurance policies to contain a provision allowing the insurer to demand an autopsy in cases of the insured's death.

An adult may execute a 'certificate of religious belief' stating that an autopsy or other specified postmortem procedure would violate his or her religious convictions. In this event, notwithstanding proper authority, the coroner may not perform the procedure in question absent a court order or unless the coroner reasonably suspects that the death was caused by criminal act or contagious disease constituting a public health hazard.

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ANATOMICAL GIFTS

Gifts of body parts are governed by the California Uniform Anatomical Gift Act. These donations are usually made by decedents personally; but they may also be made by certain surviving relatives and fiduciaries. Sometimes the decedent has executed a Power of Attorney dealing with this authority.

THE FUNERAL

Prior to death, persons are entitled to give oral or written instructions as to the preferred disposition of their remains (i.e., manner of disposition, type of funeral, etc.). Subject to the coroner's statutory responsibilities, these instructions must be followed.

Decedent's funeral directions control whether or not they are made in a will. And, if made by will, the instructions must be carried out immediately, without delay for probate and notwithstanding the will's validity in other respects.

ACCESS TO DECEDENT'S SAFE DEPOSIT BOX FOR POSSIBLE BURIAL INSTRUCTIONS AND WILL

Individuals in possession of the appropriate keys have a statutory right of limited access to a decedent's financial institution safe deposit box before letters issue. There must be no living co-owner of the box and the person seeking entry must provide reasonable proof of his or her identity and proof of the decedent's death (e.g., certified copy of decedent's death certificate).

Entry may be made only under supervision of the institution's employees. And, although the person entering the box may remove burial instructions, wills and trusts, he or she must photocopy any removed wills or trusts and place the copies back in the box. Moreover, removed wills must be filed with the superior court and copies mailed or delivered to the named executor or beneficiary.

FUNERAL DECISIONS WHERE NO INSTRUCTIONS FROM DECEDENT

If decedent has not provided for his or her interment by a will or other direction, the right to control disposition of the remains descends to the surviving relatives pursuant to a statutory schedule of priority (first to the surviving spouse, then to the surviving children, parents, next of kin under laws of succession, or the public administrator).

PREPAID FUNERAL CONTRACTS

You should ascertain whether decedent had executed a prepaid funeral contract so that you can make arrangements and inform any relatives accordingly.

OBTAIN CERTIFIED COPIES OF DEATH CERTIFICATE

Certified copies of the death certificate will be needed to effect certain transfers of decedent's assets (e.g., securities, joint tenancy property; and, if applicable, pursuant to a Sec. 13100 declaration or a Sec. 13200 declaration. They will also be needed to apply for payment of various death benefits. Usually, the

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funeral home will provide plenty of copies. But the trustee/executor should verify that the immediate relatives have received the copies and should caution them to preserve those copies.

CHAPTER 3 – LIFE INSURANCE, EMPLOYEE AND OTHER BENEFITS

LIFE INSURANCE

The successor trustee/executor should inquire into the existence of insurance policies on decedent's life and make sure that the proceeds are applied for promptly and properly.

Usually, the application process will require the beneficiary to select a particular method of payment. You should be prepared to discuss the alternatives with the beneficiary, if asked, so that a settlement option making economic sense can be chosen.

The procedures for collecting benefits under a life insurance policy or annuity are basically the same:

1. Preliminarily, a written request should be sent to the carrier, advising it of the insured's death, date of death and the policy number, and requesting that the proper claim form be forwarded to you (typically in triplicate) for processing on behalf of the named beneficiary (or the estate representative if there is no named beneficiary).
2. The completed claim form, signed by the beneficiary, should be filed immediately with the carrier, along with a certified copy of the death certificate.

If the applicant anticipates that a federal estate tax return filing will be required, it is also a good idea to request the insurance carrier to complete IRS Form 712 at the time of application for the benefits. Although Form 712 is not needed to process the claim for the proceeds, taking care of this paperwork now will save duplication of effort later on.

EMPLOYEE, UNION AND ASSOCIATION BENEFITS

Death benefits may or may not be receivable from decedent's employer or union association, and the benefits payable may be quite varied. Counsel should therefore contact the employer, union, etc. to determine whether the survivors have claims to any death benefits; if so, copies of the pertinent documents should be obtained so that timely and proper application for payment may be made.

SOCIAL SECURITY BENEFITS

If decedent was a wage earner insured under social security, a lump-sum social security death benefit of up to \$255 is payable to decedent's surviving spouse or, if none, the surviving minor children. Application must be made within two years of the death (unless good cause is shown for delay).

In addition to the lump-sum benefit, certain surviving family members may be entitled to collect monthly social security survivor benefits (the amount is based on decedent's lifetime earnings).

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Social security survivor benefits are payable generally to the: (i) surviving spouse who is at least age 60 or is at least age 50 and disabled, (ii) dependent unmarried minor or disabled children, (iii) dependent grandchildren whose parents are both dead or disabled, (iv) certain dependent parents.

Both legitimate and 'illegitimate' minor children are eligible for survivorship benefits if they were dependent upon decedent at time of death. The Social Security Act ('SSA') establishes certain 'deemed dependency' presumptions, one of which presumes that decedent's legitimate children meet the SSA dependency requirement. However, 'illegitimate' children may also be eligible under other presumptions of dependency or upon affirmative proof of dependency (the government may not conclusively presume that certain illegitimate children are ineligible).

Moreover, survivor benefits may even be payable to a posthumously born illegitimate child of whom the decedent was unaware at time of death: The 'dependency' requirement is deemed satisfied so long as decedent was contributing to the support of the unborn child's mother commensurate with the needs of the unborn child at time of decedent's (father's) death; proof of a subjective intent to support the fetus is not required.

Social security lump-sum and survivor benefits are both collectible by filing an appropriate claim form with a local district Social Security Administration office, together with a certified copy of decedent's death certificate. (The claim form can be obtained by calling or writing the district office.) If the office contests eligibility and rejects the application, a hearing may be held before an administrative law judge; otherwise, the benefits are usually payable forthwith.

And, while there is no per se time limit on applying for survivor benefits, application should be made promptly after the death so as to be assured of collecting the full monthly benefits payable: Retroactive payments are allowed only for a maximum 12-month period preceding the month in which the application was filed

If you need help in determining eligibility (e.g., decedent's coverage) or the application procedures, call the local Social Security Administration office.

Other government death benefits (lump-sum and monthly annuities)--e.g., from the Veterans Administration or under the Railroad Retirement Act ('RRA'), the California Public Employees' Retirement System, or the State Teachers' Retirement System -- may also be payable; and these may affect eligibility for social security benefits -- receipt of RRA benefits disqualifies beneficiary from receiving social security benefits). Inquiry into these benefits and the application and payment procedure should be directed to the applicable government office (Veterans Administration; Railroad Retirement Board; Public Employees' Retirement System; State Teachers' Retirement System). As a word of caution, do not delay the inquiry since there may be a time limit within which to file.

STATE EMPLOYEE PAYROLL WARRANTS; CONFLICTING CLAIMS

A state employee's designee is statutorily entitled to receive all state warrants (i.e., payroll amounts) due the employee at the time of his or her death . . . notwithstanding any other provision of law. Thus, the State is compelled to deliver the warrants to the designee despite the existence of competing claims (e.g., a surviving spouse's community property/intestate succession claim).

However, delivery of the warrants pursuant to law does not alter the property's character (separate vs. community property) and interests therein. In other words, the deceased employee's designee does

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not necessarily become the ultimate beneficiary. Instead, relevant provisions of the Family and Probate Codes govern the character and final disposition of the property.

WORKERS' COMPENSATION DEATH BENEFITS

Where a work-related injury causes death, and the decedent is survived by any person dependent upon him or her for support, the dependents may be eligible for workers' compensation death benefits. The employer is also liable for the reasonable expenses of decedent's funeral, up to \$2,000.

ANNUITIES

It is equally important to review the specific terms of all annuities in which decedent may have had an interest.

The annuity may not necessarily have terminated at decedent's death. Under some policies, there will be survivor benefits to obtain, because, pursuant to the contract, decedent has designated a person to receive the benefits in the event that person survives decedent's death. The procedure for collection is basically the same as with life insurance proceeds: Contact the carrier for its claim form and return an executed copy with a certified copy of the deceased annuitant's death certificate.

Frequently, annuities have a refund feature in which event, the estate may be entitled to a portion of the unamortized value of the annuity payments. In all cases, the insurance carrier or other issuing entity should be contacted immediately and consulted as to the particulars.

NOTICE REQUIRED IF DECEDENT WAS A MEDICAL RECIPIENT

Where decedent received Medi-Cal benefits, the State Director of Health Services must be given notice of decedent's death within 90 days of the date of death. The Department of Health Services is entitled to pursue a claim for reimbursement of health care services rendered to decedent. See Chapter 8 -- below.

CHAPTER 4 – REAL ESTATE

REPORTING REAL ESTATE 'CHANGE IN OWNERSHIP'

Where a 'change in ownership' of real property (or of a manufactured home) is occasioned by death, the successor to the property must file a change in ownership statement within a statutorily-specified time limit.

"Change in ownership" for this purpose means the 'transfer of a present interest in real property, including the beneficial use thereof, the value of which is substantially equal to the value of the fee interest.

Whether a particular testate or intestate transfer qualifies under a statutory exclusion is sometimes unclear from the statutory language; and failure to file where required may trigger assessment of monetary penalties. Accordingly, in doubtful cases, the best precaution is to file the statement, even if it appears that the particular property or property interest will probably pass ultimately to the surviving spouse.

TIME FOR FILING

If decedent's property passes by probate proceedings, the estate executor or administrator must file the statement no later than the date the inventory and appraisal is filed with the court, i.e., within four months after the personal representative's appointment. (Note that the statement is filed with the county recorder or assessor where the property is located . . . not with the probate court).

Concurrent with the filing of the inventory and appraisal, the personal representative must file a certificate indicating (i) a change in ownership statement has been filed in each California county where the decedent owned real property at the time of death; or (ii) no change in ownership statement is required because the decedent owned no California real property at the time of death.

TRANSFERS OUTSIDE PROBATE (E.G., WHERE THERE IS A LIVING TRUST)

If decedent's estate is not probated, the successor in interest must file the change in ownership statement with the county recorder or assessor in each county where the decedent owned real property within 150 days after the date of death. This mandate applies to all non-probate real property transfers, including those 'through the medium of a trust.

PENALTY FOR LATE FILING

If the statement is not timely filed as required (above), a penalty may be assessed, increasing real estate taxes due (up to \$2500 for non-willful defaults).

→ A change in ownership ordinarily triggers property tax reassessment.

Transfers of a 'principal residence' between parents and children (by will, intestate succession or otherwise) after November 5, 1986 are exempt from reassessment provided a timely claim for exclusion is filed.

TIMELY CLAIM FOR EXCLUSION

A 'principal residence' transfer between parents and children is excluded from reassessment only if the 'eligible transferee' (parent or child), transferee's legal representative or transferee's estate representative timely files a claim for exclusion with the county assessor (along with statutorily-required certificates attesting to eligibility for the exclusion).

Transfer by will or intestate succession: The date of a parent-child transfer by will or intestate succession is the date of death. Thus, the three-year limitations period for filing a claim for exclusion (above) starts to run immediately upon the death of the parent or child without regard to when administration is commenced.

Notwithstanding the foregoing, an exclusion claim is timely if filed within six months after the mailing date of a notice of supplemental or escape assessment, issued as a result of the subject real property's transfer or sale.

In effect, the parent-child exclusion application may be filed within three years of the transfer or six months of the mailing of notice of supplemental or escape assessment, whichever is later. Thus, the exclusion is preserved for taxpayers ignorant of the filing requirements.

CHAPTER 5 – MULTIPLE-PARTY ACCOUNTS

This chapter deals with bank and similar accounts that are held in the name of the decedent and another person..

The California Multiple-Party Accounts Law governs 'multiple-party accounts' (i.e., accounts with more than one signatory) at all 'financial institutions' In addition to providing methods for establishing, modifying and terminating multiple-party accounts, the law states several presumptions regarding the nature of funds held on deposit in multiple-party accounts. The provisions relevant to estate administration are summarized below.

Definitions

A 'multiple-party account' may be any of the following:

1. 'Joint account' . . . meaning an account payable on request to one or more of two or more parties, whether or not 'mention is made of any right of survivorship'
2. 'P.O.D. account' . . . meaning an account payable on request to one or more persons during their lifetimes and on the death of all of them to one or more P.O.D. payees
3. 'Totten trust account' . . . meaning an account in the name of one or more parties as trustee for one or more beneficiaries, where the relationship is established by the form of the account and there is no trust 'res' other than the sums deposited in the account
4. 'Net contribution': A party's 'net contribution' to a multiple-party account (as of any given time) is the total of:

All deposits in the account made by or for the party, less all withdrawals made by or for the party that have not been paid to or applied to any other party's use; plus

A pro rata share of any interest or dividends earned, whether or not included in the current balance; plus

Any proceeds of deposit life insurance added to the account by reason of the death of the party whose net contribution is in question.

Several important statutory presumptions apply to determine the respective ownership rights of parties to a multiple-party account:

- Husband and wife accounts -- Presumptively community property: 'Net contributions' to accounts held by married couples are deemed to be community property (whether or not the parties are described as husband and wife in the deposit agreement). The community property presumption affects the burden of proof and is rebuttable.
- Unmarried account holders: Absent proof to the contrary, the 'net contributions' of unmarried persons having a present right of withdrawal are deemed to be equal. The account is presumed to belong to the unmarried holders during their lifetimes in the same proportion

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as their individual net contributions to the deposited sums, absent 'clear and convincing evidence of a different intent.'

Effect of one party's death on joint account:

Sums on deposit in a joint account are presumed to belong to the surviving party or parties, as against the deceased party's estate, absent 'clear and convincing evidence of a different intent.'

P.O.D. ("payable on death") accounts

A P.O.D. payee has no right to deposited sums during the lifetime of any party to the account, absent 'clear and convincing evidence of a different intent.'

Sums on deposit in a P.O.D. account belong to the surviving party or parties, as against the deceased party's estate, absent 'clear and convincing evidence of a different intent.'

Totten Trust accounts

Totten trust beneficiaries have no right to deposited sums during the lifetime of any party to the account, absent 'clear and convincing evidence of a different intent.'

The presumption upon a party's death is similar to that applicable to P.O.D. accounts. Except as set forth above, the death of any party to a multiple-party account has no effect on beneficial ownership of the account other than to transfer the decedent's rights as part of the decedent's estate.

Survivorship Rights

Withdrawal of funds from a multiple-party account by a party with a present right of withdrawal unilaterally terminates the survivorship rights of the other parties (whether or not they consent to or even know of the withdrawal).

Ordinarily, survivorship rights in a multiple-party account may not be changed by will. This includes beneficiary designations in Totten Trust accounts and P.O.D. account payee designations.

Under certain circumstances, survivorship rights in community property accounts may be changed by will: If the account is expressly described as a 'community property' account, the deceased spouse's community property interest is subject to testamentary disposition (either in a 'spousal set-aside' proceeding or formal estate administration). In other words, unless the account clearly indicates otherwise, the spouses' ownership interests are governed by general community property law.

CHAPTER 6 – JOINT TENANCY PROPERTY

NATURE OF JOINT TENANCY PROPERTY, GENERALLY

The title designation or instrument of transfer typically states, e.g., 'A or B as joint tenants'; and, although not legally necessary, often adds, 'with right of survivorship' (below). (Sometimes the title is abbreviated as 'JTWROS'.)

Joint tenancy title is a classic 'probate avoidance' device. Unlike other forms of co-ownership (partnership, tenancy in common, community property), joint tenancy implies a 'right of survivorship'.

Each joint tenant's interest is coextensive with the others'; each interest automatically passes at death to the surviving joint tenants; and no interest in joint tenancy property may pass to decedent's creditors, heirs, devisees or personal representative (unless, of course, the decedent in question is the last remaining joint tenant).

Clearing Title to Joint Tenancy Property:

Even though joint tenancy interests pass outside probate, title must still be cleared in favor of the surviving co-owners; otherwise, until steps are taken to make the deceased joint tenant's death a matter of record, the property's marketability is impaired. The procedures for clearing title vary depending on the type of property involved.

Where no death certificate is available, a person claiming an interest in affected real or personal property (i.e., the surviving joint tenant) may proceed to obtain a court decree establishing the fact of death. And, in an uncontested case, the court may act ex parte upon affidavit.

However, the court order only establishes the fact of death; it does not by itself clear title. In the case of real property, a certified copy of the order must be recorded to clear title in the name of the surviving joint tenant.

REAL PROPERTY--AFFIDAVIT PROCEDURE WITHOUT COURT PROCEEDING:

In many cases, there is no dispute over title to real property; and a court proceeding to establish the fact of death (above) would be wasteful because of the availability of a death certificate. For such cases, there is statutory authority permitting recordation of an affidavit to establish evidence of death when it affects title to real property

Requirements:

Title may be cleared under the statutory affidavit procedure by recording in the county where the property is located an affidavit of the death executed by a 'person having knowledge of the facts.'

FORM: Affidavit re Death of Joint Tenant, see next page:

[FORM 2:D]

AFFIDAVIT RE DEATH OF JOINT TENANT

RECORDING REQUESTED BY

AND WHEN RECORDED MAIL TO

Name
Street
Address
City &
State

SPACE ABOVE THIS LINE FOR RECORDER'S USE

CAT. NO. NN00110
TO 426 CA (2-83)

Affidavit - Death of Joint Tenant

THIS FORM FURNISHED BY TICOR TITLE INSURERS

A P N

ALL P/P/N	<p>STATE OF CALIFORNIA, County of _____</p> <p>_____, of legal age, being first duly sworn, deposes and says: That _____, the decedent mentioned in the attached certified copy of Certificate of Death, is the same person as named as one of the parties in that certain _____ dated _____ executed by _____ to _____ as joint tenants, recorded as Instrument No. _____, on _____, in Book/Reel _____, Page/Image _____, of Official Records of _____, in County, California, covering the following described property situated in the _____ County of _____, State of California:</p> <p>That the value of all real and personal property owned by said decedent at date of death, including the full value of the property above described, did not then exceed the sum of \$ _____</p> <p>Dated _____</p> <p>SUBSCRIBED AND SWORN TO before me _____</p> <p>this _____ day of _____</p> <p>Signature _____</p> <p style="text-align: center;">(This area for official notarial seal)</p> <p>Title Order No. _____ Escrow or Loan No. _____</p>
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AFTER DEATH ACTIONS

Contents of affidavit:

1. The affidavit must include a 'particular description' of the real property involved and an attached attested or certified copy of a record of the death made and filed in a designated public office as required by law (i.e., a certified copy of the death certificate). In all other respects, the affidavit is subject to the usual statutory requirements for recorded documents
2. If a certified copy of the death certificate is not available, a proceeding to establish fact of death will have to be initiated first--but, again, if there is no dispute, the matter may be handled ex parte . A certified copy of the court's decree establishing death may then be recorded.

Effect of recording:

If properly executed and recorded, the affidavit is prima facie evidence of the death insofar as it identifies real property situated in the county, title to which is affected by the death. This is a presumption affecting the burden of producing evidence. As a result, title insurers, by statute, are entitled to rely on the recorded affidavit. Likewise, third persons may rely on the recorded affidavit as prima facie evidence of ownership of the property.

SECURITIES:

Generally, joint tenancy title to stocks and bonds may be cleared by furnishing the appropriate transfer agent with a certified copy of decedent's death certificate, the original stock certificate, and an 'Affidavit or Declaration of Domicile' (showing that decedent was not a New York resident).

FORM: Affidavit of Domicile, see next pages.

AFFIDAVIT OF DOMICILE

State of _____)

) SS:

County of _____)

(BY INDIVIDUAL EXECUTOR OR ADMINISTRATOR)

_____, being duly sworn, deposes and says as follows:

My address is _____ State of _____ I am _____ (designate Executor or Administrator) of the Estate of _____ (name of decedent) deceased, who died on the _____ day of _____ 19__.

(BY SURVIVOR) _____, being duly sworn deposes and says as follows: My address is _____ State of _____ I am Surviving Tenant of the joint tenancy between myself and _____ (name of decedent) deceased; who died on the _____ day of _____ 19__.

(BY CORPORATE EXECUTOR OR ADMINISTRATOR)

_____, being duly sworn deposes and says as follows: I am an executive officer, namely _____ of _____ a corporation duly organized under the laws of the State of _____ having its principal place of business at _____ which is _____ (designate Executor or Administrator) of the Estate of _____ (name of decedent) deceased; who died on the _____ day of _____ 19__.

THE FOLLOWING IS TO BE COMPLETED IN ALL CASES

At the time of death the domicile (legal residence) of said decedent was at:

_____ (street address, if any) _____ County of _____ State of _____. He/She resided in the State of _____ for _____ year(s) prior to death, and was not a resident of _____ or any other State within the United States of America, at the time of death.

The said decedent filed his/her last Federal Income tax return (which was for the year _____) as a resident of the State of _____

Further, the said decedent was not a resident of the State of New York, did

AFTER DEATH ACTIONS

not reside, dwell or lodge in the State of New York for the greater part of any twelve consecutive months during the twenty-four months immediately preceding his/her death, nor did said decedent by his/her last will and testament declare himself/herself to be a resident of the State of New York. This affidavit is made for the purpose of obtaining the transfer of the following described securities owned by said decedent at the time of his/her death:

[List Quantity Security Title Kind and Class of Security for each security]

The above-mentioned securities were physically located in the _____ (City, town or other location) in the County of _____ State of _____ on the date of death of said decedent. Subscribed and sworn to before me this _____ day of _____ 19____.

Signature of Deponent

Notary Public
(Affix Seal)

→ (Note that some transfer agents insist that the Affidavit of Domicile be made on their own forms, which they supply upon request.)

Corporate transfer agents have different requirements. It is therefore advisable to write or phone the appropriate agent and inquire as to the specific documents needed to complete the transfer and clear title. For example, in cases where an estate representative has been appointed, some transfer agents require a current (i.e., dated within 60 days) certified copy of the letters, even though the stock is held in joint tenancy.

Often, upon request, decedent's stock broker will supervise the transfer of joint tenancy securities for a nominal (if any) charge.

BANK AND SAVINGS AND LOAN ACCOUNTS:

Title to joint bank and savings and loan accounts may be cleared by advising the institution of the joint tenant's death. Frequently, the institution will require a certified copy of the death certificate (or, if none, a certified copy of a court decree establishing the fact of death). Cross-refer--California Multiple-Party Accounts Law See page 18.

JOINT TENANCY VEHICLES:

As discussed earlier, any vehicle with title registered in the names of two or more alternative owners by use of the word 'or' is deemed to be held in joint tenancy. Title may be cleared in favor of the surviving joint tenant by filing routine papers with the DMV (see page 40).

Non-joint tenancy vehicles may also qualify for a non-probate title-clearing procedure (by declaration), if the balance of decedent's estate does not require probate administration.

CHAPTER 7 – SMALL ESTATES

Certain small estates can be quickly and easily handled without probate or other procedures.

ESTATES NOT EXCEEDING \$150,000--COLLECTION OR TRANSFER OF PERSONAL PROPERTY BY AFFIDAVIT

California Probate Code Secs. 13100-13115 set forth a relatively simple procedure for the non-probate distribution of a decedent's personal property. Decedent's testate beneficiaries and/or heirs at law may make their claims and take title (assuming no conflicting claims) simply by presenting a statutorily-prescribed affidavit to the holders of the property.

Property collectible

Assuming the estate's gross fair market value does not exceed the \$150,000 limit, decedent's successors in interest may use the Sec. 13100 procedure to:

1. Collect money due decedent;
2. Receive decedent's tangible personal property; and/or
3. Have transferred any 'evidence of a debt, obligation, interest, right, security, or chose in action' (whether or not secured by a lien on real property) belonging to decedent.

But title to real property may not be transferred under this procedure.

Threshold prerequisites

Notwithstanding the value of the estate, the Sec. 13100 procedure may be used only if (a) no probate proceeding is currently pending or has been conducted for the estate in California; or (b) decedent's personal representative consents in writing to transfer of the property described in the Sec. 13100 declaration.

For this purpose, 'probate proceedings' do not include (i) petitions for administration that were dismissed before appointment of a personal representative; (ii) summary set-aside proceedings; or (iii) actions or proceedings commenced in other states.

Moreover, even where a California petition for probate has been filed, qualified estates are not prevented from proceeding under the Sec. 13100 summary set-aside procedure provided the estates do so before the petition for administration is heard and a representative is appointed.

40-day wait

Also, the procedure may not be utilized until at least 40 days have elapsed since the date of the deceased owner's death.

DELIVERY' OF DECEDENT'S TANGIBLE PERSONAL PROPERTY

Another statute, Ca Probate Sec. 330, authorizes specified entities and individuals in possession of decedent's tangible personal property at time of death to 'deliver' that property to decedent's surviving spouse, conservator or guardian without waiting 40 days and regardless of the value of the estate. See below.

Limited to maximum \$150,000 estates

Personal property qualifies for Sec. 13100 summary collection only if the total 'current gross fair market value' of decedent's real and personal property in California (excluding Sec. 13050 property,) does not exceed \$150,000. It is unclear whether Sec. 13101's reference to 'current' value requires the subject real and personal property to be valued as of the date of decedent's death or at the time the Sec. 13100 declaration is made. (Traditionally, Sec. 13100 property has been valued as of the date of decedent's death)

Real property not subject to Sec. 13100 summary collection:

Decedent's real property in California must be considered in determining whether the gross fair market value of the California estate satisfies the maximum \$150,000 ceiling. But title to real property in the estate may not be cleared under Sec. 13100. This procedure is limited to the non-probate transfer of decedent's California personal property.

However, there is independent Code authority for the summary distribution of certain real property by court order; affidavit); see below. And, realty held in joint tenancy passes outside probate in any event (by right of survivorship, Chapter 6 -- above).

Exclusions from \$150,000 limit calculation

In determining the total gross value of the estate, certain statutory exclusions are required, i.e., the \$150,000 gross fair market value limit is calculated *after subtracting* the following items:

1. Vehicles registered with the State under the Vehicle Code including 'non-motor' vehicles, such as trailers--do not count against the \$150,000 estate value limit.
2. Also excluded are state-registered mobile homes, manufactured homes, commercial coaches, truck campers and floating homes and undocumented So long as decedent leaves no other assets requiring probate, such state-registered property will usually be transferable by affidavit as well. But the procedures are governed by different statutes; and there is not complete conformity with the Sec. 13100 affidavit procedure. .
3. Likewise disregarded are (i) any amounts due decedent for services in the armed forces and (ii) up to \$5,000 in unpaid salary or other compensation (including compensation for unused vacation) owing to decedent for personal services from any employment. This exclusion does not prevent use of the Sec. 13100 procedure to collect salary owed to decedent. But other procedures for collection of employment compensation may also be available. For example, under Ca Probate Secs. 13600-13606, a surviving spouse may obtain by affidavit up to \$5,000 in employment compensation owed to the deceased spouse. This procedure will usually be the most efficacious for a spouse in need of immediate funds since, unlike Sec. 13100, no 40-day wait is required.

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4. Also excluded is all property (including real estate) in which decedent held a joint tenancy interest, or a life estate or other interest terminable at death (e.g., employee retirement or death benefits), and property passing outright to the surviving spouse.
 5. Likewise disregarded is any 'multiple-party account' to which decedent was a party at death, regardless of whether the account contained community property, but only to the extent the funds pass to a surviving party, P.O.D. payee or beneficiary. (Conversely, to the extent the funds do not belong after decedent's death to a surviving party, P.O.D. payee or beneficiary, they are includible in the 'gross value' calculation.)
- The Code does not specifically address exclusion of property held in an inter vivos trust. However, since such property passes outside probate, it should be disregarded in calculating the dollar limitation.
 - Insurance policy or retirement plan proceeds included in calculation if estate designated as beneficiary: The \$150,000 gross fair market value calculation must include any life insurance policy or retirement plan proceeds payable to the estate as the designated beneficiary (or where the designated beneficiary predeceased the decedent).

The above rules demonstrate how seemingly large estates might qualify for the relatively speedy and inexpensive Sec. 13100 summary collection procedure. For example, the largest portion of decedent's estate might consist of assets held in inter vivos trust and/or joint tenancy. When these assets are deducted from the estate's total value, there may be only a nominal estate remaining (typically where decedent inadvertently failed to transfer one or two assets into trust or joint tenancy title). As a result, probate administration may not be needed at all!

ELIGIBLE CLAIMANTS ('SUCCESSORS OF DECEDENT')

The Sec. 13100 procedure may be used by any 'successor of the decedent.' This term broadly includes anyone entitled to succeed to the claimed property under decedent's will or by the laws of intestacy. Specifically, the term encompasses:

1. Testate beneficiaries: The sole beneficiary under decedent's last will or, if more than one beneficiary, all beneficiaries under the will may proceed under Ca Probate Sec. 13100, regardless whether any beneficiary is related to decedent.
2. Trusts included as 'successors': An eligible testate beneficiary successor includes a trustee of decedent's inter vivos or testamentary trust where the trust succeeds to the particular item of property under decedent's will. Even in the unlikely event the trust is subject to continuing court jurisdiction, the trustee may utilize Sec. 13100 on the trust's behalf without obtaining prior court approval.
3. If decedent died without a will, Sec. 13100 is available to any or all of decedent's intestate heirs
4. The eligible heirs may also include 'heirs' determined pursuant to another jurisdiction's intestate succession law: If, under applicable conflict of laws principles, succession to the particular item of property is determined by the law of a sister state or foreign nation, the successors in interest under that law may use the Sec. 13100 procedure.
5. As stated above, the trustee of a trust is an eligible Sec. 13100 transferee as to items passing from decedent to the trust; the trustee need not obtain prior court approval to utilize.

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6. Likewise, guardians or conservators of the estates of eligible transferees are themselves eligible to use the Sec. 13100 procedure on such persons' behalf without authorization by the court where the guardianship or conservatorship is pending.
7. A personal representative appointed in a sister state may act on behalf of the estate's beneficiaries, and thus may proceed under Sec. 13100 for the beneficiaries who would be eligible to do so.
8. Similarly, if decedent's will authorizes a custodian to receive a devise under the Uniform Gifts to Minors Act or the Uniform Transfers to Minors Act of any state, the custodian is eligible to collect the devise pursuant to Sec. 13100 provided the beneficiary has not yet reached the age at which the custodianship is to terminate. (In California, the age at which the custodianship terminates and the child receives the custodial property depends on the terms of the transfer. In appropriate cases, the custodianship may remain in effect until the child reaches age 25.

AFFIDAVIT (DECLARATION) PROCEDURE:

The transfer may be effected by presenting to the 'holder' (see below) an affidavit or declaration under penalty of perjury executed in the prescribed statutory form and content and complying with specified statutory formalities.

➔ Carefully follow the statutory requirements. The property holder is not required to honor a defective Sec. 13101 declaration; and a holder who does honor a defective declaration will not receive the protection afforded by Ca Probate Sec. 13106 (which discharges the holder from further liability with respect to the property transferred under Sec. 13100).

CONTENTS OF DECLARATION:

The contents of the Sec. 13100 declaration are prescribed by Ca Probate Secs. 13101 and 13106.5. Here is a sample declaration:

DECLARATION

DECLARATION PURSUANT TO CALIFORNIA PROBATE CODE Sec. 13100

The undersigned, (name of declarant), declares as follows:

1. I am the successor in interest of decedent (name of decedent), who died in (County), California, on, 19....

2. At least 40 days have elapsed since the death of the decedent, as shown in the certified copy of the decedent's death certificate attached to this declaration.

3. [Either of the following, as appropriate:]

No proceeding is now being or has been conducted in California for administration of the decedent's estate.

[OR]

The decedent's personal representative has consented in writing to the payment, transfer, or delivery to the declarant of the property described in this declaration.

4. The current gross fair market value of the decedent's real and personal property in California, excluding the property described in Section 13050 of the California Probate Code, does not exceed sixty thousand dollars (\$100,000).

5. The following (e.g., "account") constitutes a portion of the property in decedent's estate: (describe property claimed by this declaration--e.g., "current balance in Savings Account No. 123-45678 at Main Street National Bank, Head Office, 123 Main Street, Los Angeles, CA 90017").

6. Decedent died without a will and, under Section 6402 of the California Probate Code, I am decedent's sole heir at law and the successor of the decedent (as defined in Section 13006 of the California Probate Code) to the decedent's interest in the described property. [Modify appropriately if (i) the declarant is decedent's testate beneficiary of the described property or (ii) decedent died without a will and left more than one intestate heir, but declarant has the superior right under Prob.C. Sec. 6402 to inherit the described property.]

7. No other person has a superior right to decedent's interest in the described property.

8. Pursuant to the facts set forth above and Section 13100 et seq. of the California Probate Code, I request that the (described property) be paid (or "transferred" or "delivered" as appropriate) to the declarant.

I declare under penalty of perjury under the law of the State of California that the foregoing is true and correct.

DATED:, 19....

/s/

(Name)

Declarant

[Note: If more than one declarant is entitled to succeed to the described property, all should join in executing the declaration and the allegations should be modified to reflect the plural.]

ACKNOWLEDGMENT

STATE OF CALIFORNIA

COUNTY OF _____

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On _____, 19__ before me, _____ (name and title of officer), personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) (is/are) subscribed to the within instrument and acknowledged to me that (he/she/they) executed the same in (his/her/their) authorized capacity(ies), and that by (his/her/their) signature(s) on the instrument the person(s) (or the entity upon behalf of which the person(s) acted) executed the instrument.

WITNESS MY HAND AND OFFICIAL SEAL.

(Signature) (Seal)

[Note: Attach certified copy of decedent's death certificate; inventory and appraisal if estate includes California real property; and, if applicable, evidence of decedent's ownership of the described property and copies of personal representative's consent and letters. Proof of identity, must be presented to the holder.]

Execution and recordation:

The declaration must be executed by all of decedent's successors who have an interest in the property sought to be collected, received or transferred. In other words, a joint declaration is required if more than one person is a rightful successor in interest to the claimed property. (Of course, where more than one person executes the declaration, the statements required by Ca Probate Sec. 13101, above, should be modified as appropriate to reflect that fact.)

Further, if the property transferred is an obligation secured by a lien on real property, the affidavit or declaration must be recorded in the office of the county recorder for the county where the real property (or any part of it) is located. Such recordation has the same effect as is given to recording an assignment of a mortgage and an assignment of a beneficial interest under deed of trust.

But the recording does not itself put the obligor on notice so as to invalidate a payment made to the holder of the note secured by the lien on the real property. Any duty of the obligor to pay the decedent's successor or otherwise to satisfy the obligation does not arise until the obligor has been furnished with satisfactory evidence that the affidavit or declaration has been recorded and satisfies the requirements of Secs. 13101(a) and 13106.5 ('Satisfactory evidence' might be, e.g., a certified copy of the recorded affidavit or declaration; but any other satisfactory evidence of the recorded affidavit or declaration will also suffice.)

Attachments to declaration:

One or more attachments to the Sec. 13100 declaration may be required:

1. A certified copy of the decedent's death certificate must be attached.
2. Inventory and appraisal (if California estate includes real property): Again, the Sec. 13100 declaration may not be used to transfer real property. Even so, if the estate includes 'any real

AFTER DEATH ACTIONS

property in this state,' the declaration must also be accompanied by an inventory and appraisal of the real property. 'Any real property in this state': Section 13103 is expressly limited to California real property. Out-of-state realty is not listed on an inventory and appraisal or appraised by a California probate referee because such property is handled through ancillary administration. Therefore, no inventory and appraisal attachment is required if decedent's only real property holdings are located in another state. Nor will an inventory and appraisal attachment be required if decedent's only realty interests were held in joint tenancy (since joint tenancy property is not part of the probate estate). The statute does not require attachment of an inventory and appraisal for decedent's personal property even though the personal property is the subject of the Sec. 13100 transfer. Generally, the form, content and manner of making the inventory and appraisal is the same as that applicable in formal estate administrations. We suggest that you see legal counsel in this regard. The appraisal must be made by a probate referee appointed by the State Controller to appraise property in the county where decedent's realty is located. However, unlike formal probates, the particular referee (in the applicable county) may be selected by the declarant (in formal probates, the referee is appointed by the court when letters are issued.)

3. Still further, if decedent had evidence of ownership of the property described in the declaration, and the holder of the property would have had the right to require presentation of same prerequisite to the duty to deliver the property to decedent, that evidence of ownership, if available, must also be attached to the declaration. (This requirement is similar to the certificate of ownership prerequisite to the non-probate transfer of vehicles and other state-registered property) The Sec. 13100 transfer can proceed even if the evidence of ownership is 'not available.' But in this event, the holder may require as a condition to the transfer that the declarant furnish an indemnification bond or undertaking.
4. If decedent's personal representative consented to the payment, transfer or delivery of the described property, copies of the consent and of the personal representative's letters must be attached to the affidavit or declaration.

PRESENTMENT FORMALITIES

To whom presented

Presentment of the declaration, requisite attachments and proof of identity normally must be made to the 'holder of the decedent's property'. Thus, where declarant seeks collection of money owed decedent, presentment is made to the person or entity owing the money (individual, representative, bank, corporation, etc.).

If declarant seeks collection of tangible personal property, presentment is made to the custodian of that property. And, if declarant seeks the transfer of an evidence of debt, obligation, interest, right, security or chose in action belonging to decedent, presentment is made to the applicable registrar or transfer agent (e.g., corporate secretary or transfer agent in charge of stock transfers).

When money or property claimed in a Sec. 13100 declaration is the subject of a pending action or proceeding in which decedent was a party, decedent's successor in interest must, without procuring letters of administration or awaiting probate, file a motion to be substituted as a party in place of decedent. The Sec. 13100 declaration is filed with the court when the motion is made. We suggest you seek legal counsel in this regard.

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Each person executing the declaration must furnish the holder with 'reasonable' proof of his or her identity. It is the claimant's duty to 'furnish' the holder with proper identification. But holders should be advised of this requirement and warned to demand proper proof of identity before releasing claimed property to the declarant. A holder who transfers decedent's property without 'reasonable proof of identity' risks liability to other persons who had a superior right thereto

For purposes of Sec. 13104, the holder may accept any of the following as 'reasonable proof of identity':

1. The person executing the declaration is personally known to the holder and,
2. The declaration is executed in the holder's presence
3. A notary public's certificate of acknowledgment identifying the person executing the declaration. Property holders will normally prefer proof of identity to be made by acknowledgment before a notary public. This is because, absent a notary public's certificate of acknowledgment, the holder will either have to note on the declaration that he or she personally knows the person who executed it or affix a description of the identification furnished by the executing party. Even though simpler methods of proof are authorized by the statute, a notary public acknowledgment will generally also be advisable from the claimant-declarant's perspective. In addition to constituting statutory proof of identity, the notarial acknowledgment permits recordation of the Sec. 13100 declaration (recordation may be desirable to impart constructive notice; or, in the case of a promissory note secured by deed of trust, because the security is an interest in real property). Notarial acknowledgment also provides a form of proof likely to satisfy the requirements of out-of-state transfer agents.
4. Execution of the declaration in the holder's presence and affirmance of the executing person's identity through written statement under penalty of perjury by a person personally known to the holder.
5. Alternatively, so long as the declaration is executed in the holder's presence, he or she may rely on any of the following as 'reasonable proof of identity':
 - a) California DMV identification card or driver's license that is current or was issued in the past five years ;
 - b) U.S. State Department passport that is current or was issued in the past five years;
 - c) So long as it is current or was issued in the past five years and contains a photograph and description of the named person, is signed by the named person, and bears a serial or other identifying number, either:
 - A foreign passport stamped by the U.S. Immigration and Naturalization Service;
 - An out-of-state driver's license;
 - An out-of-state identification card; or
 - An identification card issued by any branch of the U.S. armed forces.

Provided the formalities of Secs. 13101-13104 and 13106.5 are followed (content, attachments,

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evidence of ownership, proper proof of identity), the property holder need not inquire into the truth of the declaration. Likewise, assuming full compliance with Secs. 13101-13104 and 13106.5, the persons executing the declaration as 'successor of the decedent' are entitled to have the described property paid, delivered or transferred to them.

RECIPIENT'S LIABILITY FOR DECEDENT'S DEBTS

→ As a general rule, the Sec. 13100 property recipients are personally liable for decedent's unsecured debts to the extent of the net value of the property received.

The recipient's total liability cannot exceed the fair market value of the property, valued as of the time the Sec. 13100 declaration was presented, less the amount of any liens or encumbrances thereon at that time, together with any net income received in the interim. But if the property has since been disposed of, the maximum personal liability is increased by money-judgment interest (currently 10%) accruing on the fair market value from the date of disposition.

A recipient sued by decedent's creditors under Sec. 13109 is entitled to assert any 'defenses, cross-complaints, or setoffs' that would have been available to decedent had he or she not died.

A claim against Sec. 13100 distributees is not enforceable if otherwise barred by the probate Code 'nonclaim statute'; i.e., if a probate is opened, decedent's creditors may not circumvent the claim filing rules by suing the Sec. 13100 distributees directly on 'stale' claims. Likewise, the statute of limitations fully applies to an action against Sec. 13100 distributees--i.e., suits on causes of action against decedents dying on or after January 1, 1993, which survive the decedent's death, must be commenced within one year after the decedent's death. Decedent's creditors may also enforce their claims through a formal probate proceeding.

A holder who transfers property or changes registered ownership upon compliance with all of the Sec. 13100 et seq. prerequisites (receipt of proper declaration and attachments, evidence of ownership, proof of identity, etc.) is fully discharged from liability with respect to that property--including liability for taxes due the State by reason of the transfer.

Likewise, in the case of a transferred obligation secured by a lien on real property meeting the requirements of Sec. 13100 et seq., the obligor on the debt is protected in paying the debt to the person(s) who executed and properly recorded the affidavit or declaration. Thus, any person who in good faith and for valuable consideration enters into a transaction concerning the underlying real property may rely on (i) the trustee's recorded reconveyance under the deed of trust or (2) a recorded discharge of the deed of trust executed by the person(s) executing the Sec. 13101 affidavit or declaration.

IMMEDIATE 'DELIVERY' OF DECEDENT'S TANGIBLE PERSONAL PROPERTY WHERE POSSESSION NOT DISPUTED

Probate Code Sec. 330 authorizes certain entities and individuals to release decedent's tangible personal property in their possession to specified claimants without waiting for any minimum period of time after decedent's death and whether or not a probate proceeding will be commenced.

Section 330 is intended to alleviate delays that might otherwise accompany a decedent's survivor's

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efforts to gain access to decedent's residence and to tangible personal property located, e.g., at decedent's place of business. The statute also permits hospitals, police and other official agencies to turn over impounded property more quickly (i.e., without waiting a minimum 40 days or for the commencement of a probate proceeding). Section 330 thus supplements the Sec. 13100 'collection by affidavit' procedure and expedites the transfer of possession but only to the limited extent developed below:

Eligible transferors

Only the following entities and individuals in possession of decedent's property are authorized to release that property under Sec. 330:

1. the public administrator;
2. a government official;
3. a law enforcement agency;
4. the hospital or institution where decedent died; or
5. decedent's employer.

Exception if possession disputed

Decedent's property may not be delivered pursuant to Sec. 330 if the entity or individual in possession 'knows or has reason to believe' that the right to possession is disputed.

Eligible recipients

Delivery pursuant to Sec. 330 may be made only to decedent's:

1. surviving spouse;
2. relative; or
3. conservator or guardian of the estate 'acting in that capacity at the time of death.'

Eligible property

Section 330 applies only to 'tangible personal property' in the possession of the eligible entity or individual (above), expressly including 'keys to the decedent's residence.'

Procedural limitations

Unlike the Sec. 13100 'collection by affidavit' procedure, delivery under Sec. 330 is not conditioned upon a 40-day post-death waiting period. However, these minimum procedural requirements must be followed:

1. An eligible recipient's claim for possession need not be made on any particular form or in any particular manner (presumably an oral request may suffice, although the transferor will probably require some form of signed written statement). But the eligible claimant must present 'reasonable proof' of his or her status or identity. For this purpose, the entity or individual in possession (transferor) may rely on any document constituting reasonable proof of identity under Ca Probate Sec. 13104(d) (regarding proof of identity pursuant to a Sec. 13100 declaration)--e.g., current driver's license or passport or, in the case of a court-appointed fiduciary, a certified copy of the fiduciary's letters.

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2. The transferor must keep a record of the property delivered and of the recipient's status and identity for three years after the date of delivery.

Effect of delivery

A Sec. 330 delivery of tangible personal property only passes bare possession; it does not determine ownership of the property 'or confer any greater rights in the property than the recipient would otherwise have.'

Nor does a Sec. 330 delivery preclude later proceedings for administration of the decedent's estate. Indeed, if probate proceedings are subsequently commenced, the person holding the property must deliver it to the personal representative on the personal representative's request. (The same general rule applies to transferees acquiring personal property under the Sec. 13100 summary collection procedure)

Following a proper delivery of property pursuant to Sec. 330, the transferor (entity or individual) is immunized from liability for any loss or damage to the property caused by the transferee.

SUMMARY TRANSFER OF REAL PROPERTY OF 'SMALL VALUE' BY AFFIDAVIT

When decedent's real property interests are of relatively small value, a nonprobate transfer procedure is available pursuant to Ca Probate §§ 13200-13210; this transfer scheme is similar to the affidavit method of collecting personal property in maximum \$150,000 estates (above).

The Sec. 13200 procedure does not apply to joint tenancy real property because decedent's joint tenancy interests pass automatically outside probate by right of survivorship

If the total gross value of all of decedent's California realty does not exceed \$20,000, the successors in interest may obtain marketable title by filing with the court and recording a statutory affidavit in compliance with Ca Probate Sec. 13200 et seq.

Threshold prerequisites

The Sec. 13200 procedure may be used only if (i) no California probate proceeding currently is pending or has been conducted; or (ii) decedent's personal representative consents in writing to its use. (Where estate administration proceedings have not been commenced, utilizing Sec. 13200 does not foreclose a subsequent probate)

At least six months must have passed since the date of decedent's death. (Compare: There is only a 40-day wait for the Ca Probate Sec. 13100 affidavit transfer of decedent's personal property)

Further, decedent's funeral expenses, last illness expenses, and all unsecured debts must have been paid. (Compare: There is no comparable prerequisite to the Sec. 13100 affidavit transfer of personal property.)

The 'gross value' of all California real property in decedent's estate may not exceed \$20,000. For this purpose, 'gross value' is determined net of the real property exclusions under Ca Probate Sec. 13050 (joint tenancy and other terminable interests, realty passing to surviving spouse under Ca Probate Sec. 13500; see above in connection with exclusions from \$150,000 estate calculation for Sec. 13100 purposes). Note that only California realty is considered in calculating value. By the same token, out-of-state realty may not be distributed by affidavit (or, for that matter, through a California probate). Ancillary administration in the other state will be necessary

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The size of decedent's personal property estate has no bearing on whether Sec. 13200 can be used to obtain marketable title to the realty. Thus, Sec. 13200 is available to obtain a quick distribution of nominal real property holdings even though a probate may be required for personal property.

The Sec. 13200 procedure may be used by 'successors of the decedent'--i.e., if decedent left a will, by the testate beneficiaries (including trusts, 2:16.2) entitled to succeed to the real property (or interest therein) under the will; and, if decedent did not leave a will, by his or her intestate heirs entitled to succeed to the property. (Except as noted below, these rules are comparable to those regarding eligible Sec. 13100 personal property claimants, see above)

Unlike the Sec. 13100 personal property collection procedure, sister-state personal representatives may not use the Sec. 13200 procedure. But the beneficiaries in an out-of-state probate may proceed under Sec. 13200 on their own behalf if otherwise eligible to do so.

Affidavit mechanics:

Unlike Sec. 13100, the Sec. 13200 real property affidavit is not presented to a property 'holder.' Rather, it is to be filed with the superior court. If the affidavit complies with the statutory requirements, the court clerk will return a certified copy to the claimant to be recorded in the proper county; the recording establishes marketable title in the affiant's (or joint affiants') name.

Mandatory 'official form' affidavit:

The affidavit must be executed in compliance with Ca Probate Sec. 13200 in the form prescribed by the Judicial Council The Judicial Council has adopted an official form Sec. 13200 affidavit (DE-305 'Affidavit re Real property of Small Value')

Briefly, the affidavit must allege all of the following:

1. Decedent's name and date and place of death (items '1' and '2' on Sec. 13200 form).
2. A legal description of the property and decedent's interest therein (item '5' on Sec. 13200 form, also stating that description may be affixed as 'Attachment 5a').
3. If applicable, the name and address of each person known to affiant to be serving as guardian or conservator of the estate of the decedent at time of death (item '7' on Sec. 13200 form). (Such persons must also be mailed a copy of the affidavit and attachments.)
4. That the \$20,000 gross value maximum is satisfied, as shown by an attached inventory and appraisal (items '8' and '9' on Sec. 13200 form).
5. That the threshold prerequisites are satisfied (i.e., passage of six-month waiting period, no California probate pending or yet conducted or personal representative's written consent obtained, payment of decedent's unsecured debts and funeral and last illness expenses) (items '3,' '10' and '11' on Sec. 13200 form).
6. That affiant is decedent's successor in interest entitled to receive the property and that no other person has a superior right to that interest (item '6' on Sec. 13200 form, also requiring affiant to indicate whether claim is as testate or intestate successor).
7. 'The affiant declares under penalty of perjury under the law of the State of California that the foregoing is true and correct' (immediately following item '11' on the Sec. 13200 form, and providing space for multiple declarations where there are joint affiants).

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8. Mandatory notarial acknowledgment of declarant's identity: A notary public's certificate of acknowledgment must be affixed (mandatory), identifying each person executing the affidavit (see official Sec. 13200 form, above re form of notarial acknowledgment). Comment: The notarial acknowledgment on the official Sec. 13200 form has not been amended to conform to the statutory language contained in Ca Civil Sec. 1189 (a). Since some county recorders may not accept forms containing the old style notarial acknowledgment, you may wish to have your notary attach his or her own acknowledgement in the new format (on 8 1/2-by-11-inch paper, as required by Ca Rules of Court Rule 201).

Attachments

In addition, an inventory and appraisal of decedent's California realty must be attached to the affidavit (excluding property not considered in calculating the \$20,000 limit under Ca Probate Sec. 13050) (see item '9' on Sec. 13200 form; official form DE-160 may be used for this purpose). The usual procedures for completing an inventory and appraisal apply except that the declarant may choose the probate referee from those empowered to appraise realty for the county where the particular property is located (a court appointment is not required). (The procedures are the same as when an inventory and appraisal must be attached to a Sec. 13100 declaration; above.)

In addition (as with a Sec. 13100 declaration), a certified copy of decedent's death certificate must be attached (see item '3' on Sec. 13200 form).

If the declarant is claiming as testate successor (beneficiary under decedent's will) and no probate is pending or has been conducted in California, a copy of the will must also be attached (see item '6a' on Sec. 13200 form).

If decedent's personal representative consented to the Sec. 13200 procedure, copies of the written consent and of his or her letters must also be attached.

Filing

The affidavit is to be filed with the clerk of the superior court of the county where decedent was domiciled at date of death or, if decedent was not a California domiciliary at time of death, then in the superior court of any county where the claimed realty is located (see item '4' on Sec. 13200 form, requiring applicable 'jurisdiction/venue' declarations).

A \$35 filing fee will be required; this fee covers the charge for one certified copy of the declaration (for recording purposes) as well.

If decedent had a guardian or conservator at time of death, a copy of the affidavit and attachments must be mailed to the guardian or conservator (see item '7' on Sec. 13200 form).

The court clerk will accept the declaration for filing and issue a certified copy upon determining that it contains the information (including requisite attachments) required by Sec. 13200 (see page two, last section, of Sec. 13200 form).

To obtain marketable title, the declarant(s) must record the certified copy (without the attachments) in the office of the county recorder of the county where the real property is located. The county recorder will index decedent as the grantor (grantor index) and each person designated by the certified copy as successor to the property as a grantee (grantee index). The result: Marketable title effectively passes to the declarant successors in interest (see below).

Rights and liabilities following due recording

After the § 13200 recording, persons who in good faith and for valuable consideration enter into transactions concerning the real property have the same rights and protections as distributees under a final order for distribution

In other words, good faith purchasers, lessees, encumbrancers, etc. are protected against adverse claimants who later assert superior rights to the property. (An adverse claimant's remedy is against the successor transferee, not the good faith purchaser, lessee, encumbrancer, etc.; see below.)

Those designated as successors in the recorded Sec. 13200 affidavit remain personally liable to third persons who have a superior testate or intestate right to the property. The extent of such liability is the same as that applicable to Sec. 13100 property recipients (See above.).

Such liability is limited to the property's fair market value, less liens and encumbrances, as of the time the clerk issued the certified copy of the affidavit, together with net income received in the interim; and, if the property has since been disposed of, money-judgment interest on the fair market value, calculated from the date of disposition.

A person who fraudulently executes or files a Sec. 13200 affidavit (e.g., knowing there is someone else with a superior right of succession), is liable to the superior claimant for three times the fair market value.

The declarant-successor is immune from liability to superior claimants if the property (or its value) is properly restored to the estate (i) after a probate is opened or (ii) following the personal representative's request for restoration (where the representative previously consented to the Sec. 13200 procedure notwithstanding a pending probate).

As with Sec. 13100 property recipients, those succeeding to real property pursuant to a Sec. 13200 affidavit are personally liable for decedent's unsecured debts to the extent of the net value of the property unless a probate is commenced and the property is restored to the estate or the statute of limitations has expired on the creditor's claim.

If a probate proceeding is commenced in California following a Sec. 13200 transfer, or if decedent's personal representative consents to a Sec. 13200 transfer during administration but later requests restoration of the transferred property, the Sec. 13200 successors are obligated to make restitution to the estate as follows:

1. In kind--i.e., restoring the property to the estate, together with (i) net income received thereon and (ii) if the property was encumbered after issuance of the certified copy of the affidavit, the amount necessary to satisfy the balance owing as of the date the property is restored to the estate; or
2. In value--i.e., if the property has since been disposed of, restoring to the estate an amount equal to the property's fair market value, together with (i) net income received therefrom and (ii) money-judgment interest on the property's fair market value accruing from date of the disposition ('Fair market value' is determined as of the time of disposition of the property net of liens and encumbrances thereon at the time the certified copy of the affidavit was issued.
3. In kind, subject to increased value reimbursement: Restitution of the property in kind, as improved, upon condition that the estate reimburse the Sec. 13200 recipient for:

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- a) The amount by which the improvement increases the fair market value of the property (determined as of time of restitution), and
- b) The amounts paid by the Sec. 13200 recipient in principal and interest on any liens or encumbrances on the property since the certified copy of the Sec. 13200 declaration was issued.
- c) The fair market value of the property determined as of the date that the certified copy of the Sec. 13200 affidavit issued (i.e., fair value before improvements were made), net of liens and encumbrances at that time, plus money-judgment interest on the net amount accruing since the date of issuance of the certified copy of the declaration.

An action to enforce the restitution obligation can only be maintained by the estate representative; and it must be brought within three years after issuance of the certified copy of the Sec. 13200 declaration or, in fraud cases, three years after discovery of the fraud, whichever is later.

OTHER PROCEDURES THROUGH COURT

There are a number of other procedures which involve at least minimal probate procedures which are beyond the scope of this book. If you are not in a situation to use any of the procedures outlined in this or the other chapters of this book, we urge you to seek legal counsel.

NON-PROBATE TRANSFER OF VEHICLES AND OTHER STATE-REGISTERED PROPERTY BY DECLARATION:

As discussed above, vehicles and specified state-registered property (mobile homes, boats, floating homes, etc.) are excluded in calculating the '\$150,000 gross value' limit for non-probate transfers under Ca Probate Sec. 13100 (personal property) and Sec. 13151 (real and personal property). However, this property may be transferable by affidavit or declaration outside probate.

The procedures discussed below permit a successor in interest to secure a transfer of registration of decedent's title or interest without the need to probate the estate. The rules are akin to those under Sec. 13100 et seq. (collection of personal property by declaration), but the requirements are contained in other statutes and there is not complete conformity:

Automobiles and other vehicles registered under the Vehicle Code

Title to automobiles, trailers and other 'vehicles' registered in decedent's name alone under the Vehicle Code is transferable swiftly, outside probate, provided the deceased owner left no other property requiring probate. The value of the vehicle is immaterial.

Unlike the non-probate procedures for transferring interests in other state-registered property (vessels, mobile homes, truck campers, etc.), the successor in interest may proceed immediately after decedent's death. There is no 'waiting period.' For 'policy' reasons, some DMV offices may require a 40-day wait notwithstanding Ca Vehicle Sec. 5910 language to the contrary (above).

The transfer may be secured by the appropriate testate or intestate beneficiary (i.e., the rules as to who may claim decedent's personal property under a Sec. 13100 declaration, above, apply here as well). Thus, if the vehicle was bequeathed by decedent's will or trust, the designated testate beneficiary (or beneficiaries jointly) has the superior right to secure a transfer of registration or title. In this case, the

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designated beneficiary must sign the affidavit.

Otherwise, when the vehicle was not bequeathed by will or trust, the transfer of title may be secured by decedent's surviving spouse or other intestate heir (or the guardian or conservator of such person).

The eligible successor (above) may perfect the transfer of title by presenting to the DMV all of the following

- a) The certificate of ownership and registration card, if available.
- b) An affidavit stating:
 - c) The date and place of decedent's death; and, if required by the DMV, a death certificate.
 - d) That decedent left no other property necessitating probate and that no California probate proceeding is now being or has been conducted for decedent's estate. (Typically, the balance of the estate will be subject to collection under Ca Probate Secs. 13100, 13150 or 13200--i.e., via a nonprobate transfer.) The Ca Vehicle Sec. 5910 procedure may not be used where decedent's estate is otherwise subject to probate administration. If a surviving spouse claims that the vehicle passes 'outright' to him or her, the transfer may be handled as part of the Ca Probate Sec. 13650 spousal property set-aside proceeding and, if the vehicle was owned in joint tenancy, it passes outside probate by right of survivorship. Otherwise, however, the vehicle must be inventoried in the probate estate.
 - e) That the declarant is entitled to the vehicle either (i) as intestate heir under Ca Probate Secs. 6401-6402 (when the vehicle was not bequeathed by will) or (ii) as the proper testate beneficiary (when the vehicle was bequeathed by will); and that no other person has a superior right to the vehicle.
 - f) Also, if required by the DMV, declarant must furnish the names and addresses of any other heirs or beneficiaries.
 - g) And, that there are no unsecured creditors of decedent or, if there are, that the unsecured creditors have been paid in full or their claims have otherwise been discharged.

FORM: A combined form is available from the DMV to transfer title. Below is a sample of such a form:

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DMV AFFIDAVIT FOR TRANSFER OF VEHICLE OR VESSEL WITHOUT PROBATE

[Note: Notwithstanding the form's language marked by * below, automobiles, trailers and other vehicles may be transferred immediately after decedent's death (no 40day waiting period)]

DMV

A Public Service Agency

AFFIDAVIT FOR TRANSFER WITHOUT PROBATE
CALIFORNIA TITLED VEHICLE OR VESSELS ONLY

VEHICLE OR HULL IDENTIFICATION NO. _____

VEHICLE LICENSE OR VESSEL CF NO. _____

FOR MOTORCYCLES ONLY

MAKE OF VEHICLE OR VESSEL BUILDER _____

Engine No.: _____

The undersigned states that:

_____ the owner of the above described vehicle or vessel died on
_____, in _____
DATE PLACE OF DEATH

that said decedent left no other property necessitating probate and no probate proceeding is now being or had been conducted in this state for the decedent estate, that there are no creditors of the deceased whose claims remain unsatisfied, that the undersigned is the heir pursuant to Probate Codes 6401 and 6402, bearing the relationship to the decedent of:

- () Sole person or persons who succeeded to the property of the decedent.
- () Conservator or guardian of the property of the sole person or persons who succeeded to the property of the decedent.
- () Beneficiary under the decedent's last will and testament and has the right to have title to the vehicle transferred to his/her name without probate proceedings.
- () Trustee, under trust agreement by the deceased, in which the primary beneficiaries are the next of kin.

(*) Vehicles and vessels may be transferred if 40 days have elapsed since the death of the registered or legal owner and applicant is the heir pursuant to Probate Codes 6401 and 6402. The person who secures transfer of this vehicle is subject to the provisions of Sections 13109 through 13113 inclusive, of the Probate Code to the same extent as a person to whom transfer of property is made.

I certify under penalty of perjury under the laws of the State of California that the information entered on this document is true and correct.

SIGNATURE

DATE

Rights and liabilities after transfer

The transferee remains liable to the same extent as a person who secures a property transfer under Ca Probate Sec. 13100: i.e., for decedent's unsecured debts; to adverse claimants with a superior right of succession (including the risk of treble value liability if the transfer was fraudulently secured); and for restoration to the estate if a probate is commenced (see above.).

Even where a probate is required, joint tenancy property is not part of the probate estate; title to a joint tenancy vehicle (as with other joint tenancy property) passes 'outright' by 'right of survivorship' to

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the surviving owner (or owners).

Registration of an automobile or other vehicle in the names of two or more persons alternatively, by use of the word 'or' (i.e., 'X or Y'), creates a joint tenancy between them unless a contrary intention is expressed in the registration application. Registered ownership between persons by use of the word 'and' creates a joint tenancy only when the ownership certificate so states (i.e., 'X and Y as joint tenants').

Although succession is automatic (by 'survivorship'), title may still be cleared by having the DMV reissue the ownership certificate and registration card in the surviving owner's name. To do this, the survivor should execute the ownership certificate in the appropriate places on the reverse side and submit the certificate with the registration card and smog-pollution control compliance certification to the DMV.

LIVING TRUST ADMINISTRATION WITHOUT COURT PROCEEDING

Ordinarily a Living Trust can be administered by the successor trustee without any need to have any court proceedings of any kind. This allows for a quick and inexpensive way to carry out the terms of the trust. The following Chapters describe some of the steps to be taken if no court proceedings will be undertaken.

CHAPTER 8 – DUTIES OF SUCCESSOR TRUSTEE

This is a brief summary of some of the duties of a successor trustee. They are similar to those of an Executor of a Will.

In general, your duties are to collect and conserve, and manage and control the assets of the estate. Depending upon the way the trust document and any Will may be written, you may also have the duty to pay the debts of the decedent, pay all taxes due from the decedent and the estate, and distribute the balance of the estate according to the trust. The law expects you to use care and diligence in carrying out these duties.

AS A SUCCESSOR TRUSTEE YOU SHOULD DO THE FOLLOWING:

1. Take possession of all the estate's property insofar as practicable. Joint tenancy property, life insurance proceeds, and retirement plan benefits (unless payable to the estate) are not included in the trust estate, but there may be actions you should take with regard to them. Subsequent chapters discuss these items.
2. Collect all dividends, interest and other income, and deposit all such items in an interest-earning trust bank account (or accounts) until the trust is closed;
3. Keep a detailed account of all your receipts and disbursements for the trust: List the date, source, and amount of each receipt and the date, nature of payment, and amount of each disbursement;
4. File all tax returns and pay all taxes--this is discussed further in subsequent chapters; and
5. Keep trust property adequately insured (we recommend early review of all casualty, property and liability insurance policies and of the general need for insurance).

→ With regard to the following, we suggest that you NOT do any of the following without consulting legal counsel in advance:

1. Sell any property of the estate;
2. Give away any estate property;
3. Lease estate property;
4. Pay or compromise any debts or claims against the estate (including funeral bills and/or expenses of the decedent's last illness);
5. Sell stock, exercise subscription rights, or buy stocks or bonds for the estate;
6. Distribute estate property to any devisee or heir;

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7. Deposit estate funds in your personal account or otherwise commingle estate property with your own;
8. Act without the concurrence of the other personal representative(s) if two or more have been appointed by the probate court.

DETERMINE AND CARRY OUT THE DECEDENT'S WISHES WITH RESPECT TO

- funeral, burial, cremation, etc.;
- Locate the original will;
- Maintain the decedent's home;
- Protect the decedent's property;
- Provide for support of the decedent's dependents; and
- Notify the State Director of Health Services (if the decedent was receiving MediCal benefits).

The circumstances of each decedent vary widely, and temporary needs will be met differently in each case. There are usually alternative solutions for special problems and temporary difficulties that may exist during the period of winding up the trust. When in doubt, consult legal counsel.

NOTICE TO CREDITORS

YOU SHOULD THOROUGHLY CHECK THE DECEDENT'S RECORDS AND PERSONAL EFFECTS FOR EVIDENCE OF CREDITORS' CLAIMS. There are procedures that usually should be employed to give notice to all creditors of the decedent.

PAYMENT OF CLAIMS

Ordinarily, you may pay a properly approved claim with trust funds without incurring any personal liability. If, however, you discover evidence that a particular debt was or should be disputed, do not pay it until you have sought legal counsel.

RECORDS AND ACCOUNTINGS

Keeping careful records is an essential part of a successor trustee's duties. You must either keep detailed records of all trust transactions yourself or, as discussed later, have someone else keep them for you. The record of trust receipts and disbursements will be needed in preparing the accountings required by the probate court. In addition, records will be needed for the preparation of estate and income tax returns. Checking and savings account records and statements supplied by stock brokers, trust company agents, mutual funds, and others provide much of the information needed to prepare accountings and tax returns.

TAXPAYER ACCOUNT NUMBERS

The use of electronic data processing for federal income tax returns has resulted in the enactment of laws and regulations requiring the use of identifying numbers on tax returns. Every estate that is

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required to file any federal tax returns must apply for an employer identification number, which is the estate's tax account number.

You can apply for and obtain a employer identification number online at <http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Apply-for-an-Employer-Identification-Number-%28EIN%29-Online> .

GIFT TAXES

If the decedent made any gifts in the year prior to his or her death, it may be necessary to file federal and state gift tax returns. California no longer imposes a gift tax, but some other states still do. It may also be necessary to file delinquent gift tax returns for unreported gifts made by the decedent in prior years.

Gift taxes paid after death are deductible on the estate tax return, but any federal gift tax paid or payable with respect to gifts made within three years of the decedent's death must be included as an asset on the federal estate tax return.

INCOME TAXES

Final income tax returns must be filed for the portion of the year prior to the decedent's death and are due by April 15th of the following year. Extensions of time to prepare such returns can be obtained if necessary.

Tax return forms and due date:

IRS Form 1040 and FTB Form 540, respectively, are used to report the decedent's federal and California individual income tax liabilities for the year of death. The returns are due 3 1/2 months after what would have been the last day of the decedent's tax year if he or she had lived (i.e., the due date is ordinarily April 15th)

Amount reportable:

The amount reportable on decedent's final return is generally the income which was earned and received by him or her from the beginning of the tax year through the date of death.

1. Community property income: To the extent decedent's income was community property, only one-half is reportable as the decedent's income; the other half will presumably be reported by decedent's spouse (or on a joint return with the decedent);
2. 'Marvin' (nonmarital cohabitation) income? Despite the implications of Marvin v. Marvin (recognizing the right of nonmarital cohabitants to enforce contracts relating to, and to assert equitable interests in, 'nonmarital cohabitation' property), there is no authority to indicate that a portion of income may be attributed to a non-spouse with whom the decedent may have cohabited at the time of his or her death.
3. Income received after the date of decedent's death is not reported on the decedent's final return. Instead, such income is to be reported either by the estate on its returns (IRS Form 1041 and FTB Form 541) or by the decedent's other successor or beneficiary who receives the income.

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Estate tax deduction:

The decedent's share of income tax for the year of death (and for the prior taxable year if unpaid at death), if actually paid, is deductible as a debt on the Estate Tax Return

The entire personal exemption is available even though the decedent did not survive the entire year.

Any tax refunds due the decedent are includible in his or her gross estate.

Filing Jointly With Surviving Spouse:

26 USCA Sec. 6013(a)(2) authorizes the estate representative and the surviving spouse to file a joint return for the year of decedent's death, provided that (a) both spouses' tax years began on the same date, and (b) the surviving spouse does not remarry before the end of the taxable year. (The representative may also elect to file a joint return for the preceding year if that year's return has not yet been filed)

Due date:

The return is due by April 15th of the year following the year of decedent's death (or 3 1/2 months after the end of decedent's tax year if other than a calendar year).

If no estate representative has been appointed by the due date (including extensions granted), the surviving spouse alone may sign and file the joint return. However, in this event, a later-appointed estate representative may disaffirm the joint return.

A final joint return must report the decedent's income for the year through the date of death and the surviving spouse's income for the entire taxable year. A joint return may be filed even if both spouses die in the same year.

Partnership Income:

If the decedent was a member of a partnership, his or her final return will include only the income decedent received (if any) for the partnership taxable year ending within the tax period covered by decedent's final return (i.e., decedent's final taxable year). In other words, if no partnership taxable year ended within that period, no partnership income is to be reported on the decedent's final return.

If partnership income represented a large portion of decedent's total income, such that the availability of this income means that deductions available for decedent's final return could be lost, consider whether estate distributions could be made to the surviving spouse before the end of the surviving spouse's tax year and reported on a joint return.

If decedent was a shareholder of an S corporation, any S corporation income (1) for the corporation's tax year ending within the decedent's final tax year or (2) for the decedent's final tax year if decedent dies before the end of the corporation's tax year, must be reported on the decedent's final return.

DEDUCTIONS

Medical expenses

The decedent's medical expenses which are paid by the estate within one year of death may be

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deducted on either the estate tax return or the decedent's final income tax return, but not on both. If possible, medical expenses should be paid before decedent's death in which case, a 'double deduction' will in effect be available. (I.e., the expenses will be deductible on decedent's final income tax return and will reduce decedent's gross estate.)

The decision to claim the deduction on one return or the other generally requires a determination of which option will produce the greatest overall tax savings. For example, consider the estate's marginal estate tax bracket vs. the decedent's individual (or joint with spouse) income tax bracket.

Note also that, whereas medical expenses deducted for income tax purposes are subject to a threshold limitation (i.e., a minimum percentage of adjusted gross income), there is no comparable rule of qualification for deductibility on the estate tax return. The IRS has ruled that where medical expenses are deducted on the income tax return, the nondeductible amount below the threshold may not be deducted on the estate tax return.

Medical expenses are generally not deductible on the estate (fiduciary) income tax return.

To claim the medical expenses as income tax deductions (on decedent's final return), the representative must file a statement with respect to (though not necessarily accompanying) the income tax return, indicating that the medical expenses are not being deducted on the federal estate tax return and waiving any future right to claim them on the estate tax return.

Other deductions:

Examples of additional deductions and reportable items available for the decedent's final income tax return are:

- (1) Losses and bad debts.
- (2) Involuntary conversions.
- (3) Capital gain on sale of residence.
- (4) Depreciation. [26 USCA Secs. 167, 168, 179]

Prompt Assessment and Discharge

After the return is filed, the IRS must assess the decedent's income tax within 18 months after the estate representative files a written request for assessment. The Service is also entitled at that time to begin court proceedings for collection.

After the return is filed, if the estate representative makes written application for release from personal liability for decedent's unpaid income taxes, the IRS may notify the representative of the amount of taxes. The representative, upon payment of such amount as notified (or nine months after making the application if no IRS notification is received), is discharged from personal liability for the taxes.

REAL PROPERTY TAXES AND CHANGE OF OWNERSHIP FORMS

You must plan to pay all real property taxes when due. The first installment of taxes on California real property is delinquent on December 10th, and the second installment is delinquent on April 10th.

The county assessor of each county in which the decedent held real property must be notified first

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of the change of ownership from the decedent to the estate; and then upon distribution of the real property from the estate to the beneficiary. The change of ownership may result in a reassessment for property tax purposes, depending on the relationship of the transferee. See page 16

EXPENSES AND COMPENSATION OF SUCCESSOR TRUSTEE AND PROFESSIONALS

The expenses of winding up the trust vary depending on many factors, only one of which is the size of the estate. In addition, the successor trustee is entitled to a fee for the services involved. Ordinarily, this fee is determined by the trust document itself. If no provision is set in the trust, the trustee is entitled to reasonable compensation. If necessary, this amount can be set by a Petition to the Probate court.

PAYMENT OF CLAIMS, DEBTS AND EXPENSES

Property held in the revocable inter vivos trust of a decedent who dies on or after January 1, 1992 may be protected from creditor recourse by provisions which basically track the Probate Code's general creditor claim-filing requirements

The one-year statute of limitations restrict the time within which decedent's creditors may file claims against the trust's assets. The statutes also provide a comprehensive scheme for presenting, allowing, approving, rejecting and litigating such claims.

Procedure optional

➔ Trustees are not required to use the Code's creditor claims procedure. However, failure to do so means distributees may be personally liable for a pro rata portion of decedent's debts (i.e., an amount based on the value each individual's distribution bears to the total value of all trust property distributed).

A trustee who has actual knowledge of a pending California probate for the decedent trustor's estate may not use the trust creditor claims procedure. Nevertheless, the trustee and trust beneficiaries receive the same protection from creditors afforded the personal representative of decedent's estate.

Sections 19000 et seq. require a separate proceeding for obtaining court orders allocating debts between the trust and decedent's surviving spouse. (Again, this procedure is comparable to that used in probate administration)

Procedural considerations

As in estate administration proceedings, the creditor claim procedure is commenced by the trustee filing a Proposed Notice to Creditors **in the probate court**, publishing same and giving 'actual notice' to known creditors.

If all statutory notice requirements are met, a form creditor's claim must be timely filed (i.e., within four months of first publication of the notice to creditors or within 30 days after notice was given to a creditor who became known in the last 30 days of that period, whichever is later). Under appropriate circumstances (e.g., when known creditors are not given notice), late claims may be permitted.

AFTER DEATH ACTIONS

In any event, no claim may be filed after expiration of the one-year limitations period (Because of limited resources, the Judicial Council has deferred adoption of the above form. In the interim, some courts are permitting the use modified versions of the DE-172 decedent's estate creditor's claim form.)

Once the claim is filed, the trustee allows or rejects the claim (with or without court approval) and gives the claimant notice of the action on a form prescribed by the Judicial Council. (Again, because of limited resources, the Judicial Council has not yet adopted the above form. In the interim, some courts are permitting counsel to use modified versions of the DE-174 decedent's estate allowance or rejection of claim form.)

The trustee or a beneficiary (but not a creditor) also may petition the court to allow, compromise or settle any claim that has not been rejected by the trustee.

CHAPTER 9 – NOTICE OF TRUST TO BENEFICIARIES, HEIRS

A new California law requires the successor trustee to issue a notice to all beneficiaries of the trust and heirs at law within **120 days** of the date a trust becomes irrevocable or the death of the trustor.

When Notice Is Required

Although these provisions result in less disclosure than apply to a Will, which must be filed with the court, the practical result will be more public disclosure than was earlier expected.

Because the law is new (January, 1998), there are uncertainties about its application. While it is clear that whenever a trust becomes irrevocable, the notice must be given, it is not clear in all cases when this happens. In almost all cases of a single person trust, when the trustor (person who wrote the trust) dies, the trust becomes irrevocable and notice must be given.

Unclear is whether when one spouse dies and there is a joint trust the notice requirement is applicable. Where a tax sensitive trust has been created, the so-called "AB" or "ABC" trust was created, at least a portion of the trust becomes irrevocable and the notice should be given.

Less clear is the situation where a married couple has written a standard joint trust which remains revocable during the lifetime of the survivor. In such a case, the community share and separate property of the deceased could be considered as having become irrevocable, requiring notice. At this time the issue is unresolved and caution would indicate it better to give notice unless some overriding concern indicates otherwise.

Notice Contents

The notice must declare the existence of the trust, inform the recipient that he/she has the right to obtain a copy of the terms of the trust and that he/she has a specified period (usually 120 days) to contest the trust.

The Notice must state the name of the trustor(s), the date of execution of the trust, the name, mailing address and phone number of each trustee, the physical address of the principal place of administration, any additional information required by the terms of the trust, notification of the right to receive the terms of the trust, and the following statement:

"You may not bring an action to contest the trust more than 120 days from the date this notification by the trustee is served upon you or 60 days from the day on which a copy of the terms of the trust is mailed or personally delivered to you in response to your request during that 120 day period."

Consequences of Failure to Deliver the Notice

A trustee who does not make a good faith effort to comply with the statute can be held liable for damages, including attorney fees and costs, caused by the failure to give notice.

CHAPTER 10 – REVOCABLE OR LIVING TRUSTS – WHEN COURT MAY BE APPROPRIATE

Inter vivos trust assets not subject to probate: Property held in an inter vivos trust is not part of the grantor's probate estate, unless the trust estate reverts back to the grantor's estate on his or her death. The property is not subject to probate administration even if the decedent-grantor was a life beneficiary of the trust or retained the unexercised power to revoke the trust.

ELECTIVE JURISDICTION OF PROBATE COURT:

Contest of Trust

However, this is not to say the trust is immune from contest. The grantor's establishment and maintenance of an inter vivos trust may be challenged on grounds similar to those urged for the invalidity of any donative transfer (e.g., lack of capacity, undue influence, fraud, menace, etc.).

"Pour Over Will" Provisions

On the other hand, if decedent's will provides for a pour-over of probatable assets into an inter vivos trust, probate proceedings will be necessary to prove the will and establish the court's jurisdiction over those assets. Until then, the pour-over cannot be effected.

A valid devise under California law may be made by will to the trustee of a trust (including a funded or unfunded life insurance trust) established or to be established by the testator or the testator and/or some other person. The trust must be identified in the testator's will and its terms set forth in a written instrument (other than a will) executed before or concurrently with the testator's will, or in the valid last will of a person who predeceased the testator.

Such devises are not invalid because the trust is amendable and/or revocable, or because the trust was amended after the will's execution or testator's death. However, unless otherwise provided in the will, the devise lapses if the trust is revoked or terminated before the testator dies.

'Pour-over' devises are not deemed to be held under the testator's testamentary trust unless the testator's will provides otherwise. Instead, they become part of the trust to which they are given. Further, the devised property must be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments made before or after the testator's death (regardless of whether said amendments were made before or after execution of the testator's will).

A formal probate administration will have to be initiated even if the pour-over is of community,

quasi-community or separate property passing in trust for the benefit of the surviving spouse.

CLEARING TITLE TO TRUST ASSETS ON TRUSTOR'S DEATH

The fact that probate proceedings will not be required for trust assets does not necessarily ease the administration burden. The successor trustee will need to clear title to property held in decedent's name as trustee (or co-trustee). Attorney advice probably will be needed for the preparation and filing of death tax returns, collection of insurance and qualified plan proceeds, income tax planning and similar matters.

Federal tax liens on property held in a revocable trust attach automatically on the trustor's death. Until such liens are cleared, the trust property may not be marketable. Hence, steps will have to be taken to obtain appropriate releases of tax liability. (There is no comparable state tax obstacle. The Legislature abolished the lien for California death taxes effective for all decedents dying on or after June 8, 1982.

In clearing title to trust property, it also may be necessary to file a petition to establish fact of death; or, alternatively, if real property is involved, to record an affidavit of death; or to file a petition to determine identity of heirs or ascertain trust beneficiaries.

PROBATE COURT SUPERVISION OF INTER VIVOS TRUSTS

Although inter vivos trust property is administered outside probate (unless the decedent trustor provided otherwise), the probate court may still become involved:

The probate court has exclusive jurisdiction over proceedings concerning the 'internal affairs' of trusts. It also has concurrent jurisdiction with the superior court's civil division over actions and proceedings (i) by and against trust creditors and debtors, and (ii) involving trustees and third persons.

In all proceedings involving trusts commenced before it, the probate court is a court of 'general jurisdiction' with 'all the powers of the superior court.'

Exclusive jurisdiction over trust's 'internal affairs':

Except where the trust instrument expressly or by 'necessary implication' withholds authority to proceed (a rare event), the trustee or any trust beneficiary may petition the probate court regarding a variety of matters affecting the trust's 'internal affairs.' As to these proceedings, the probate court's jurisdiction is exclusive (i.e., not concurrent with the court's civil side).

The Code sets forth the following nonexclusive list of 'internal affair' proceedings over which the probate court has jurisdiction:

- a) Determining questions of construction of a trust instrument
- b) Determining the existence or nonexistence of any immunity, power, privilege, duty or right
- c) Determining a trust provision's validity
- d) Ascertaining beneficiaries and determining to whom trust property should pass
- e) Settling accounts and passing upon acts of the trustee
- f) Instructing the trustee
- g) Compelling the trustee to report on the trust or account to the beneficiary (if the trustee failed to

AFTER DEATH ACTIONS

submit a report or account within 60 days after the beneficiary made a written request therefor and no report or account was made within six months preceding the request) (In the case of a revocable trust, the trustee need only account for the period during which the trust is not revocable)

- h) Granting the trustee powers
- i) Fixing, allowing or reviewing the reasonableness of the trustee's compensation
- j) Appointing or removing the trustee
- k) Accepting the trustee's resignation
- l) Compelling redress by any available remedy for breach of the trust
- m) Approving or directing modification or termination of the trust (
- n) Approving or directing the combination or division of trusts
- o) Amending or conforming the trust to qualify the decedent's estate for the federal estate tax charitable deduction
- p) Authorizing or directing transfer of a trust or trust property to or from another jurisdiction
- q) Directing transfer of a testamentary trust subject to continuing court jurisdiction from one county to another
- r) Approving removal of a testamentary trust from continuing court jurisdiction
- s) Reforming or excusing compliance with the governing instrument of a charitable trust, private foundation or split interest trust
- t) Determining the trust's liability for the deceased settlor's debts (although this procedure does not confer standing to bring an action concerning the trust's internal affairs on persons whose only claims to decedent's assets are as creditors)
- u) Determining Ca Probate § 15687 'dual compensation' issues and the reasonableness of compensation for legal services requested thereunder

Procedural matters

The trustee or any trust beneficiary may file a Ca Probate Sec. 17201 petition. The petition must be verified and state the jurisdictional facts and grounds for relief.

A copy of the petition must be mailed to any trustee or beneficiary who has served and filed a notice of appearance or requested a copy and given an address to which the copy may be mailed within five days after service of the notice of appearance or receipt of the request.

Unlike probate administration (which normally requires 15 days' minimum notice), the required minimum notice for all Ca Probate Sec. 17200 proceedings is 30 days.

- a) The following persons or entities must receive notice of the petition:
- b) All trustees;
- c) All beneficiaries (except where notice to certain individuals in specified circumstances is excused under the rules relating to revocable trusts); and
- d) The Attorney General, provided the petition relates to a charitable trust subject to the Attorney

General's jurisdiction and notice is not waived.

e) As in probate proceedings generally, trust beneficiaries generally may file a request for special notice

Hearing

The court may make any orders and take any other action necessary or proper to dispose of the matters presented by the petition, including appointment of a temporary trustee to administer the trust in whole or in part.

Moreover, the court may dismiss the petition 'if it appears that the proceeding is not reasonably necessary for the protection of the interests of the trustee or beneficiary.'

Sometimes, a court proceeding is necessary to identify heirs to whom particular property passes. In the trust context, the need typically arises upon the death of the last beneficiary of an intervening interest, leaving the trust property to pass to (or be held in trust for) relatives of the trustor named by class gift

The following proceedings are available to establish record proof of the identities of successors in interest:

1. If a probate is pending, the issue may be addressed in a proceeding to determine distribution rights
2. If there is no pending probate, a quiet title action may be appropriate;
3. In a trust situation, the § 17200 et seq. procedure, above, is available; or
4. A Ca Probate § 248 petition to determine identity of heirs may be filed

When dealing with assets in trust, filing a Sec. 17200 petition with the probate court may be far more expedient than filing an independent, potentially time-consuming and cumbersome, quiet title action. Among other things, in ruling on matters relating to the 'internal affairs' of a trust, the court may be asked to determine 'questions of construction' or to ascertain beneficiaries and determine to whom property shall pass or be delivered upon final or partial termination of the trust, to the extent the determination is not made by the trust instrument.

Ca Probate Secs. 248-249 codify a separate statutory procedure for determining heirs' identities. This procedure is particularly appropriate (and far simpler) where the only other available option for determining the identity of a person entitled to property is a quiet title action (e.g., legal life estates followed by remainders).

When title to real or personal property vests (other than by the laws of succession) on the 'heirs, heirs of the body, issue or children' of the decedent with no other description or means of identifying said individuals, any interested person may file a verified petition to determine the identity of heirs in the superior court of the county where the property or any part is located.

CHAPTER 11 – ESTATE TAXES

In this chapter we will give very brief, cursory review of the estate tax issues faced in the administration of a trust estate by a successor trustee. It is especially important in this area, which is extremely complex, that you seek professional guidance.

FILING REQUIREMENTS

Estates subject to federal estate tax:

FEDERAL ESTATE TAX

The United States government levies an estate tax based on the decedent's right to transmit property at death. The estate tax is normally paid by the trust, but may be allocated and charged to the beneficiaries of the estate under certain circumstances. A return must be filed for the estate of a decedent if the estate has a "gross value" of in excess of the amounts indicated in below.

The Estate Tax is a tax on your right to transfer property at your death. It consists of an accounting of everything you own or have certain interests in at the date of death. The fair market value of these items is used, not necessarily what you paid for them or what their values were when you acquired them. The total of all of these items is your "Gross Estate." The includible property may consist of cash and securities, real estate, insurance, trusts, annuities, business interests and other assets.

Once you have accounted for the Gross Estate, certain deductions (and in special circumstances, reductions to value) are allowed in arriving at your "Taxable Estate." These deductions may include mortgages and other debts, estate administration expenses, property that passes to surviving spouses and qualified charities. The value of some operating business interests or farms may be reduced for estates that qualify.

After the net amount is computed, the value of lifetime taxable gifts (beginning with gifts made in 1977) is added to this number and the tax is computed. The tax is then reduced by the available unified credit.

Most relatively simple estates (cash, publicly traded securities, small amounts of other easily valued assets, and no special deductions or elections, or jointly held property) do not require the filing of an estate tax return. A filing is required for estates with combined gross assets and prior taxable gifts exceeding \$1,500,000 in 2004 - 2005; \$2,000,000 in 2006 - 2008; \$3,500,000 for decedents dying in 2009; and \$5,000,000 or more for decedent's dying in 2010 and 2011 (note: there are special rules for decedents dying in 2010); \$5,120,000 in 2012 and \$5,250,000 in 2013.

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"Gross value" includes the assets in the probate estate (listed on the inventory) and may also include certain assets that are not distributed by the decedent's will, such as life insurance proceeds, jointly-owned property, and assets previously transferred by the decedent in trust or otherwise. The federal estate tax is based upon the value of the assets included in the estate for tax purposes as of the date of death or, at the estate's option, as of the date six months after the date of death. The latter date is called the "alternate valuation date." The federal rule for calculating the value of an estate's assets on the alternate valuation date has exceptions, however. If the alternate valuation date is elected and any asset is sold or distributed during the first six months following the date of death, the estate's assets are valued as follows: All assets not sold or distributed are valued as of the alternate valuation date, but any assets sold or distributed within the first six months are valued as of the date of sale or distribution. Therefore, if alternate valuation is elected, the sale or distribution of estate assets can affect the federal estate tax due.

Because of the opportunity of electing the alternate valuation date, the administration of the trust may continue for at least one year. The federal estate tax return is due and the estate tax must be paid nine months after the date of death.

Certain United States Treasury Bonds may be redeemed at par in satisfaction of the estate tax, even if the market value is less than par. If the trust holds any of these eligible bonds, they should not be sold until the federal estate taxes have been finally determined by audit and paid.

→ We strongly urge you to seek professional guidance with regard to all tax matters.

California no longer imposes an inheritance tax. However, there is still a California estate tax, which is equal to the amount of the state death tax credit allowable with respect to property situated in California that is included on the federal estate tax return. The California estate tax return is due and the estate tax must be paid nine months after the date of death.

If the estate is not large enough to require a federal estate tax return, no California estate tax will be due either, and no California estate tax return will be required.

This includes estates in which there is a living trust.

These rules apply regardless of the fact that, due to deductions (e.g., the marital deduction), the taxable estate is zero and no federal estate tax is due; i.e., the estate's gross value figure is determinative of whether or not a Federal Estate Tax Return must be filed.

Due date:

The Return is due, and the tax must be paid, nine months after the date of death.

Coordination With Income Tax Planning and Returns:

As will be seen, the preparation and filing of the Federal Estate Tax Return inevitably involve consideration of related income tax elections and other income tax issues. Therefore, successor trustees who have delegated preparation of the decedent's and estate's income tax returns to, for example, an accountant, must nevertheless maintain communication among all of the professionals involved to ensure that the estate and income tax liabilities of the estate and its beneficiaries are minimized.

ASSETS INCLUDED IN GROSS ESTATE:

The includible interests are summarized briefly below.

The decedent's gross estate for federal estate tax purposes may include many assets excluded from the decedent's 'probate estate'--e.g., assets held in joint tenancy or in revocable trusts, qualified plan benefits, and life insurance proceeds. Therefore, you must carefully analyze all property owned by the decedent or in which the decedent may have had an interest, whether or not such property is subject to probate administration.

'Gross estate' defined:

A decedent's 'gross estate' includes the value of 'all property, real or personal, tangible or intangible, wherever situated.'

The gross estate includes 'the value of all property to the extent of the interest therein of the decedent at the time of his death.'

- (1) Since each spouse has an equal, coexisting one-half interest in community property, only the deceased spouse's community property interest is included in the deceased spouse's gross estate. On the other hand, for federal estate tax purposes, quasi-community property owned by the deceased spouse constitutes his or her separate property, all of which is included in his or her gross estate. (Under California law, on decedent's death the surviving spouse's expectant interest in such property vests outright in the surviving spouse and qualifies for the federal estate tax marital deduction.)
- (2) Generally, the gross estate includes the value of an 'annuity or other payment' receivable by any transferee under or pursuant to a contract by reason of the beneficiary's having survived the decedent (e.g., retirement benefits, survivorship annuities and lump-sum death benefits). The amount includible in the decedent's gross estate is an amount which bears the same ratio to the entire value of the beneficiary's annuity or other payment as the decedent's contribution to the purchase price of the contract bears to its total purchase price.
- (3) Payments from tax qualified employee benefit plans and from individual retirement accounts, annuities and bonds

Joint interests

There is a rebuttable presumption that the value of property held jointly by decedent and one or more other persons is includible in its entirety in the deceased joint owner's estate. The surviving joint tenant has the burden of proving the nature and extent of his or her contributions to the purchase of the property so as to avoid inclusion of that interest in the deceased joint tenant's estate.

Where property has been acquired by a decedent and any other joint owner or owners by gift, devise, bequest or inheritance, the decedent's fractional share of the property is included in his or her gross estate.

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With respect to jointly-owned property of decedents dying after 1981, if the property interest is owned by the decedent and his or her spouse as tenants by the entirety or as joint tenants with right of survivorship, and the decedent and his or her spouse are the only joint tenants, only one-half of the value of the jointly-owned interest will be included in the decedent's estate irrespective of which decedent furnished the original consideration for purchase of the property.

If property nominally held by husband and wife in joint tenancy in California has been purchased with community funds, the surviving tenant will be deemed to have carried his or her burden of proving equal contribution; therefore, only one-half of the property will be includible in the deceased tenant's estate. (However, different income tax ramifications may follow with respect to such property.)

Property subject to a general power of appointment (created after October 21, 1942) held by a decedent or with respect to which the decedent has exercised or released a general power of appointment is includible in the gross estate.

DEDUCTIONS ALLOWABLE IN COMPUTING TAXABLE ESTATE:

After the assets and other ownership interests comprising decedent's gross estate have been determined, valued and totaled, the estate representative is entitled to take certain deductions in calculating the 'taxable estate.'

Expenses of administration, indebtedness and taxes:

26 USCA Sec. 2053(a) permits the deduction from the gross estate of amounts paid for:

- (1) funeral expenses,
- (2) administration expenses,
- (3) claims against the estate, and
- (4) unpaid mortgages on or any indebtedness with respect to property where the full value of the decedent's interest therein is included in the value of the gross estate, provided that the amounts in question are 'allowable by the laws of the jurisdiction' where the estate is being administered.
- (5) Funeral expenses, if they constitute a legal obligation of the estate, are fully deductible to the extent 'allowable' under the applicable state law. (There is no statutory requirement that the expenses be 'reasonable'.)

Other expenses of administration which are 'actually and necessarily incurred' in administration of the estate are deductible. However, the personal expenses of heirs and legatees are not deductible.

Claims against estate: 26 USCA Sec. 2053(a)(3) permits an estate tax deduction for claims against the decedent's estate provided such claims are 'allowable and enforceable obligations of the decedent under the laws of the state where the estate is being administered.'

Debts: The personal obligations of the decedent, if allowed by the court and paid by the representative, are deductible. Of course, 'intra-family debts' are very closely scrutinized.

Contingent claims: Contingent and uncertain obligations (such as personal guarantees, personal injury claims, etc.) are deductible subject to proof as to the reasonableness of the projected liability and

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its amount. If, at death, it appears likely that the estate will not be required to pay anything on account of such claims, there is no deduction.

A claim against the estate based on a 'promise or agreement' may be deducted only to the extent the claim was contracted for in good faith and for an 'adequate and full consideration in money or money's worth.'

Medical expenses paid within one year of death may be claimed either for estate tax purposes or for income tax purposes, but not both

All types of taxes (other than death taxes) due at the date of death are deductible for estate tax purposes.

Post-death property taxes which are a lien on decedent's property: Also, real and personal property taxes are deductible, even though not due at death, if such taxes constitute a lien on the property owned by the decedent.

Mortgages and deeds of trust: 26 USCA Sec. 2053(a)(4) permits a deduction for unpaid mortgages or other indebtedness with respect to property where the value of the decedent's interest in the property, undiminished by such indebtedness, is included in the gross estate.

Casualty and theft losses incurred during the estate administration are deductible for estate tax purposes. The loss is measured by the difference between the fair market value of the affected asset immediately before and immediately after the casualty; and the maximum amount of the loss is the value of the property on the applicable valuation date (date of death or alternate valuation date). Again, such losses may not be deducted on both the estate's income tax return and estate tax return

The charitable deduction: 26 USCA Sec. 2055 permits the deduction of all bequests, legacies, devises and other qualified transfers to qualified charitable organizations described in 26 USCA Sec. 2055(a)(1),(2),(3) and (4).

Outright gifts: Outright gifts to qualified charities are fully deductible in accordance with their terms. Limitation on amount deductible: The charitable deduction is limited to the amount actually available for charitable uses. Therefore, if the federal estate tax or other death taxes are payable from property otherwise to be set aside for the charitable bequests, legacies or devises, those amounts must be subtracted from such bequests to determine the amount of the charitable deduction. [See 'Interrelated Computations for Estate and Gift Taxes,' IRS Pub. 904; also see Estate of Horne v. Comm'r (1988) 91 TC 100; Estate of Brunetti v. Comm'r, TCM 1988-517 (effect of state law apportionment statute on calculation of deduction)]

THE MARITAL DEDUCTION

Unlimited marital deduction:

Federal tax law now permits an unlimited deduction with respect to any and all property passing in a qualified form from one spouse to another, regardless of whether the property is separate, quasi-community or community.

Prerequisites for deductibility:

To qualify for the marital deduction, estate property must meet all of the following requirements:

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1. Property must pass at death or have passed during the decedent's lifetime to the decedent's surviving spouse.
2. The property interests so passing must be includible in the decedent's gross estate
3. The decedent must have been a United States citizen or resident. And the surviving spouse must be a citizen of the United States (U.S. residence without citizenship does not suffice).
4. The interest passing to the surviving spouse must be 'deductible'--i.e., it may not be a 'terminable interest.

CREDITS AGAINST TAX:

After the decedent's taxable estate has been determined (by subtracting allowable deductions from the gross estate), a tentative tax must be calculated with reference to the applicable tables.

Valuation:

The valuation of assets includible in a decedent's gross estate is critical to the determination of the estate tax. It is strongly suggested that you seek professional assistance in this regard. (Again, what follows is a broad overview.)

General rule of valuation requires valuation of the decedent's gross estate at the values prevailing 'at the time of his death,' subject to an election by the executor to value all of the estate's assets at their values as of a date six months after the date of the decedent's death .

Not surprisingly, the Regulations define 'value' to mean 'fair market value' as of the applicable valuation date. 'Fair market value' in turn is defined to mean 'the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.'

Generally, post death events (or post-alternate valuation date events) are not taken into account in determining an asset's value on the applicable valuation date unless those events were reasonably foreseeable on that date. Evidence of prices at which estate assets actually sold at a time reasonably close to the valuation date may be admissible on the issue of estate tax value.

Planning issues:

The valuation of estate assets cannot be approached in a vacuum. The asset values determined by the representative for reporting on the Estate Tax Return (subject to audit) will affect the estate and its beneficiaries in areas other than the mere calculation of the estate tax payable. Those areas include:

1. Income tax basis: 26 USCA § 1014 provides that the basis for income tax purposes of any asset received by a beneficiary from a decedent's estate is the value, as finally determined, for estate tax purposes. Thus, an asset's value will affect the capital gain or loss realized by the beneficiary of that asset upon its later sale. (Note that in the case of depreciable assets, higher basis may confer greater income tax benefits.)
2. Special qualification rules: To qualify for favorable treatment under certain sections of the 26 USCA (namely, §§ 303, 6166 and 2032A), the qualifying property must constitute a certain minimum percentage of the adjusted gross estate (35% in the case of 26 USCA §§ 303 and 6166,

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50% in the case of 26 USCA § 2032A). Thus, the values given to all assets may ultimately affect the estate's qualification under one or more of these sections.

3. Both under valuations and overvaluations may subject the estate to tax penalties.

Even if the gross value of the estate's assets appears to be below the \$600,000 filing threshold, the representative may nevertheless decide to file an Estate Tax Return, reporting the assets' values and thus establishing their values both for income tax and estate tax purposes.

Interrelationship with marital deduction:

In an estate whose gross values exceed the exemption equivalent but in which the marital deduction will reduce the estate taxes payable to zero, valuation will nevertheless play a key role in determining the size of the marital gift and, thus, the value of the surviving spouse's estate ultimately subject to tax upon the spouse's death. The lower the values determined, the less estate tax likely to be paid upon the death of the surviving spouse.

Use of appraisers:

In any estate which includes assets that are difficult to value, consider employing one or more appraisers qualified to appraise the assets in question. Not only will this approach make adjustments on audit less likely, but the representative (and his or her counsel) will dramatically reduce potential exposure to accuracy-related penalties

(Note that the appraiser's reasonable fees and expenses will be deductible for estate tax or for income tax purposes.

THE ALTERNATE VALUATION DATE:

26 USCA Sec. 2032 permits the executor to elect to have the estate's assets valued as of the date six months after the decedent's death except for those assets 'distributed, sold, exchanged, or otherwise disposed of' within six months after the decedent's death (and which are valued as of the date of such disposition). Assets affected by 'mere lapse of time' are valued at their date of death values.

With respect to decedents dying after July 18, 1984, the election is not available unless it results in both a reduction in value of the gross estate AND a reduction in the estate tax otherwise payable.

The purpose of this rule is to preclude election of the alternate valuation date to achieve higher asset values for income tax basis purposes in estates where the assets have appreciated in value since the date of death but, due to the use of the exemption equivalent and/or the unlimited marital deduction, no estate tax is payable in any event.

Timeliness of election; irrevocability:

Once made, the alternate valuation date election is irrevocable. However, the election may now be made even if the estate tax return is not timely filed, provided the election is made on a first return filed no more than 27 months after the date of death.

PREPARATION AND FILING OF ESTATE TAX RETURN

This section discusses the preparation and filing of the United States Estate (and Generation Skipping Transfer) Tax Return (IRS Form 706) for those estates large enough to require the filing of a Return. Generally, refer to the IRS Instructions accompanying the 706.

Deadline for Filing and Payment

The Estate Tax Return must be filed, and the tax shown due thereon must be paid, no later than nine months after the date of the decedent's death, subject to extensions for filing and/or payment, which must be requested in a timely manner (below).

Extensions of time

Extensions of time to file the 706 may be obtained for reasonable cause. Generally, 'reasonable cause' is established by a showing that it is 'impossible or impractical to file a reasonably complete return' on or before the due date.

Automatic one-year extensions also are available for making elections under 26 USCA Sec. 2032A (special use valuation) and Sec. 2701 (special valuation rules for certain business interest transfers).

An extension (to file and/or pay) is requested on IRS Form 4768, 'Application for Extension of Time to File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Taxes.'

IRS approval of an extension of time to file the 706 does not extend the time for payment of the tax. An extension of time to pay must be separately granted (although both extensions may be requested on the same form and it is generally good practice to request both extensions even if paying an estimated tax at the time of filing the request).

FILING THE ESTATE TAX RETURN

Recall that the Estate Tax Return must be filed, and the tax shown due thereon paid, no later than nine months after the decedent's date of death.

26 USCA Sec. 6651(a)(1) imposes a nondeductible penalty for failure to file the 706 on time; the penalty is equal to 5% of the estate tax due for each month that the tax is not paid (up to a maximum of 25% of the tax).

The penalty may be avoided if the representative's failure to file the 706 is due to 'reasonable cause' and not 'willful neglect.'

However, the estate representative's duty to file the 706 on time is non-delegable; therefore, the representative's reliance on a competent attorney to meet the deadline does not constitute 'reasonable cause' as a matter of law.

26 USCA Sec. 6651 imposes an addition to the estate tax equal to 0.5% of the amount of tax shown on the 706 which is unpaid for each month (or fraction) that payment is delinquent. In addition, interest at the applicable statutory rate accrues on the unpaid tax.

AFTER DEATH ACTIONS

PAYMENT OF THE ESTATE TAX

Again, recall that the estate tax is due and payable nine months after the date of decedent's death. Even if an extension of time for filing of the 706 is to be obtained, an estimated tax payment must be made on or before the due date to avoid the possible assessment of penalties.

ESTIMATING ESTATE TAXES

Note: This calculation does not take into account lifetime gifts, gift taxes, the credit for tax on prior transfers, and certain other matters which may affect estate tax liability.

→ Caution: These values and calculations are estimates made for the purpose of determining approximate cash need. They are based on preliminary information which may be incomplete or subject to change. Those estimates should not be construed as a final determination of tax liability.

ASSETS	Value at Death	Alternate Value
Real Estate		
Stocks & Bonds		
Mortgages, Notes & Cash		
Insurance on Decedent's Life		
Jointly Owned Property		
Other Miscellaneous Property		
Transfers During Decedent's Life		
Powers of Appointment		
Annuities		
Total Gross Estate		
DEDUCTIONS		
Expenses of Administration		
Debts of Decedent		

AFTER DEATH ACTIONS

Mortgages and Liens on Decedent's Property		
Net Losses During Administration		
Bequests & Gifts to Surviving Spouse		
Charitable Gifts & Bequests		
Total Deductions		
CALCULATIONS		
Taxable Estate (Gross Estate Minus Deductions)		
Generation-skipping tax estimate (if applicable)		
Tentative Tax (See IRC Sec. 2001(c))		
Credit for State Death Tax (subtract)		
(Calif. pick-up tax amount)		
Unified credit (subtract)		
Estimated Net Estate Tax		

CHAPTER 12 – POSTMORTEM PLANNING AND FIDUCIARY INCOME TAX CONSIDERATIONS

The time immediately after a decedent's death, as well as the entire period of trust administration, afford special opportunities for tax and asset planning that may result in substantial savings to the estate and its beneficiaries. Of course, it may be possible to plan for estate tax avoidance up to the last moment of life. But many additional and perhaps less obvious planning opportunities arise from the fact that the decedent, the surviving spouse, the other estate beneficiaries, and the estate itself—as well as any trusts that may be involved—are all independent (and usually interdependent) income tax payers subject to special rules. Most of these rules are set forth in Subchapter §§ 641-692 of the Internal Revenue Code, dealing with the income taxation of 'estates, trusts, beneficiaries and decedents.' (The income taxation of estates and trusts is ordinarily called 'fiduciary income taxation,' because the estate representative and the trustee, respectively, are responsible for filing income tax returns for these entities.)

The above-mentioned planning opportunities, along with certain estate tax elections, impose additional and sometimes burdensome responsibilities on estate representatives and their attorneys. Unlike most procedures, many of these opportunities require early vigilance; without timely action, they may be permanently lost.

→ Caveat: The law of fiduciary income taxation is technical and complex. This Chapter presents only a very brief review of some of the important considerations. You are strongly urged to see professional guidance.

PRELIMINARY AFTER-DEATH CHECKLIST ANALYSIS:

Immediately after a decedent's death, you should make an analysis of the estate plan. The following checklists are suggestive of the necessary analyses:

First, these factors should be considered:

- a) What is decedent's separate property and what is community property (and/or quasi-community property)?
- b) What is the amount of anticipated income? From what sources? Any tax exempt property? Any creditors' claims?
- c) How long until a preliminary distribution can be applied for? How long until final distribution?

AFTER DEATH ACTIONS

Estimate of death taxes:

In regard to estate tax liabilities:

- a) What is the approximate value of the taxable estate? And from this figure, what are the probable estate taxes?
- b) Will there be any death taxes payable to other states?
- c) Does the estate qualify for deferral of estate taxes

Immediate cash needs of family:

To provide for the surviving dependents during administration:

- a) Are the decedent's survivors able now, and will they continue to be able, to provide for their needs?
- b) What is the family's accustomed standard of living? Who are the dependents?
- c) How much do the dependents need? What are their resources; and how reliable (or stable) are those resources?

Delegation:

Should specialists (experts) be consulted and/or retained? E.g.: Accountants and other tax experts? Corporate agents? Appraisers?

Initial After-Death Tax Procedures:

Unless the estate is so small that it will clearly have no tax liability, the estate representative must promptly complete and file the following forms with the appropriate IRS office:

1. IRS Form SS-4 (Application for Taxpayer Identification Number): As a new independent taxpayer, the estate must have an identification number (known as an 'employer' identification number) for IRS record keeping purposes (unless the estate is so small that it will not be required to file a return). An identification number is obtained for the estate by filing IRS Form SS-4.
2. IRS Form 56 (Notice of Fiduciary Relationship): The estate representative is required to formally notify the IRS that he or she has been appointed as fiduciary and is therefore responsible to file tax returns for the estate. For this purpose, IRS Form 56 should be used.

DECEDENT'S FINAL INCOME TAX RETURNS

General Considerations in Preparing Return:

Generally, the same principles apply to preparation of the decedent's final income tax returns as would have applied to other annual returns filed during his or her lifetime. No new structure is imposed, unlike the structure for taxation of the estate's income.

AFTER DEATH ACTIONS

(For a useful compendium of information relevant to a decedent's final income tax returns, see IRS Publication 559, 'Survivors, Executors, and Administrators'; it may be obtained from any IRS office.)

Estate representative's obligation to file

The estate representative is responsible for filing the decedent's final income tax returns. If there is no representative, the person 'charged with' the decedent's property must file (e.g., decedent's surviving spouse or other successor).

It is ordinarily advisable to file returns for the decedent even if the amount of decedent's reportable income is below the threshold where a return is required. Reason: To start the limitations period running for assessment of income tax; and also to place the IRS on notice of the death so that the Service knows that future individual income tax returns for the now-deceased taxpayer are not required.

The decedent's spouse or other successor should also file any current or prior returns that decedent may have neglected to file, including gift tax returns and overdue estimated tax declarations. Consider, for example, whether a decedent dying early in the year has filed income and gift tax returns which may be due for the preceding year (check for estimated tax records).

Note that individual estimated tax installment payments due after the date of decedent's death are not required. Nor does the estate have to file additional declarations or make estimated payments on its own until the estate's first taxable year ending two or more years after the date of decedent's death.