



TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

ELECTIVE ADMINISTRATION OF DECEDENTS' ESTATES

LEGISLATIVE PROPOSAL (T&E-2013-12)

TO: Office of Governmental Affairs

FROM: Patrick A. Kohlmann, Executive Committee, Trusts and Estates Section

DATE: July 24, 2012

RE: Elective Administration of Decedents' Estates;
A proposal to add new Article 10 to Chapter 4 of Part 2 of Division 7, adding sections 8600 to 8625, and amend sections 10400 to 10592 of Part 6 of Division 7 (the Independent Administration of Estates Act) of the Probate Code.

SECTION ACTION AND CONTACTS:

Date of Approval by Section Executive Committee: May 11, 2012

Approval vote: For: 27 Against: 2 Abstain: 1

Contact:	Section Legislative Co-Chairs:
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SUMMARY OF PROPOSAL

INTRODUCTION

Current law requires the administration of decedents' estates to be supervised by courts unless the decedent planned in advance to avoid it. Widespread use of funded revocable living trusts has grown prevalent in California during the last 20 years precisely to avoid formal (court-supervised) administration.

Formal administration of a decedent's estate is an unnecessary burden when a decedent has created a will expressly naming either a sole adult beneficiary or when a decedent has created what is commonly known as a "pour-over" will. Requiring such estates to be subject to formal administration imposes an unnecessary burden on the courts, and deprives those persons who actually need the benefit of court supervision from prompt access to judicial review. In these limited situations there simply is not a blanket need for such oversight.

This proposal would permit eligible beneficiaries *to choose* between Elective Administration and formal administration in only two narrow circumstances.* The two circumstances are as follows:

- Estates in which the petitioner is an adult individual and is the sole devisee of the decedent's will entitled to distribution.
- Estates in which the petitioner is a trustee of a trust and as such is the sole *residuary* devisee of the decedent's will, and the decedent's will is a pour-over will.

Elective Administration allows eligible Californians a choice. Elective Administration is a simple alternative that will allow property to pass in limited situations at death with as much or as little court supervision as the beneficiary considers necessary. The current system would remain intact and would be utilized for most estates.

This idea is not revolutionary. At present, many states and the Uniform Probate Code allow for informal probate administration. In California, trust estates escape mandatory court supervision, as do nonprobate transfers such as life insurance and retirement beneficiary designations, payable on death accounts, transfer on death securities, joint tenancy property, and estates valued less than \$100,000.

This proposal would not prevent any interested person from seeking the protection of the court at any time during the course of an Elective Administration. If a beneficiary believed that the personal representative was improperly administering the estate, that beneficiary could

* In 2010, the then Board of Governors approved a virtually identical legislative proposal that would have permitted Elective Administration in *five* circumstances. Various discussions followed, but the proposal was never placed as legislation. That proposal has now been narrowed to allow for only two of those five circumstances, as a result of issues raised in connection with the original proposal.

petition the court for redress. The remedy of judicial supervision, therefore, remains available under Elective Administration.

The Executive Committee of the Trusts and Estates Section (TEXCOM) believes that this proposal is narrow enough to only apply in situations where there isn't a compelling reason or need for judicial oversight. TEXCOM would not have proposed Elective Administration if it believed that the proposal would encourage abuses in the administration of decedents' estates. Nevertheless, any risk (which is also present in formal administration) would be far outweighed by the monetary and time savings afforded to this limited class of beneficiaries, and the savings of court time and resources.

DESCRIPTION

Elective Administration would be implemented by a dual addition to the statutory framework. First, the petition for probate would seek authority under Elective Administration. Second, a personal representative administering under Elective Administration would have "Expanded Authority" under the Independent Administration of Estates Act (IAEA). A petition for Elective Administration would parallel a petition for probate in most particulars, but would *not* require publication of notice. Publication of notice is the single most common cause of delay in commencing probates, and rarely adds to the efficiency of the administration.

Expanded Authority under the IAEA would include the current "full authority" permitted by the IAEA and would include additional powers, including the power to distribute assets to beneficiaries without a court order.

Division 7, Part 2, Chapter 4 of the Probate Code would be amended by the addition of Article 10, sections 8600 to 8623; in addition, amendments would be made to sections 10400 to 10592 of Part 6 of Division 7 (the Independent Administration of Estates Act). The proposal would allow a personal representative to administer a probate estate without requiring continuing court supervision after appointment. Eligible decedents' estates should experience less cost and delay in completing the devolution of property to the consenting beneficiaries.

A personal representative would be appointed with Expanded Authority only after a duly noticed hearing pursuant to the requirements of the Probate Code. Notice of the hearing on this petition would be sent to all interested persons. This requirement will ensure that the court order admitting the will to probate or authorizing administration will be final.

Upon appointment, the necessity for continuing court involvement would end. This approach is consistent with the concept that an estate with a single beneficiary should not require the continuing supervision of the court. Nevertheless, any interested person would have the right to petition the court at any time concerning the administration of the estate by the personal representative. In this manner Elective Administration would parallel the procedure currently available to the administration of trusts. Elective administration would impose legal obligations and fiduciary duties on the personal representative.

Elective Administration adopts the approach toward a decedent's creditors comparable to that which applies to revocable trusts. Creditors may assert claims of the decedent against the personal representative for one year, as permitted by Code of Civil Procedure section 366.2. As under current law applicable to all transfers other than court supervised probates, the distributees of the property would be liable for any unpaid debts not barred by a statute of limitations. The benefit to this approach is that it continues the trend toward uniformity in the treatment of creditor's rights against a decedent-debtor's assets.

The personal representative would be permitted to exercise all powers under a grant of Expanded Authority under the IAEA. Expanded Authority would include all powers currently available under IAEA and the trust law. In consequence, the use of the Notice of Proposed Action procedure would be optional, as it is currently for trustees. A personal representative who does not use the Notice of Proposed Action procedure would *not* shorten the statute of limitations that a beneficiary would have to bring an action against the fiduciary arising from the proposed action. This approach has the purpose of protecting the beneficiary's rights for the maximum period of time as provided by existing law.

A report of information regarding the administration of the estate must be provided by the personal representative to the beneficiaries of the estate. The personal representative will be liable to the beneficiaries for distribution of the estate assets. The applicable statute of limitations to assert claims against the personal representative will be four years after appointment. By comparison, the entry of an order of final distribution (after expiration of the appeal period) terminates the limitations period in a court supervised probate. The applicable limitations period for trusts is three years.

No statutory fees would be available to the personal representative or the attorney. Instead, both would be limited to receiving reasonable compensation.

ISSUES AND PURPOSE:

The following paragraphs provide a detailed explanation of the Elective Administration process. When useful, this explanation enumerates the differences between the current court supervised probate administration (formal administration) and the proposed Elective Administration process (Elective Administration).

Commencement of Proceedings

Elective Administration would be limited to only two situations. First, estates in which the individual petitioner is the sole devisee of the decedent's will entitled to distribution. And second, in estates in which the petitioner is the trustee of the revocable living trust that is the sole residuary devisee of the decedent's "pour-over" will, and the total gross value of the non-residuary devises in the will does not exceed the dollar limitation of Section 13100.

Any interested party would be able to commence Elective Administration by filing a petition for probate requesting Expanded Authority to administer the estate. The request made by the petitioning party would differ from a petition for a formal probate in which the request is

that the court exercise jurisdiction over the assets of the estate and, by judgment, order the distribution of the estate to the beneficiaries.

The jurisdictional distinction between a formal administration and Elective Administration is important. In a formal administration, a prerequisite to a request that the probate court exercise jurisdiction over the probate estate is that publication of the notice of death be made in a newspaper. The court will only appoint a personal representative in a formal probate and agree to exercise jurisdiction over the probate estate at the hearing if publication has previously occurred. A result of publication is that persons interested in the estate are informed of the formal administration, and at the hearing the court acquires jurisdiction over the estate and interested persons must appear and make claims.

In Elective Administration, the petitioner will not be requesting that the court exercise jurisdiction over the estate. Similar to a situation in which the decedent's property is subject to a revocable trust, in Elective Administration, the probate court will neither be requested to nor exercise jurisdiction over the estate. Therefore, publication of death is not required. This is consistent with other situations where the probate court does not have jurisdiction over the property of a decedent and hence publication is not required, such as for joint tenancy accounts, insurance or pension proceeds payable to an individual, a resulting trust (and revocable trusts as stated above), and payable on death accounts.

As in a formal administration, however, the petition for Elective Administration would still be required to be heard by the court at a duly noticed hearing. Notice of the time, date and place of the court hearing would be mailed or delivered to all individuals who would be heirs if the decedent had died without a will, devisees, executors, alternate executors, trustees, beneficiaries of a trust, and certain public entities. The notice would inform the recipients that the petitioner is seeking to commence Elective Administration and asking for Expanded Authority under the IAEA, that the recipients can object to the petition, and that they have certain rights they can enforce. The court would have the power to deny the petition for Elective Administration, in which case the estate would proceed as a traditional formal estate administration (court supervised), with the prerequisite that publication occur before the personal representative is appointed and the court obtains jurisdiction over the estate.

At the hearing, if the court grants the petition for Elective Administration, it would issue an order appointing the personal representative with Expanded Powers and admitting the will to probate. Consistent with a formal probate, the court's order would be a final adjudication on the will. As such a final order, it would be appealable and could be vacated only on limited grounds. The court would thereafter issue Letters Testamentary to the personal representative.

After the initial court order of appointment, continuing supervision would become unnecessary, although the court would retain jurisdiction of the personal representative.

In essence, the sole difference between the appointment of a personal representative under formal probate and Elective Administration would be the elimination of the publication requirement.

Notice to Creditors and Creditors' Claims Process

Under Elective Administration, as the court does not retain supervision over the estate, creditors' rights conform to the law currently applicable to the creditors of settlors of a revocable living trust.

In a formal administration, the personal representative must notify the decedent's creditors that administration of the decedent's estate has commenced, thereby alerting the creditors to the need to file their claims against the estate. Two types of notice to creditors are required. The first type of notice is the published notice of hearing of a petition to administer the decedent's estate (publication). The second type of notice is given by the personal representative by mail or personal delivery to all known and reasonably ascertainable creditors of the estate.

In a formal administration, the general rule is that a creditor's claim is barred if it is not filed within four months after the issuance of letters to the personal representative (which occurs following the appointment of a personal representative at a noticed hearing), or if the second type of notice (specific notice) has been provided, within the later of four months after issuance of letters or 60 days after the actual notice is given to the known and reasonably ascertainable creditor.

As a result of giving the notices prescribed above, in addition to its jurisdiction over the estate, the court essentially acquires jurisdiction over the decedent's creditors. In essence, the whole world is called before the court in a formal administration, and the court acquires jurisdiction over all persons, including creditors, for purposes of determining their rights to any portion of the estate, whether or not they appear in the proceeding.

Unlike formal administration, Elective Administration conforms to the law currently applicable to the creditors of deceased settlors of revocable living trusts. In Elective Administration, where the court is not acquiring jurisdiction over the creditors of the estate, creditors must bring an action on a liability of a decedent, whether accrued or not accrued, within one year of the decedent's death pursuant to Code of Civil Procedure section 366.2. The experience of experienced trust and estates practitioners has been that in trust administrations, where neither publication nor actual notice to creditors occurs, creditors nevertheless do assert claims against a trust after the settlor's death, as such trust assets are subject to the claims of creditors by statute. Furthermore, if there is a payment, delivery, or transfer of the deceased settlor's property to a trust beneficiary prior to assertion of a claim, the trust beneficiary is made personally liable by statute for the unsecured claims of the creditors of the deceased settlor's estate, and the creditor may bring a regular civil suit directly against that beneficiary alleging his or her transferee personal liability as provided by statute.

In the case of claims of California public entities, such as the Franchise Tax Board, the Director of Health Services, and the California Victim Compensation and Government Claims Board, Elective Administration follows the law applicable to trusts by providing that such entities are subject to specific notice requirements and claim filing deadlines. These provisions are not optional.

TEXCOM notes that Elective Administration conforms in all aspects to the law applicable to creditors of a deceased settlor's trust estate, and therefore is distinguishable from the law applicable to nonprobate transfers such as joint tenancy, life insurance, and retirement plans, which impair or eliminate creditor's rights. For example, a deceased joint tenant's creditors have no rights in joint tenancy property by operation of law upon the death of a joint tenant. And, transfers of personal property by means of beneficiary designation in a contract, as in matured life insurance policies or retirement plans, are exempt from execution by creditors. As stated above, Elective Administration provides creditors with rights analogous to the creditors under trust law, including the right to assert a claim against a beneficiary on the basis of distributee liability when a transfer of property is made from an estate to a beneficiary.

Elective Administration remains sensitive to the constitutional issues that affect creditor's rights against decedent's estates and trusts, as the proposal does not limit the period for creditors to pursue their claims to less than the one year period set forth in Code of Civil Procedures section 366.2. (*Tulsa Professional Collections Services, Inc. v. Pope* (1988) 485 U.S. 478)

Bond

Under formal administration, in order to protect creditors and beneficiaries, every person appointed as personal representative must post bond. The court will determine the bond amount according to the estimated value of the decedent's personal property, the estate's probable annual gross income, and whether the surety is an admitted surety insurer or a personal surety. If the personal representative is granted Expanded Authority, the bond amount also will include the decedent's interest in real property.

This broad rule, however, is subject to many exceptions and qualifications. No bond is required if the will waives bond, as many attorney-drafted wills do. No bond is required if the personal representative is a trust company. No bond is required if all the beneficiaries waive bond in a writing attached to the petition to appoint a personal representative, unless the will requires bond. The court has discretion to not require bond or to reduce bond if the personal representative deposits cash in an insured account in a California financial institution or personal property with a trust company and subjects the deposit to a condition that the property will not be withdrawn except on court authorization.

Even if a will or all beneficiaries waive bond, the court still may impose bond for good cause, either on an interested party's petition or on its own motion and either before or after the issuance of letters. The costs of bond, of course, are borne by the estate and, ultimately, by the beneficiaries.

Under Elective Administration, no bond is required. Not requiring bond will simplify probate administration and reduce costs to the beneficiaries. In the two limited situations in which Elective Administration applies, either the will beneficiary is the sole devisee, or is a trustee entitled to distribution. If those beneficiaries do not object to Elective Administration it would be expected that they would also waive the requirement of bond, which costs they would otherwise bear.

Under some circumstances, however, it is possible that an interested party may want to require bond for good cause. For example, the sole devisee may reside out-of-state, the amount of the estate may be substantial, and a creditor with a strong claim of a substantial amount may be able to show prejudice if the creditor had to pursue the claim against the beneficiary in another jurisdiction. Or a beneficiary who previously consented to waive bond may regret that decision because of the personal representative's misconduct. Under these unusual circumstances, the interested party may petition the court under Section 8624 concerning the estate's administration under Elective Administration. The court has the discretion to "make any orders and (to) take any action necessary or appropriate to address the matters presented by the petition." The grant of powers under Section 8624 are sufficiently broad to empower the court to require bond.

By eliminating bond in the narrow range of circumstances to which Elective Administration applies and by allowing interested parties access to the court to require bond if necessary to protect their legitimate interests, the proposed bill strikes a fair balance between the goal of efficiently and inexpensively transferring property from a decedent to beneficiaries, and the goal of protecting the legitimate rights of interested parties.

Expanded Authority Under the Independent Administration of Estates Act

Under formal administration, a personal representative may request authority from the court to administer a decedent's estate under IAEA. Administration under IAEA allows the personal representative to take some administrative actions without court approval by providing notice of the proposed action to interested persons. An interested person who receives notice of an action by the personal representative may object to that action in writing. If there is an objection to a proposed action, the personal representative must seek instructions from the court or proceed under court supervision for that action.

Personal representatives may request either "full authority" or "limited authority" under IAEA at the time they are appointed by the court. A personal representative with full or limited authority, after complying with the notice of proposed action provisions, may take certain actions as set forth in Sections 10510 -10538. Notice of a proposed action is not required where the interested person has consented to the action or waived notice. Beneficiaries or other interested persons may petition the court to revoke the authority of the personal representative to administer the estate under IAEA, or may petition the court to revoke full authority and grant limited authority.

Certain actions, enumerated in Section 10501(a), do not allow the personal representative to use the notice of proposed action procedure and require court supervision regardless of whether full or limited authority has been granted. These actions include compensation for the personal representative or the attorney for the personal representative, final distributions of property, the sale or exchange of property to the personal representative or the attorney, and allowing a claim of the personal representative or the attorney.

Elective Administration will add Expanded Authority as a new category to those levels currently available under IAEA. Expanded authority is available only in the limited

circumstances where Elective Administration is granted. In those two situations, expanded authority will allow the personal representative to take all of the actions available to a personal representative with full or limited authority, as well as the actions specified in Section 10501(a), without court supervision, and without providing notice of the proposed action. The personal representative will also have the authority to exercise all of the powers granted to a trustee under Sections 16220-16249 of the Probate Code, without court supervision and without notice. The personal representative with Expanded Authority is not precluded from following the notice of proposed action procedure.

Proposed Section 8620 provides the authorization for expanded authority under Elective Administration. New Section 10404 adds the term “expanded authority” to the IAEA. Sections 10404 – 10406 are renumbered as Sections 10405-10407 without change from the existing language. Section 10450 and Section 10452 are revised to include Expanded Authority in the general IAEA provisions. Section 10454 has been revised to give any interested person the right to petition the court to revoke the Expanded Authority of the personal representative. Sections 10501, 10510, 10530, 10550 and 10580 have been revised to clarify that the actions specified in those sections do not require a notice of proposed action when expanded authority has been granted.

The changes to the notice of proposed action provisions under IAEA are procedurally necessary to utilize Elective Administration as an alternative to formal probate. Expanded Authority confers on the personal representative the ability to handle the administration of certain probates without court involvement.

Inventory and Report

Existing law, commencing with Section 8800, requires the personal representative to file an inventory and appraisal of estate assets with the court. The personal representative can appraise cash and related assets. However, all other assets must be appraised by a probate referee.

Under Elective Administration, a personal representative with Expanded Authority is required to provide an inventory to the beneficiary. The inventory is not required to be filed with the court, nor is the property required to be appraised.

Upon request by a beneficiary, the personal representative with Expanded Authority is required to provide a report of information to each person entitled to distribution in the estate.

Distribution

Under formal administration, a personal representative may not make any preliminary distribution unless it appears that the distribution will not result in loss to creditors or injury to the estate or any interested person. After the time for filing creditor’s claims expires, a personal representative with independent authority may distribute, by a notice of proposed action without a court order, income to the persons entitled to income, tangible personal property with an aggregate fair market value under \$50,000, and pecuniary bequests not to exceed \$10,000 to any

one person. Otherwise, a court order after a noticed hearing is required for any preliminary distribution. At the hearing, the court must find that the distribution will not result in loss to creditors or injury to the estate or any interested person. In addition, if the preliminary distribution occurs before the time for filing creditor's claims, the court must require a bond. Even if the preliminary distribution occurs after the time for filing creditor's claims, the court still has the discretion to require bond.

Under formal administration, a personal representative of a solvent estate cannot petition for final distribution until all debts have been paid or are adequately provided for. The petition for final distribution requires notice to each heir and devisee whose interest in the estate the petition would affect and to anyone who has filed a request for special notice. The rules of court require that any distribution petition must list and describe in detail the property to be distributed and the community or separate character of the property. If the petition seeks to distribute property outright to the surviving spouse, the rules of court also require that the petition include the surviving spouse's written election to administer the decedent's share of community property or, if applicable, the surviving spouse's share of community property.

Distribution under Elective Administration is much simpler. The personal representative under Elective Administration need not give a notice of distribution to the creditors, heirs, devisees, or other person interested in the estate unless that person has filed with the court a request for special notice. When distributing estate assets, the personal representative must provide each person entitled to distribution with a report of information identifying the estate's assets, liabilities, receipts, and disbursements, the personal representative's acts, and the particulars relating to the estate's administration. A beneficiary who receives the distribution will be liable for the decedent's unsatisfied debts to the extent of the distribution.

A personal representative under Elective Administration has the power to pay a distribution directly to a beneficiary or to another person for the beneficiary, such as a custodian under the California Uniform Transfers to Minors Act. In making a distribution, however, the personal representative is subject to the same fiduciary duties as a trustee.

The simplified rules for Elective Administration make sense for the two cases in which an estate qualifies for Elective Administration. In return for the reduced cost and reduced delay in distributing estates, the estate distributees assume responsibility for the decedent's debts. On the other hand, a creditor who believes that Elective Administration does not adequately protect his claim can petition the court under Section 8624 to administer the estate under formal administration.

Compensation

Formal administration provides for statutory compensation to the personal representative and the attorney based upon a percentage of the gross value of the estate. The compensation is based upon 4% of the first \$100,000, 3% of the next \$100,000, 2% on the next \$800,000 and 1% on the next \$9,000,000. In addition to statutory compensation, the personal representative and the attorney can ask the court for extraordinary compensation. Both statutory and extraordinary compensation can only be paid with a court order.

Under Elective Administration, the personal representative and the attorney do not have a right to statutory compensation. Instead, they are entitled to reasonable compensation for services rendered, as in a trust administration. The attorney's fees for services are to be determined by private agreement between the attorney and the client. No prior court approval is required for the payment of fees. This change has the possibility of benefitting beneficiaries by reducing costs of administration, particularly in situations where the majority of the estate is concentrated in real property.

Final Report, Distribution, and Closing

Under formal administration, a personal representative generally must file a final report and account with the court as to: (1) the acts of the personal representative; and (2) the estate's assets, liabilities, income, expenses, receipts, and disbursements. In addition, because payments of personal representative fees or attorneys' fees and most distributions to the beneficiaries occur only with court approval, this final report typically also requests authority to pay the fees of the personal representative and the personal representative's attorney and to distribute the remaining assets. Upon entry of an order by the court, the personal representative pays the fees and costs, distributes the assets pursuant to the court order, and receives receipts of the distributions from the estate beneficiaries. After filing those receipts with the court, the personal representative may petition the court to be discharged.

In the two limited situations eligible for Elective Administration, when distributing assets the personal representative must report to the beneficiaries about (1) the acts of the personal representative and (2) the estate's assets, liabilities, income, expenses, receipts, and disbursements. Pursuant to the beneficiaries' election, the personal representative is not required to petition the court for approval of that report. Under Elective Administration the personal representative may distribute estate assets and pay fees and expenses without requiring prior court order. Elective Administration eliminates the need for a personal representative to request court approval prior to making these payments or distributions. However, because there is no court approval of the distributions or actions of the personal representative, the personal representative is not discharged.

A formal administration limits the time that a beneficiary has to object to a report to less than one month. A discharge will prevent any future claims against the personal representative. In contrast, Elective Administration affords the beneficiaries as much as one year from receipt of the report upon distribution to challenge the personal representative's actions. This extended time period affords greater protection to the beneficiaries than under current law.

Under Elective Administration the beneficiaries remain fully informed because the personal representative must provide an inventory to the beneficiaries and report to the beneficiaries when distributing assets. The beneficiaries also retain the right to petition the court for relief from the personal representative's actions. Many jurisdictions in the United States have probate processes that are less court-supervised than Elective Administration, and attorneys in other states do not report significant problems with those processes.

Statute of Limitations

Under formal administration, the personal representative remains liable for actions or omissions until after the court has entered a final order approving the report of those activities. Under current law, the court's discharge of the personal representative relieves the personal representative from all future all liability.

Elective Administration eliminates the duty to report to the court and therefore the personal representative cannot be discharged. Instead, the personal representative remains liable until the later of: (1) four years from the granting of Elective Administration; or (2) one year after the beneficiary discovered, or reasonably should have discovered, the circumstances giving rise to the beneficiary's claim.

By eliminating the reporting requirement and discharge procedure that exists in formal administration, Elective Administration leaves the personal representatives at risk for potentially longer periods of time. Thus, Elective Administration provides substantial protections for the beneficiaries from potential abuse, while maintaining its objectives of independence and flexibility.

HISTORY:

There have not been any similar bills introduced.

IMPACT ON PENDING LITIGATION:

No pending litigation would be impacted by this legislation if enacted.

LIKELY SUPPORT & OPPOSITION:

Some may oppose this proposed legislation based on a concern that any administration of a decedent's estate other than through a formal probate administration may lead to fraud or fiduciary abuse, or based on the premise that allowing Elective Administration in these two limited situations will lead to a chain of events that will culminate in a broader system of informal probate administration.

TEXCOM does not believe the incidence of fraud and abuse in the administration of decedents' trusts and estates will increase due to the limited changes in the law as a result of this proposal. In each circumstance the decedent will have executed a will. Furthermore, the will itself will have expressly directed the decedent's estate to be distributed solely to one beneficiary, or to "pour over" into a revocable living trust also created by the decedent.

TEXCOM has intentionally limited this proposal to two very narrow circumstances where decedents have executed wills devising their estates to one beneficiary. TEXCOM believes the Legislature could control any risk that this proposal is a first step down a "slippery slope" which will lead to the diminution of formal probate, as statutory changes beyond those contained in this proposal would need to be made before that could happen.

FISCAL IMPACT:

Unknown fiscal impact. Elective Administration would continue to require that petitions for probate be filed with the court, accompanied by the then applicable filing fees. Enactment of Elective Administration may increase the budgetary efficiency of the courts, as there would be fewer files requiring court staff involvement.

GERMANENESS:

This proposal requires the special knowledge, training, experience and technical expertise of the members of TEXCOM because it relates to the resolution of probate and estate matters which are the special purview of the Committee.

DISCLAIMER

This position is only that of the Trusts and Estates Section of the State Bar of California. This position has not been adopted by either the State Bar's Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California.

Membership in the Trusts and Estates Section is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

TEXT OF PROPOSAL:

SECTION 1. Article 10, sections 8600 through 8625 are added to the Probate Code, to read:

ARTICLE 10. ELECTIVE ADMINISTRATION OF DECEDENTS' ESTATES

§8600. Application of Article; Conflict with other provisions of the Probate Code.

Unless the provision or context otherwise requires, the definitions in this article govern the construction of this article. Should there be a conflict with other provisions of the Probate Code, the provisions in this Article shall prevail.

§8601. Petitioner.

The term "Petitioner" means the individual or trustee who is permitted to file a petition to commence Elective Administration proceedings under this article.

§8602. Elective Administration.

The term "Elective Administration" means the administration of a decedent's property pursuant to the provisions of this article and shall include both Elective Appointment and Elective Probate.

§8603. Elective Appointment.

The term "Elective Appointment" means the Elective Administration procedure for the appointment of a personal representative under this article.

§8604. Elective Probate.

The term "Elective Probate" means the Elective Administration procedure for the probate of a decedent's will under this article.

§8605. Qualifying Estates

The term "Qualifying Estate" shall refer to either one of the following situations:

(a) The Petitioner is an individual, is an adult, and is the sole devisee of the decedent's will entitled to distribution.

(b) The Petitioner is a trustee and as such is the sole residuary devisee of the decedent's pour-over will.

(c) For purposes of this section, a pour-over will is a will (1) by which the residue is devised to the trustee of an existing trust of which the decedent was a settlor and could

have revoked before death, and (2) the total gross value of the non-residuary devises in the will does not exceed the dollar limitation of Section 13100.

§8606. Restrictions on Commencement of Elective Administration

Elective Administration of a decedent's Qualifying Estate may be commenced under this article by a Petitioner unless either of the following applies:

(a) A proceeding for the court-supervised administration of the decedent's estate is pending under Chapter 1 (commencing with Section 8000) of Part 2 of this division; or

(b) The decedent's will precludes Elective Probate or Elective Administration under this article.

§8607. Filing of Petition to Commence Elective Administration

At any time after a decedent's death, any interested person may commence proceedings under this article for Elective Administration of the estate of the decedent by filing a petition with the court for an order determining the date and place of the decedent's death and for either of the following:

(a) Elective Probate of the decedent's will.

§8608. Contents of Petition; attachment of will.

(a) The petition shall contain all of the following information:

(1) The date and place of the decedent's death.

(2) The street number, street, and city, state or other address, and the county, of the decedent's residence at the time of death.

(3) The name, age, address, and relation to the decedent of each heir and devisee of the decedent, so far as known to or reasonably ascertainable by the petitioner.

(4) The name of the person for whom appointment as personal representative is petitioned.

(5) The character and estimated value of the property in the estate.

(6) That the petitioner requests Expanded Authority under the Independent Administration of Estates.

(b) That the decedent left a will:

(1) The petitioner shall attach to the petition a photographic copy of the will. In the case of a holographic will or other will of which material provisions are handwritten, the petitioner shall also attach a typed copy of the will.

(2) If the will is in a foreign language, the petitioner shall attach an English language translation. On admission of the will to probate, the court shall certify to a correct translation into English, and the certified translation shall be filed with the will.

(3) The petition shall state whether the person named as executor in the will consents to act or waives the right to appointment.

§8609. Hearing; time.

The hearing on the petition shall be set for a day not less than 15 nor more than 30 days after the petition is filed. At the request of the petitioner made at the time the petition is filed, the hearing on the petition shall be set for a day not less than 30 nor more than 45 days after the petition is filed. The court may not shorten the time for giving the notice of hearing under this section.

§8610. Notice of hearing; contents

The notice of hearing of a petition for elective administration of a decedent's estate shall state substantially as follows:

NOTICE OF PETITION FOR ELECTIVE ADMINISTRATION

ESTATE OF _____, PROCEEDING NO _____

To all heirs, beneficiaries, and persons who may be otherwise interested in the will or estate, or both:

Notice is hereby given that _____ has filed in the Superior Court of California, County of _____, a petition for elective probate of the decedent's will dated _____ and the beneficiary is (check applicable boxes):

An adult individual and is the sole devisee of the decedent's will entitled to distribution.

A trustee and as such is the sole residuary devisee of the decedent's pour-over will. A pour-over will is a will (a) by which the residue is devised to the trustee of an existing trust of which the decedent was the settlor and could have revoked before death, and (b) the total gross value of the non-residuary devises in the will does not exceed the dollar limitation of Section 13100.

The petition is set for hearing in Dept. No _____ at _____ (Address) on _____ (Date of Hearing) at _____ (Time of Hearing).

YOU HAVE THE RIGHT TO:

- (1) Object to the elective probate of the decedent's will, and
- (2) Require that the court supervise the administration of the decedent's estate.

UNLESS OBJECTIONS ARE RECEIVED by the above-referenced court, the court on or after _____ may act to admit the decedent's will to probate:

IF YOU OBJECT to the granting of the petition, you should appear at the hearing and state your objections or file written objections with the court before the hearing. Your appearance may be in person or by your attorney.

Upon appointment, the personal representative may administer the estate with Expanded Authority under the Independent Administration of Estates without court supervision and will have full power to possess, control and manage the assets of the estate, incur and pay costs of administration, fees to the personal representative and attorney and distribute the property of the estate in accordance with the will of the decedent.

As a beneficiary of an estate subject to administration without court supervision, you have important rights which include, but are not limited to, the following:

1.The right to receive a copy of the petition for appointment of the personal representative and a copy of the decedent's will;

2.The right to receive an inventory of estate assets.

3.The right to receive information concerning all receipts and disbursements of estate assets during the administration of the estate;

4.The right to receive information concerning the compensation to be paid to the personal representative or to the attorney for the personal representative; and

5.The right to receive within twelve months after the appointment of the personal representative:

(i) Distribution of the estate assets to which you are entitled as a beneficiary, or

(ii) A status report from the personal representative which explains why the estate cannot be distributed and provides an estimate of the additional time required for distribution.

As a beneficiary, you are entitled to enforce the above rights, either by contacting the personal representative directly or through an attorney of your choice. In addition, if the personal representative fails to comply with any of the above requirements, you may file a petition with the Court to compel compliance.

§8611. Service of notice

At least 15 days before the hearing of a petition for elective administration of a decedent's estate, the petitioner shall serve notice of the hearing by mail or personal delivery on all of the following persons:

(a) Each heir of the decedent, so far as known by or reasonably ascertainable by the petitioner;

(b) Each devisee, executor and alternate executor, named in any will being offered for probate, regardless of whether the devise or appointment is purportedly revoked in a subsequent instrument;

(c) Each trustee of a trust that is a beneficiary of the will being offered for probate and each person to whom income or principal from the trust would be required to be currently distributed or who would be entitled to distribution if the trust were terminated at the time notice is required to be given; and

(d) Each public entity to which notice is required under Section 9202 of this division.

§8612. Request for Special Notice

- (a) At any time after the Petition for Elective Probate is filed under this article, any person interested in the estate, whether as devisee, heir, creditor, beneficiary under a trust, or as otherwise interested, may in person or by attorney, file with the court a written request for special notice.
- (b) The request for special notice shall be so entitled and shall set forth the name of the person and the address to which notices shall be sent.
- (c) Special notice may be requested of one or more of the following matters:
 - (1) Petitions or any other pleadings filed with the court in the administration proceeding.
 - (2) Notice of proposed action provided under Chapter 4 (commencing with Section 10580).
 - (3) Distributions of property to beneficiaries.
- (d) Special notice may be requested of any matter in Subdivision (c) by describing it, or of all the matters in Subdivision (c) by referring generally to “the matters described in Subdivision (c) of Section 8612 of the Probate Code” or by using words of similar meaning.
- (e) A copy of the request shall be personally delivered or mailed to the personal representative or the attorney for the personal representative. If personally delivered, the request is effective when it is delivered. If mailed, the request is effective when it is received.
- (f) When the original of the request is filed with the court, it shall be accompanied by a written admission or proof of service.
- (g) A request for special notice under this chapter may be modified or withdrawn in the same manner as provided for the making of the initial request.

§8613. Hearing; examination and compelling attendance of witnesses; matters to be established.

- (a) At the hearing on the petition, the court may examine and compel any person to attend as a witness concerning any of the following matters:
 - (1) The time, place, and manner of the decedent's death.
 - (2) The place of the decedent's domicile and residence at the time of death.
 - (3) The character and value of the decedent's property.
 - (4) Whether or not the decedent left a will.

(b) The following matters shall be established:

(1) The jurisdictional facts, including:

(A) The date and place of the decedent's death.

(B) That the decedent was domiciled in this state or left property in this state at the time of death.

(2) The existence or nonexistence of the decedent's will.

(3) That notice of the hearing was served as provided in Section 8611 of this article.

§8614. Appearances and responses or objections; interested persons.

An interested person may appear and make a response or objection as provided in Section 1043 to the petition for Elective Administration.

§8615. Establishment of jurisdictional facts; order determining time and place of death and jurisdiction, admitting will to probate, and appointing personal representative; effect of defect of form or error in petition.

(a) If the court finds that the matters referred to in paragraph (1) of subdivision (b) of Section 8613 are established, the court shall make an order determining the time and place of the decedent's death and the jurisdiction of the court. When appropriate and on satisfactory proof, the order shall admit the decedent's will to probate and appoint a personal representative. The date the will is admitted to probate shall be included in the order.

(b) If through defect of form or error the matters referred to in paragraph (1) of subdivision (b) of Section 8613 are incorrectly stated in the petition but actually are established, the court has and retains jurisdiction to correct the defect or error at any time. No such defect or error makes void an order admitting the will to probate or appointing a personal representative or an order made in any subsequent proceeding.

§8616. Inventory.

Except as otherwise required, the personal representative shall provide an inventory of the estate of the decedent to the beneficiaries. No inventory is required to be filed with the court in an Elective Administration proceeding under this article. The personal representative may estimate in good faith the values of assets listed on the Inventory.

§8617. Notice to Creditors.

Except as otherwise required, no notice to creditors is required in an Elective Administration proceeding under this article.

§8618. Claims of a Creditor.

Nothing in this article affects the liability of the probate estate, if any, for the claims of a creditor and the personal representative is not liable for any claim paid in good faith from the probate estate.

§8619. Liability for decedent's debts; limitations; defense, cross complaints, or setoffs.

- (a) Subject to subdivisions (b), (c), and (d), each person who receives the decedent's property under this article is personally liable for the unsatisfied debts of the decedent.
- (b) The personal liability of each person shall not exceed the fair market value at the date of distribution of the property received by that person under this article, less the amount of any liens and encumbrances on the property at that time.
- (c) In any action or proceeding based upon an unsecured debt of the decedent, each person who receives property under this article may assert any defense, cross-complaint, or setoff which would have been available to the decedent if the decedent had not died.
- (d) Nothing in this section permits enforcement of a claim that is barred under Part 4 (commencing with Section 9000) of this division.
- (e) Section 366.2 of the Code of Civil Procedure applies in an action under this section.

§8620. Authority to administer estate under expanded authority under the Independent Administration of Estates Act.

- (a) Subject to the limitations and conditions of this article, a personal representative who has been granted Expanded Authority to administer the estate under the Independent Administration of Estates Act may exercise the powers granted under Articles 1, 2 and 3 of Chapter 3 of Part 6 of this Division 7 without court authorization, instruction, approval or confirmation.
- (b) In addition to the powers exercisable without court supervision granted to the personal representative of expanded authority to administer the estate under Part 6 of this Division 7, the personal representative may exercise the trustee powers, described in §§16220-16249 of Chapter 2 of Part 4, without court authorization, instruction, approval or confirmation. A personal representative who exercises the trustee powers described in §§16220-16249 of Chapter 2 of Part 4 of this Code shall assume the duties of a trustee set out in §§16000-16040 of Chapter 1 of Part 4 of this Code.

§8621. Personal representative responsibility; person entitled to distribution demand and suit to recover; release.

- (a) The personal representative is responsible for distribution of the property in the estate in accordance with the will of the decedent.
- (b) Each person entitled to distribution from the estate may demand, sue for, and recover from the personal representative or any person in possession, property to which that person is entitled.
- (c) The personal representative, when distributing the assets of the estate, shall provide to each person entitled to distribution a report of information identifying the assets, liabilities, receipts, and disbursements of the estate, the acts of the personal representative, and the particulars relating to the administration of the estate.
- (d) The personal representative may obtain a general liability release from the beneficiaries of the estate only after distributing all of the assets of the estate, less a reasonable reserve if necessary, and providing an account of the following items of the estate administration:
 - i. The receipts, disbursements, assets and liabilities of the estate as of the end of the period covered by the account; and
 - ii. The total fees paid or payable to the personal representative and the personal representative's attorney in connection with the administration of the estate.

Notwithstanding the preceding sentence, any beneficiary may waive the requirement of an account from the personal representative.

- (e) If the personal representative has not distributed the property of the estate within twelve months of appointment, the personal representative shall provide a status report which explains why the estate cannot be distributed and provides an estimate of the additional time required for distribution.

§8622. Personal Representative and Attorneys Fees.

The personal representative may receive reasonable fees for services performed in connection with the filing of a petition and other actions performed under this article; prior court approval is not required.

The attorney's fees for services performed in connection with the filing of a petition and other actions performed under this article shall be reasonable and determined by private agreement between the attorney and the client; prior court approval is not required.

§8623. Statute of Limitations.

No action may be commenced against the personal representative or a successor in interest to the personal representative by a beneficiary after the later of the following time periods:

(a) four years after the initial order granting authority to administer the estate under this article; or

(b) one year following the date of discovery by the beneficiary making the claim of the circumstances giving rise to a claim against the personal representative, or the date such circumstances should have been discovered by such beneficiary.

Notwithstanding the preceding sentence, an action to confirm title to the estate's assets in a successor in interest and any claim for expenses of administration may be brought at any time prior to distribution of the estate's assets.

§8624. Petition by Any Interested person.

Any interested person may petition the court concerning the administration of the estate pursuant to Expanded Authority. The court in its discretion may make any orders and take any other action necessary or appropriate to address the matters presented by the petition.

§8625. Removal of Personal Representative.

A personal representative who has been granted Expanded Authority may be removed pursuant to the provisions of Article Six of Chapter Four of Part Two of Division Seven (sections 8500 et seq.). Upon such removal the court shall determine whether the successor personal representative shall administer the estate with or without Expanded Authority.

SECTION 2. Sections 10404 to 10407 of Part 6 of Division 7 (the Independent Administration of Estates Act) of the California Probate Code are amended to read:

§10404. As used in this part "expanded authority" means authority to administer the estate under this part, and includes all the powers granted under this part.

§10404~~5~~. The personal representative may not be granted authority to administer the estate under this part if the decedent's will provides that the estate shall not be administered under this part.

§10405~~6~~. A special administrator may be granted authority to administer the estate under this part if the special administrator is appointed with, or has been granted, the powers of a general personal representative.

§104067. (a) Subject to subdivision (b), this part applies in any case where authority to administer the estate is granted under this part or where independent administration authority was granted under prior law.

(b) If the personal representative was granted independent administration authority prior to July 1, 1988, the personal representative may use that existing authority on and after July 1, 1988, to borrow money on a loan secured by an encumbrance upon real property, whether or not that existing authority includes the authority to sell real property.

SECTION 3. Sections 10450, 10452, and 10454 of Part 6 of Division 7 (the Independent Administration of Estates Act) of the California Probate Code are amended to read:

§10450. (a) To obtain authority to administer the estate under this part, the personal representative shall petition the court for that authority either in the petition for appointment of the personal representative or in a separate petition filed in the estate proceedings.

(b) The petition may request ~~either~~ any of the following:

(1) Expanded authority to administer the estate under this part.

~~(2)~~ Full authority to administer the estate under this part.

~~(3)~~ Limited authority to administer the estate under this part.

§10452. Unless an interested person objects as provided in Section 1043 to the granting of authority to administer the estate under this part and the court determines that the objecting party has shown good cause why the authority to administer the estate under this part should not be granted, the court shall grant the requested authority. If the objecting party has shown good cause why only full or limited authority should be granted, the court shall grant only full or only limited authority as requested.

§10454. (a) Any interested person may file a petition requesting that the court make any of the following orders:

(1) An order revoking the authority of the personal representative to continue administration of the estate under this part.

(2) An order revoking the expanded authority of the personal representative to administer the estate under this part and granting the personal representative full or limited authority to administer the estate under this part.

~~(3)~~ An order revoking the full authority of the personal representative to administer the estate under this part and granting the personal representative limited authority to administer the estate under this part.

(b) The petition shall set forth the basis for the requested order.

(c) Notice of the hearing on the petition shall be given as provided in Section 1220. In addition, the personal representative shall be served with a copy of the petition and a notice of the time and place of the hearing at least 15 days prior to the hearing. Service on the personal representative shall be made in the manner provided in Section 415.10 or 415.30 of the Code of Civil Procedure or in such manner as may be authorized by the court.

(d) If the court determines that good cause has been shown, the court shall make an order revoking the authority of the personal representative to continue administration of the estate

under this part. Upon the making of the order, new letters shall be issued as provided in section 8405.

(e) If the personal representative was granted expanded authority and the court determines that good cause has been shown, the court may make an order revoking the expanded authority and granting the personal representative full or limited authority. Upon the making of the order, new letters shall be issued with the notation described in subdivision (c) of Section 8405 that is required where the authority granted is limited authority.

(e-f) If the personal representative was granted full authority and the court determines that good cause has been shown, the court shall make an order revoking the full authority and granting the personal representative limited authority. Upon the making of the order, new letters shall be issued with the notation described in subdivision (c) of Section 8405 that is required where the authority granted is limited authority.

SECTION 4. Section 10501 of Part 6 of Division 7 (the Independent Administration of Estates Act) of the California Probate Code is amended to read:

§10501. (a) Notwithstanding any other provision of this part, whether the personal representative has been granted full authority or limited authority, a personal representative who has obtained authority to administer the estate under this part is required to obtain court supervision, in the manner provided in this code, for any of the following actions:

- (1) Allowance of the personal representative's compensation.
- (2) Allowance of compensation of the attorney for the personal representative.
- (3) Settlement of accounts.
- (4) Subject to Section 10520, preliminary and final distributions and discharge.
- (5) Sale of property of the estate to the personal representative or to the attorney for the personal representative.
- (6) Exchange of property of the estate for property of the personal representative or for property of the attorney for the personal representative.
- (7) Grant of an option to purchase property of the estate to the personal representative or to the attorney for the personal representative.
- (8) Allowance, payment, or compromise of a claim of the personal representative, or the attorney for the personal representative, against the estate.
- (9) Compromise or settlement of a claim, action, or proceeding by the estate against the personal representative or against the attorney for the personal representative.
- (10) Extension, renewal, or modification of the terms of a debt or other obligation of the personal representative, or the attorney for the personal representative, owing to or in favor of the decedent or the estate.

(b) Notwithstanding any other provision of this part, a personal representative who has obtained only limited authority to administer the estate under this part is required to obtain court supervision, in the manner provided in this code, for any of the following actions:

- (1) Sale of real property.
- (2) Exchange of real property.
- (3) Grant of an option to purchase real property.
- (4) Borrowing money with the loan secured by an encumbrance upon real property.

(c) Paragraphs (5) to (10), inclusive, of subdivision (a) do not apply to a transaction between the personal representative as such and the personal representative as an individual where all of the following requirements are satisfied:

(1) Either (A) the personal representative is the sole beneficiary of the estate or (B) all the known heirs or devisees have consented to the transaction.

(2) The period for filing creditor claims has expired.

(3) No request for special notice is on file or all persons who filed a request for special notice have consented to the transaction.

(4) The claim of each creditor who filed a claim has been paid, settled, or withdrawn, or the creditor has consented to the transaction.

(d) When the personal representative has been granted expanded powers under this part, the personal representative shall not be required to obtain court supervision for any of the actions listed under subdivision (a) or (b) of this section.

SECTION 5. Section 10510 of Part 6 of Division 7 (the Independent Administration of Estates Act) of the California Probate Code is amended to read:

§10510. The personal representative with full or limited authority may exercise the powers described in this article only if the requirements of Chapter 4 (commencing with Section 10580) (notice of proposed action procedure) are satisfied.

SECTION 6. Section 10530 of Part 6 of Division 7 (the Independent Administration of Estates Act) of the California Probate Code is amended to read:

§10530. Except to the extent that this article otherwise provides, the personal representative with full or limited authority may exercise the powers described in this article without giving notice of proposed action under Chapter 4 (commencing with Section 10580). A personal representative acting with Expanded Authority may exercise the powers described in this article without giving notice of proposed action under Chapter 4 (commencing with Section 10580).

SECTION 7. Section 10550 of Part 6 of Division 7 (the Independent Administration of Estates Act) of the California Probate Code is amended to read:

§10550. The personal representative may exercise the powers described in this article without giving notice of proposed action under Chapter 4 (commencing with Section 10580). In addition to the powers exercisable under this section, a personal representative with expanded authority may exercise the powers under Article 2 and Article 3 of this part, without giving notice of proposed action.

SECTION 8. Section 10580 of Part 6 of Division 7 (the Independent Administration of Estates Act) of the California Probate Code is amended to read:

§10580. (a) A personal representative who has been granted full or limited authority to administer the estate under this part shall give notice of proposed action as provided in this chapter prior to the taking of the proposed action without court supervision if the provision of Chapter 3 (commencing with Section 10500) giving the personal representative the power to take the action so requires. Nothing in this subdivision authorizes a personal representative to take an action under this part if the personal representative does not have the power to take the action under this part.

(b) A personal representative who has been granted authority to administer the estate under this part may give notice of proposed action as provided in this chapter even if the provision of Chapter 3 (commencing with Section 10500) giving the personal representative the power to take the action permits the personal representative to take the action without giving notice of proposed action. Nothing in this subdivision requires the personal representative to give notice of proposed action where not required under subdivision (a) or authorizes a personal representative to take any action that the personal representative is not otherwise authorized to take.