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CHAPTERS 6 - 12

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CHAPTER 6

MARSHALING AND INVENTORYING ASSETS

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MARSHALING AND INVENTORING ASSETS

Scope Note: After letters are issued, one of the estate representative's initial—and most important—responsibilities is the “marshaling” of all assets and property interests held in decedent's name or *owned* by decedent . . . including decedent's separate property and one-half interest in community and quasi-community property that will be probated, regardless of how title to such property is held. In the estate administration context, “marshaling” is the process of discovering, identifying, and taking possession and control of the decedent's assets so they may be managed and administered in an orderly fashion, used to pay taxes, creditors' claims and expenses of administration, and, ultimately, distributed to the estate beneficiaries.

Once marshaled, all assets subject to probate administration must be reported to the court (inventoried) and appraised. In some cases, appraisal is made by the court-appointed probate referee and in others by the representative personally. Also, in the process of obtaining financial information about the estate, the representative will have to collect all relevant information regarding decedent's liabilities and make arrangements for payment of all proper creditors' claims (*Ch. 8*). This Chapter discusses the asset marshaling, reporting and appraisal procedures.

A. MARSHALING ASSETS

1. [6:1] **Nature of Duty to Marshal Assets:** Subject to limited statutory exceptions, the personal representative “has the right to, and shall take possession or control of, all the property of the decedent to be administered in the decedent's estate and shall collect all debts due to the decedent or the estate.” The “property” for this purpose includes *rents, issues* and *profits* generated from estate property throughout the period of administration and until the estate is distributed. [Prob.C. §9650(a)(1) & (2)]

Further, the representative “shall pay taxes on, and take all steps reasonably necessary for the management, protection, and preservation of, the estate in his or her possession.” [Prob.C. §9650(b)]

Thus, estate administration basically consists of:

- Collecting, managing and *preserving* decedent's assets;
- Paying debts, taxes and expenses of administration; and ultimately

- Distributing the net (remaining) estate to the beneficiaries and/or heirs.

Given these responsibilities, the proceedings necessarily depend on the identification, collection and valuation of decedent's "probate estate." This marshaling of estate assets is one of the personal representative's main functions. [*Lobro v. Watson* (1974) 42 CA3d 180, 189, 116 CR 533, 539]

a. **Maintaining action to recover possession**

(1) [6:1.1] **Generally:** Where necessary, the duty to "take possession or control of" the probate estate *may* require the representative to *bring a third party action to recover possession* of estate property or to determine title thereto. [See Prob.C. §§9820(a) (action or proceeding for benefit of estate), 9654 (action by heirs or devisees, alone or jointly with representative, for possession of property or to quiet title to property), & 9860 et seq. (action to determine title to property held by another)] See *further discussion*, ¶6:3.20-3.24.

(2) [6:1.2] **Duty to recover certain property for benefit of creditors:** On application of a *creditor* of the estate, the representative must commence and prosecute an action to recover decedent's property for the benefit of creditors *if* (a) the representative has insufficient assets to pay creditors *and* (b) decedent during lifetime did any of the following with respect to the property:

- Made a *conveyance* of the property or any interest therein that is *fraudulent* as to creditors under the Uniform Fraudulent Transfer Act (CC §3439 et seq.);
- Made a *gift* of the property "*in view of impending death*" (Prob.C. §§5700-5705, *discussed in Ch. 12*); or
- Directed transfer of a vehicle, undocumented vessel, manufactured home, mobilehome, commercial coach, truck camper, or floating home to a designated beneficiary on the decedent's death pursuant to Health & Saf.C. §18102.2 or Veh.C. §§5910.5, 9916.5 (¶2:29.14 *ff.*) and the property has been transferred as directed. [Prob.C. §9653(a)]

Cross-refer: The nature of the §9653 obligation and the applicable procedure and representative's responsibilities thereunder are fully explained in *Ch. 15*. See ¶15:505 *ff.*

- b. [6:1.3] **Special “discovery” procedures:** The ability to properly marshal and inventory decedent’s assets necessarily presupposes that the personal representative *knows what* those assets are and *where* they are, *and* is able to obtain control of them. When the representative (or other interested person) *suspects* (but is not certain) that *third persons* are *withholding* estate property or *have knowledge* about property of the decedent (including a possible will), special estate administration “discovery” procedures are available to require the third person to answer relevant questions and, if applicable, to

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account for property in his or her possession or control. [Prob.C. §§8870-8874]

(1) [6:1.4] **Citation to answer interrogatories or appear for witness examination:** On the representative's (or interested person's) petition, the court may "cite" the third person to provide written answers to relevant interrogatories *and/or* to appear before the court and be "examined" concerning:

- suspected wrongful taking, concealment or disposition of estate property, *or*
- the third person's knowledge about or possession of a "deed, conveyance, bond, contract, or other writing" that contains evidence of or that might disclose decedent's interest in or claim to property or a lost will of the decedent. [Prob.C. §8870(a); compare *Estate of Gallio* (1995) 33 CA4th 592, 597, 39 CR2d 470, 472-473—state constitutional right of privacy precludes discovery of *living* person's will (stepchildren could not compel discovery of stepmother's will in effort to establish deceased father's purported transmutation of marital property)]

The citation is a *court order*, enforceable by contempt. [Prob.C. §8870(c)]

(a) [6:1.5] **Answering interrogatories:** Pursuant to a citation re interrogatories, the citee must provide written answers signed under penalty of perjury; and must file the answers with the court. [Prob.C. §8871]

(b) [6:1.6] **Conducting witness examination:** At an examination before the court, each side has the right to produce and to examine and cross-examine witnesses. If the examination reveals that the petitioner's allegations are "true" (citee has pertinent information about decedent's assets), the court may order the citee to disclose his or her knowledge of the facts to the personal representative. [Prob.C. §8872(a)]

On the other hand, if it appears from the examination that petitioner's allegations are *not* "true" (citee has not wrongfully taken, concealed or disposed of decedent's property and has no knowledge about the subject property), the citee's "necessary expenses" (including a reasonable attorney's fee) must be charged against the petitioner or allowed out of the estate, as determined by the court. [Prob.C. §8872(b)]

- (2) [6:1.7] **Citation to appear and account:** Another citation procedure is available to facilitate the personal representative's duty to marshal and inventory estate property *known* to be in the possession or control of third persons who will not release or account for it: On the personal representative's petition, the court may order that third person to appear before the court and *account under oath* for the property and his or her actions with respect to the property. (Again, disobedience of the citation is punishable as a contempt of court.) [Prob.C. §8873]
- (3) [6:1.8] **Normal civil discovery also available?** It is unclear whether the above Probate Code "discovery" procedures are intended to be exclusive remedies for obtaining relevant "asset information" from uncooperative third persons.

The Probate Code provides generally that "the rules of practice applicable to civil actions, *including discovery proceedings*, apply to, and constitute the rules of practice" in estate administration proceedings; but the Code also states that general rules of civil practice do *not* apply "to the extent that" the Probate Code "provides applicable rules." [Prob.C. §1000 (amended Stats. 1994, Ch. 806); see *Swaithes v. Super.Ct. (Hunter)* (1989) 212 CA3d 1082, 1088-1089, 261 CR 41, 44-45—general CCP §36 trial preference rule for litigants over age 70 applies to probate will contests because Probate Code is silent on the subject; *Estate of Davis* (1990) 210 CA3d 663, 667-668, 268 CR 384, 387-388—CCP §387 nonparty intervention procedures *not* applicable to probate accounting proceedings because Probate Code provides specific alternative to intervention (appearance by any "interested persons")]

No reported case to date has reached the issue in connection with estate asset "discovery." Hence, the matter remains open to conflicting interpretations:

- For example, it can be argued that the Prob.C. §8770 et seq. procedures for estate asset "discovery" provide a "special rule" intended to *preempt* normal civil discovery.
- On the other hand, it is just as plausible (and, from a policy standpoint, preferable to argue) that "special" Probate Code rules on the same subject render the general CCP provisions inapplicable *only* if those CCP provisions are *inconsistent* with the specific Probate Code rules; that the Probate Code provides a procedure on a given subject matter does *not necessarily* render the more general CCP

provisions *inconsistent* therewith and so, arguably, *both provisions* may be applicable *alternatives* in probate proceedings. [See generally, *Swaithes v. Super.Ct. (Hunter)*, supra, 212 CA3d at 1088-1089, 261 CR at 44—“(t)hose cases which have held provisions of the Code of Civil Procedure inapplicable in probate proceedings involve provisions of the Code of Civil Procedure which are *inconsistent with specific provisions of the Probate Code*” (emphasis added)]

Cross-refer: Prob.C. §§8870-8873 are discussed further in *Ch. 15* in connection with estate litigation; see ¶15:513 ff.

c. **Attorney's role**

- (1) [6:2] **Supervising representative:** At least in the case of lay estate representatives (as opposed to corporate executors or administrators), the attorney ordinarily will have to supervise the asset-marshaling, managing and reporting tasks. (The extent to which counsel will have to play an active role of course varies with the size of the estate and the sophistication of the representative.)

In all cases, counsel must advise the representative of the representative's duty to take possession of and inventory decedent's assets subject to probate. This is usually accomplished by conference *and* through the comprehensive written instructions

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given to the representative when probate proceedings are commenced (§15:8; *Form 5:A*).

- (2) [6:2.1] **Independent duty of investigation:** But counsel's ultimate responsibility to "diligently" handle probate cases (§11:47.21) requires more than a mere "passive" ("consultant") role in marshaling the estate assets. "One of the first duties of an attorney hired to settle an estate is to *ascertain the assets of the estate...*": i.e., to determine what property and property interests decedent owned at death, how title was held, where the assets are located, etc. [*Butler v. State Bar* (1986) 42 C3d 323, 328, 228 CR 499, 502; also see *Alberton v. State Bar* (1987) 43 C3d 638, 238 CR 374]

In some cases, it may be enough to accept the representations of decedent's immediate survivors regarding decedent's property holdings; but in others, particularly where counsel has cause to suspect that those representations are inaccurate, misleading or incomplete (as where counsel drafted decedent's will and thus is in a position to know what assets probably comprise the estate), an *independent* investigation by the lawyer may be required. [See *Butler v. State Bar*, *supra* (probate lawyer suspended from practice for dilatory handling of probate matter, including failure to conduct prompt investigation of estate assets); and §11:47.22-47.23]

- d. [6:3] **Checklist approach recommended:** Many practitioners find it effective to prepare a checklist for the representative's use, in addition to the general letter of instructions. Such a checklist assists the representative in inventorying the probate assets and determining decedent's debts; and it helps to insure an orderly approach to the task.

In addition, it may be helpful to supplement the checklist with a blank copy of the federal estate tax return (assuming the estate is large enough to require the filing of a return). This step will also assist the representative in fashioning an orderly system for collection and description of the estate assets and obligations. (A sample estate tax return is reproduced in Chapter 10, *Form 10:A*.)

- **FORM:** Checklist of Assets Subject to Probate, Liabilities and General Information, see *Form 6:A*.

2. [6:3.1] **Exceptions to Representative's Duty to Take Possession:** The obligation to take possession or control of the estate does not necessarily require the representative to obtain physical custody over all of decedent's assets. The Code allows the representative some measure of discretion