

## MEMORANDUM

TO: [REDACTED], Esq.

FROM: [REDACTED], Esq.  
[REDACTED]

CC: [REDACTED], Esq.  
[REDACTED], Esq.  
[REDACTED]

RE: [REDACTED] Matter

DATE: [REDACTED], 2006

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This Memorandum addresses the three questions posed in your e-mail of [REDACTED], 2006.

### **1. Is Wife Vicariously Liable for Intentional Torts of Her Late Husband?**

Short Answer: As a general rule, the answer is “Yes.” But there may be some procedural maneuvers available to lessen the magnitude of her exposure (see further discussion below).

Provisions concerning spousal liability in decedents’ aftermaths used to be parceled throughout diverse sections of the *Probate Code* and, in some instances, even in the *Family Code*. Former *Probate Code* § 205 used to provide outright that a surviving spouse from a non-first (e.g., second, third, fourth, etc.) marriage was not liable for debts of the deceased spouse *except* for (1) items of general expense, (2) contracts entered into during the second, third, etc. marriage, and (3) torts committed by the deceased spouse during the marriage. Section 205 is no longer in effect; [Legislative History: (b) Former Prob C § 205, as added Stats 1974 ch 11 § 6, amended Stats 1974 ch 752 § 8, Stats 1975 ch 173 § 5, Stats 1976 ch 1079 § 59, Stats 1980 ch 955 § 5, Stats 1982 ch 41 § 1.2, ch 497 § 141.1]. Even if it were, nothing in your e-mail indicates that we are dealing here with anything other than a first spouse. So we need not further dwell on former Section 205.

The broader, all-encompassing applicable statute is now *Probate Code* § 13350, which provides the general rule:

“Except as provided in Sections 11446, 13552, 13553, and 13554, upon the death of a married person, the surviving spouse is personally liable for the debts of the deceased chargeable against the property described in Section 13551 to the extent provided in Section 13551.”

Section 11446 deals with payment of funeral expenses and costs of the decedent's last illness, and thus is not relevant to our discussion. Section 13551 provides a cap on the maximum amount that may be recovered from the surviving spouse, determined by a formula approach. Section 13552 bars certain creditors from proceeding on their debt, but is no help to us given our fact situation because one of the exceptions to the bar provision covers "Creditors who commence judicial proceedings for the enforcement of the debt and serve the surviving spouse with the complaint therein prior to the expiration of the time for filing claims." *Probate Code § 13552(a)*. Since according to your e-mail the litigation was already ongoing *and* the wife was also named as a defendant by the time of the decedent's death, Section 13552(a) does not benefit us.

Section 13554(a) reiterates that "Except as provided in this chapter, any debt described in Section 13550 may be enforced against the surviving spouse in the same manner as it could have been enforced against the deceased spouse if the deceased spouse had not died." Subsection (b) of the section merely establishes that the surviving spouse will have available all defenses that the deceased spouse could have asserted in the litigation.

There is no distinction between debts arising from torts committed by a decedent versus those which arose in some other fashion. But your surviving spouse may be able to limit the extent to which liability can be imposed on her personally. There are two different possible limitations (these are the "procedural maneuvers" mentioned earlier above):

- The formula limitation provided for by *Probate Code § 13551*; or
- The limitation provided for by *Probate Code § 13553*, which provides that "The surviving spouse is not liable under this chapter if all the property described in paragraphs (1) and (2) of subdivision (a) of Section 13502 is administered under this code."

Section 13502 provides an election which may or may not be made by the surviving spouse regarding whether she wishes to submit certain property to administration by the probate court. To the extent she makes this election -- in full, as to all property required by the statute to be covered by it -- her liability that would otherwise exist under *Probate Code § 13550* will be extinguished.

Whether invoking the *Probate Code § 13551* formula limitation or making the *Probate Code § 13502* election will or will not minimize the surviving spouse's liability under our situation is necessarily fact-dependent based on her particular circumstances.

Both Sections 13551 and 13502 are specifically written so that the surviving spouse cannot completely circumvent the general rule of liability prescribed by Section 13550. The two exculpatory sections are written so as to force the surviving spouse to act in a manner such that a portion of the marital assets will be subject to a regular probate proceeding, into which a creditor of the deceased spouse -- any creditor -- may interpose a claim. The obvious question is: Under which available scenario would the surviving spouse's personal exposure and the exposure of her assets best be minimized?

I do not have any financial information regarding either the property of the marriage, the property of the estate, or the size of the potential claims being asserted by the putative creditor, all of which would be necessary to carry out an analysis of the two possible (partially?)-exculpatory avenues. If you would like me to undertake such an analysis, please e-mail me or give me a call at [REDACTED] and we can discuss what information would need to be collected to complete such a task.

Note that, in California, there appears to be a distinction between attempting to hold one spouse liable for the other spouse's tortious or criminal acts *when the tortfeasor/criminal* is still alive, versus when he or she has deceased. In *In re Marriage of Stitt* (1983) 147 Cal.App.3d 579, 587, the court held that the non-involved (still alive) spouse had no liability under virtually any circumstances. But shortly thereafter this broad opinion was criticized in *Marriage of Hirsch* (1989) 211 Cal.App.3d 104, 108-109, wherein the court said:

“Confined to its facts, *Stitt* is correct. An innocent spouse is not required to share in losses incurred by the intentionally tortious or criminal conduct of a spouse where there is no benefit to the community. But the holding in *Stitt* is overbroad because it includes negligent as well as intentional torts. Thus, to the extent *Stitt* holds the negligent conduct of a spouse engaged in an activity benefiting the community provides sufficient justification to characterize a debt as a separate obligation, it is incorrect.”

The *Marriage of Hirsch, supra* court went on to observe that in the case before it, which involved a husband's claim for reimbursement of legal fees incurred in defending himself from lawsuits following the failure of a bank on whose Board of Directors he served, it was somewhat unclear whether his actions were or were not either “tortious” or “criminal.” But most importantly, the court emphasized that the results of his actions -- the receipt of compensation which, during the parties' marriage, inured to the wife's benefit as augmentation to the pool of community property -- benefited the wife as much as it did the husband. (The same argument could easily be applied to our circumstances -- to the extent that the decedent derived any monetary or other benefits by doing the things of which [REDACTED] is accusing him, the surviving spouse presumably shared equally in the fruits of her husband's actions.) Under such circumstances, it was held that the husband was entitled to recover one-half (the community share belonging to the wife) of his legal fees and defense costs, even after the parties had divorced.

But in any case, in *Stitt* and in *Hirsch, supra*, the involved parties were all still alive and merely possessed *civil* claims against each other within the context of marital dissolution proceedings. In our fact situation, it is a third-party *creditor* who is seeking to impose liability on a deceased tortfeasor's surviving spouse. *Probate Code* § 13550 is the statutory mechanism that is controlling here, and it is clear that it imposes liability.

## 2. Is There a Probate Estate in Existence Given That the Decedent Died Intestate?

Short Answer: “Probably.” It depends on what kind of property and assets were owned by the decedent, and the form in which they were held, at the time of his demise. Second Short Answer: “It doesn’t matter anyway.”

The main theory advanced in your e-mail is based on your belief that “...community property *immediately* vests in surviving spouse upon death of other, and that...there is no probate estate.” You also mention the fact that the family home was held in joint tenancy between the two spouses, and that the wife accordingly acceded to ownership of her husband’s interest simultaneously with the moment of his death.

First, I do not believe the argument that “...there is no probate estate...” is tenable. *Probate Code* § 6600 provides as follows:

“§ 6600. ‘Decedent’s estate’ defined; Exclusions in determining estate of the decedent or its value

(a) Subject to subdivision (b), for the purposes of this chapter, ‘decedent’s estate’ means all the decedent’s personal property, wherever located, and all the decedent’s real property located in this state.

(b) For the purposes of this chapter:

(1) Any property or interest or lien thereon which, at the time of the decedent’s death, was held by the decedent as a joint tenant, or in which the decedent had a life or other interest terminable upon the decedent’s death, shall be excluded in determining the estate of the decedent or its value.

(2) A multiple-party account to which the decedent was a party at the time of the decedent’s death shall be excluded in determining the estate of the decedent or its value, whether or not all or a portion of the sums on deposit are community property, to the extent that the sums on deposit belong after the death of the decedent to a surviving party, P.O.D. payee, or beneficiary. As used in this paragraph, the terms ‘multiple-party account,’ ‘party,’ ‘P.O.D. payee,’ and ‘beneficiary’ have the meanings given those terms in Article 2 (commencing with Section 5120) of Chapter 1 of Part 2 of Division 5.” [Emphasis added]

So unless the *only* asset the decedent owned any interest in at the time of his death was his joint tenancy interest in the personal residence, whatever assets were in existence -- any assets at all -- were and are sufficient under *Probate Code* § 6600(a) to create an “estate.” And any estate can,

of course, be sued -- whether or not it is solvent or able to respond in total to the amount of any eventual judgment is irrelevant.

Second, and of even more importance, I believe that this issue loses sight of the real problem. When you get right down to it, our goal here is two-fold: Protect from the greedy [REDACTED] whatever assets the decedent had at the time of his death; and protect the surviving spouse against personal liability. Arguing that there is no probate estate (maybe; maybe not, depending on whether our decedent owned anything other than the joint tenancy interest in the home) accomplishes neither of these goals.

Assume that your argument is correct, and that immediately as of the time of the decedent's intestate death, all community property (and the joint tenancy interest in the home) *immediately*, without further proceedings or administration, became vested in the surviving spouse. That lands us right back into the thicket of *Probate Code* § 13350 (“...upon the death of a married person, the surviving spouse is personally liable for the debts of the deceased...”), and *Probate Code* § 13554(a) (“...any debt described in Section 13550 may be enforced against the surviving spouse in the same manner as it could have been enforced against the deceased spouse if the deceased spouse had not died”). Thus, even if you could succeed in arguing that the wife got everything forthwith upon the decedent's death and that a formal probate proceeding was never required to bring about this vesting, the predictable result would be for [REDACTED] to say, “That's OK; we're already suing her *personally* anyway; if that's her position, I guess everyone agrees that suing her in a representative capacity vis-à-vis the existent, or non-existent, estate (depending on who you believe), would be an idle act anyway.” At worst, he might have to seek leave of the court to amend the existing complaint somewhat, but resisting that effort irrespective of the fact that your trial is imminent, if it results from an issue that your own client raises, would in my estimation be difficult at best.

### 3. [REDACTED]'s “Creditor's Complaint” and His Right to Conduct Discovery re Assets.

Short Answer: “There is no specific rule that precludes financial discovery. It is a balancing act between the materiality and value of the information sought versus the extent of the intrusion on the right to privacy of the party holding the information. It can be argued both ways. On balance, I believe your assessment is correct, and that in this case, the privacy issue outweighs [REDACTED]'s need (What need?) and ability to demonstrate relevancy (What relevancy?) of the type of information he has apparently been seeking.”

The general statute that defines the permissible scope of discovery is *Code of Civil Procedure* § 2017.010, which provides:

“§2017.010. What matters may be subject to discovery

Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or

appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action. Discovery may be obtained of the identity and location of persons having knowledge of any discoverable matter, as well as of the existence, description, nature, custody, condition, and location of any document, tangible thing, or land or other property.”

Note that Section 2017.010 neither rules discovery concerning financial information *out*, but neither does it rule it *in*. The answer in any given situation is, once again, fact-dependent.

Some types of recurring fact situations have given rise to long-established rules that financial information is almost *always* discoverable; marital dissolution proceedings, for one, are probably the most common and well-known. Clearly, to sort out the financial affairs of a marital partnership, to deny financial discovery would defeat the whole purpose of the proceeding. The same is true in, e.g., partnership disputes wherein causes of action for an accounting are involved.

But the true bird’s-eye-view of this area reveals that the rule involves a balancing test: One tenable interest in litigation is the right to discover relevant evidence, or evidence that could reasonably be expected to lead to the discovery of admissible evidence. The countervailing interest is that there is equally clearly a right to privacy in the disclosure of financial information, whether through discovery or some other means. In a case involving an “artificial entity defendant” -- generally agreed to have a lesser degree of a constitutional right to privacy than individuals -- the court in *Ameri-Medical Corp. v. Workers' Compensation Appeals Board* (1996) 42 Cal.App.4th 1260, 1287, discussed the scope of allowable financial discovery when privacy issues are raised concerning an artificial entity defendant:

“[T]he relevance of the subject matter standard must be reasonably applied; in accordance with the liberal policies underlying the discovery procedures, doubts as to relevance should generally be resolved in favor of permitting discovery [citation]. [Citation.] The right to privacy in disclosure of financial information affects the scope of discovery. 'Our right to privacy is guaranteed and protected by state and federal Constitutions.' [Citation.]”

Section 2017.010’s first hurdle for a party seeking discovery -- including financial information discovery -- to overcome is that the subject matter must be *relevant*. It is almost always relevant in domestic relations matters and partnership accountings, as previously noted. It is usually relevant when the plaintiff as a matter of law stands a good chance of recovering punitive damages from the defendant, because the degree of deterrence such an award might have would nearly always be dependent upon the defendant’s financial resources. And it is relevant in strange fact situations like the one involving a “Trial Within a Trial Within a Trial,” as one court has recently put it, in which a plaintiff seeking to recover from his or her own attorney for professional malpractice may need to prove the financial resources of the party formerly being sued to demonstrate how much of any judgment he could and should have

obtained but for the malpractice would ultimately in fact have been recoverable. See, *Hecht, Solberg, Robinson, Goldberg & Bagley v. Superior Court of San Diego County*, D047185 (CA 3/9/2006) (CA, 2006). But in our fact situation, out of every single reported and unreported appellate case in California since January 1, 1925 through this writing, ██████'s term for his "creditor's complaint" has only been used in a grand total of two decisions, neither of which has any bearing on asset discovery. See, *Leoni v. State Bar* (1985) 39 Cal.3d 609; and *Randone v. Appellate Department* (1971) 5 Cal.3d 536. It sounds like he simply made it up.

The holding in *Ameri-Medical Corp.*, *supra*, could obviously have been a lot more helpful had it not been so general. The problem was anticipated long ago, when in *Pacific Tel. & Tel. Co. v. Superior Court of San Diego County* (1970) 2 Cal.3d 161, 172, the Supreme Court noted that by use of the phrase "reasonably calculated to lead to the discovery of admissible evidence," former *Code of Civil Procedure* § 2016(b) gave some guidance in determining what discovery was "relevant to the subject matter," but no precise or universal test of relevancy was furnished by the law, leaving the question to be determined in each case according to the teachings of reason and judicial experience. In another case, it was observed that the trial court's determination of good cause necessarily depends on the facts and issues of the particular case. *Volkswagenwerk Aktiengesellschaft v Superior Court* (1981) 123 Cal.App.3d 840, 850.

*Code of Civil Procedure* § 2017.010 was adopted by Stats. 2004 ch 182 § 23 (AB 3081), and did not become operative until July 1, 2005. It was patterned after several pre-adoption discovery statutes, the court interpretations of which should still be afforded great weight on the question of ██████'s assertedly broad financial information discovery rights.

The clearest -- and seminal -- case dealing specifically with the discovery of a defendant's financial information was and is undoubtedly *Doak v. Superior Court of Los Angeles County* (1968) 257 Cal.App.2d 825. There the Court of Appeals held unambiguously that it was an abuse of the trial court's discretion to order a defendant in an action for damages for wrongful death to answer questions in pretrial discovery proceedings relating to his present financial responsibility and his ability to respond in damages in the event the plaintiff obtained a judgment against him, such order being an unwarranted invasion of defendant's right to privacy and contrary to public policy. 257 Cal.App.2d at 838.

Other holdings which are in accord with *Doak*, *supra*, include:

*Irvington-Moore, Inc. v. Superior Court* (1993), 14 Cal.App.4th 733, 742, in which the court observed that applicants for insurance are often required to divulge personal and financial information in an application, which is then incorporated into the contract of insurance. The court went on to hold that unless an application is made part of the policy, the application would not be separately discoverable.

*Norton v. Superior Court* (1994) 24 Cal.App.4th 1750, 1762, in which the trial court was required to hold an *in camera* inspection of financial information that had been produced prior to determining whether it should be released to the party demanding discovery.

*Catholic Mutual Relief Society v. Superior Court* (2005, Cal.App. 2nd Dist.) 2005 Cal.App. LEXIS 650, 2005 Daily Journal DAR 4688, in which it was held that the trial court had erred in denying a motion to quash deposition subpoenas seeking documents concerning a liability insurer's financial condition, including its reserves and any reinsurance agreements; this information was not discoverable under *Code of Civil Procedure* § 2017(b) or under the general relevancy rules of Section 2017(a).

**4. Conclusion.**

I hope that this examination of the pertinent authorities has been helpful to you. As always, if you should have any questions or comments regarding any of the above, please feel free to contact me at any time by e-mail at [REDACTED] or by telephone at [REDACTED].

[REDACTED]

[REDACTED]  
Research Attorney

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