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# Probate Court Jurisdiction: The Demise of the Privity Rule in Title Disputes

Nancy Sweet

*University of the Pacific; McGeorge School of Law*

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# Probate Court Jurisdiction: The Demise Of The Privity Rule In Title Disputes

*California's law on the issue of a probate court's jurisdiction to try title to estate property when there is an adverse claimant has recently been the object of statutory change. The "privity" rule and its numerous exceptions led to Assembly Bill 1812 of 1972, an attempt to abolish the previous case law distinctions by providing that a probate court has jurisdiction to try title to estate assets whenever there is an adverse claimant to estate property. The much-needed clarification in this area of probate court jurisdiction may be threatened by the fact that a bill which proposes the enactment of the Uniform Probate Code in California was introduced in 1973, a bill which is a potential challenge to the existence of the law as clarified by Assembly Bill 1812. This comment analyzes the prior case law and its exceptions, explains the change in the law by Assembly Bill 1812, and discusses the possible effect of enactment of the Uniform Probate Code on the issue of trying title.*

Probate jurisdiction is in the superior court, and the probate court is merely a department of the superior court exercising jurisdiction over probate matters.<sup>1</sup> These matters are civil in nature, and the superior court sitting in probate has the right to exercise its inherent equitable functions as such.<sup>2</sup> The probate court is sometimes called a court of "limited jurisdiction" because its jurisdiction and powers are wholly *statutory*, but this concept is somewhat misleading.<sup>3</sup> The court is still a constitutional court of general jurisdiction (*i.e.*, a superior court), and "within its proper sphere its judgments and orders are protected by the same presumptions on collateral attack as those

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1. See CAL. CONST. art. VI, §5; CAL. PROB. CODE §300 *et seq.*; 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §159 (7th ed. 1960). The superior court sitting in probate has *exclusive* jurisdiction over certain matters, including for example: probate of wills and lost wills; controversies relating to a representative's administration of an estate; interpretation of wills; appointment of personal representatives; determination of heirship; questions relating to settlement and distribution of estates; setting apart homesteads; making of a family allowance; presentation, allowance, and payment of creditors' claims; and compensation of the personal representative. 1 CONTINUING EDUCATION OF THE BAR, CALIFORNIA DECEDENT ESTATE ADMINISTRATION §5.15 (1971).

2. *Schlyen v. Schlyen*, 43 Cal. 2d 361, 273 P.2d 897 (1954).

3. See generally 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §159 (7th ed. 1960); 1 CONTINUING EDUCATION OF THE BAR, CALIFORNIA DECEDENT ESTATE ADMINISTRATION §5.16 (1971).

which apply to any other orders or judgments of the superior court."<sup>4</sup> The only limitation is that its *scope* is statutory.

New legislation has expanded the powers of the probate court in recent years, and many problems have arisen in defining the extent of probate jurisdiction. During its 1972 regular session, the California Legislature enacted Assembly Bill 1812 which expanded the jurisdiction of the probate court and attempted to resolve one problem presented by conflicting case law—whether or not the probate court has jurisdiction to try title to assets in an estate when the person who claims title to the property is a third person "not in privity to the proceedings."<sup>5</sup> Privity with the estate in this context means sufficient connection with the probate proceeding so that the alleged claim may be said to come *through* probate and not against it.<sup>6</sup>

In addition to the statutory powers, the superior court sitting in probate has such incidental powers as are necessary to enable the court to exercise any of the powers expressly conferred upon it.<sup>7</sup> Prior to Assembly Bill 1812, the extent of the probate court's incidental powers was limited by the privity rule—when third persons claiming adversely to the estate were involved, the probate court had no jurisdiction to try title to the property.<sup>8</sup> Assembly Bill 1812, which amends Sections 851.5, 852, and 853 of the Probate Code, allows the probate court to try title to property when there is an adverse claimant.

The purpose of this comment is to examine existing case law regarding the status of California probate court jurisdiction on the issue of trying title to probate court assets when there is an adverse claimant, to analyze the potential effect of Assembly Bill 1812 on such case law, and to examine proposed changes in this area of law contained in the Uniform Probate Code.

#### PROBATE JURISDICTION AND THE PRIVACY RULE

In the area of trying title to property, California law has followed the general rule that the probate court has no jurisdiction to determine controversies between the representative of the estate and a third person who

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4. *Estate of Kay*, 30 Cal. 2d 215, 181 P.2d 1 (1947); CAL. PROB. CODE §§302, 1220; 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §159 (7th ed. 1960).

5. CAL. STATS. 1972, c. 641, at 1192.

6. Comment, *An Extension of Probate Jurisdiction: Estate of Baglione*, 7 SANTA CLARA LAW. 275 n.4 (1966). For a discussion of cases which involve a "stranger" to the probate proceedings, see generally 1 CONTINUING EDUCATION OF THE BAR, CALIFORNIA DECEDENT ESTATE ADMINISTRATION §5.18 (1971).

7. See generally CAL. CODE CIV. PROC. §§128, 177; 1 CONTINUING EDUCATION OF THE BAR, CALIFORNIA DECEDENT ESTATE ADMINISTRATION §5.17 (1971).

8. *Central Bank v. Superior Court*, 45 Cal. 2d 10, 14, 285 P.2d 906, 908 (1955); *Schlyen v. Schlyen*, 43 Cal. 2d 361, 372, 273 P.2d 897, 903 (1954).

is "not in privity with the proceedings," *i.e.*, a stranger who claims title to property.<sup>9</sup> The rationale is that the probate court handles the settlement of an estate, not the resolution of controversies between the estate and strangers, which is the function of courts of general jurisdiction.<sup>10</sup>

A "stranger" to the probate proceedings may be a child of the decedent or his surviving spouse.<sup>11</sup> A typical situation is where a stranger claims that the decedent made an agreement or contract to leave a will in his favor and instead the decedent left the property to others, either by will or succession. The heirs, devisees, or legatees are entitled to distribution irrespective of the rights of the claimant which could only be asserted in a separate action seeking quasi-specific performance of the agreement;<sup>12</sup> one over whose claims the probate court has no jurisdiction is not bound by that court's adjudications.<sup>13</sup> In these cases (at least prior to Assembly Bill 1812, discussed in detail later), the procedure was to file in the superior court of general jurisdiction a civil action against the administrator.<sup>14</sup> After it was determined in the proper proceeding that decedent was not the owner of the property at the time of his death, the item of property was no longer an "asset" of the estate and the probate court no longer had jurisdiction over it.

#### A. Statutory Exceptions Prior to Assembly Bill 1812

Notwithstanding the general rule that the probate court has no jurisdiction to try title to property,<sup>15</sup> the California Legislature enacted several statutes which authorized a probate court to transfer a decedent's property under limited circumstances. Pursuant to Probate

9. Estate of Hart, 51 Cal. 2d 819, 823, 337 P.2d 73, 76 (1959); Central Bank v. Superior Court, 45 Cal. 2d 10, 14, 285 P.2d 906, 908 (1955); Estate of Dabney, 37 Cal. 2d 672, 676, 234 P.2d 962, 965 (1951); Bauer v. Bauer, 201 Cal. 267, 256 P. 820 (1927).

10. Central Bank v. Superior Court, 45 Cal. 2d 10, 15, 285 P.2d 906, 908-09 (1955); Comment, *An Extension of Probate Jurisdiction*, *supra* note 6, at 275.

11. In Estate of Hart, 51 Cal. 2d 819, 337 P.2d 73 (1959), a wife predeceased her husband, who then died. The husband's administrator claimed property in the wife's estate as either his separate property or as community property vesting in the husband as survivor. The proper procedure was held to be a separate civil action. In Merola v. Superior Court, 125 Cal. App. 2d 1, 269 P.2d 664 (1954), the probate court was held to have no jurisdiction to consider the claim of a widow to joint tenancy property as she was claiming adversely to the estate. See also, Estate of Dalton, 87 Cal. App. 2d 333, 197 P.2d 62 (1948).

12. Estate of King, 199 Cal. 113, 118-19, 248 P. 519, 521 (1926); Estate of Ross, 180 Cal. 643, 648-49, 182 P. 755, 758-59 (1919); Estate of Cropper, 83 Cal. App. 2d 105, 187 P.2d 780 (1947).

13. Estate of Dabney, 37 Cal. 2d 672, 676, 234 P.2d 962, 966 (1951); Texas Co. v. Bank of America Ass'n, 5 Cal. 2d 35, 46, 53 P.2d 127, 133 (1935); 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §164 (7th ed. 1960).

14. See Estate of Hart, 51 Cal. 2d 819, 337 P.2d 73 (1959); 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §164 (7th ed. 1960).

15. CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1965 CODE LEGISLATION 221.

Code Section 850, the court was permitted to authorize transfer of a decedent's property by the personal representative in uncontested cases in which a decedent had previously executed a specifically enforceable contract in writing.<sup>16</sup> However, in the absence of a written contract to convey, if a decedent were to die in possession of or holding title to property that belonged to a third person, the probate court had no jurisdiction to resolve the issue. In such a case, even if there were no factual dispute, a separate quiet title action in the superior court was necessary, thereby causing additional expense and delay.<sup>17</sup> This problem occurred most frequently when the property at issue was in the possession of a deceased bailee or deceased resulting trustee, or was property which decedent held in title for convenience.<sup>18</sup>

Probate Code Section 851.5,<sup>19</sup> proposed to the legislature by the State Bar of California in 1965, was designed to remove this burden of extra expense and delay in certain limited situations. The section authorized the probate court to approve *uncontested* transfers of property held by a decedent but owned by another, even in the absence of a written contract to convey. However, under Section 851.5 only the decedent's personal representative was authorized to file a petition to approve the transfer and was required to mail notice of the petition to all known heirs and devisees. Moreover, the *claimant* was to have executed an affidavit attesting to the truth of the facts set out in the petition of the representative.<sup>20</sup> The court was required to disapprove the petition if it was not satisfied that the conveyance or transfer should be made.<sup>21</sup>

Sections 852 and 853 were amended in 1965 to provide a procedure for a hearing and issuance of a decree ordering the conveyance of the property, as was previously provided in cases where the decedent was bound by a contract to transfer the property.<sup>22</sup> At the same time Probate Code Section 851.5 was enacted, Section 852 was amended to *limit* the probate court's authority to approve petitions. A court could not approve a petition if: (1) objection to it was made; (2)

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16. *Henderson v. Fisher*, 236 Cal. App. 2d 468, 46 Cal. Rptr. 173 (1965) (this remedy is not exclusive); *Estate of Roche*, 202 Cal. App. 2d 295, 20 Cal. Rptr. 775 (1962) (the section does not apply when the right to specific performance is doubtful).

17. 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §§159, 164 (7th ed. 1960), (Supp. 1969).

18. CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1965 CODE LEGISLATION 221.

19. A.B. 616, CAL. STATS. 1965, c. 1901, §1, at 4409.

20. *Id.*

21. See A.B. 616, CAL. STATS. 1965, c. 1901, §2, at 4410; 1 CONTINUING EDUCATION OF THE BAR, CALIFORNIA DECEDENT ESTATE ADMINISTRATION §5.24 *et seq.* (1971).

22. CAL. STATS. 1965, c. 1901, §§2, 3, at 4410.

a civil action was pending with reference to the matter; or (3) the court determined that the matter should have been decided in a regular civil action. If an interested party objected to a stranger's petition to determine his title, the probate court automatically lost jurisdiction.

Furthermore, the history of hearings on the proposal by the State Bar Committee on Administration of Justice indicated that the intent of Probate Code Section 851.5 was *not* to vest the probate court with jurisdiction to try title.<sup>23</sup> The committee expressed the opinion that the petition by the personal representative (for transfer) should not be filed unless the personal representative was convinced of the merits of the third party's claim;<sup>24</sup> the procedure was not intended as a means to try title in the probate court when there was a dispute or doubt as to facts.

### B. Judicial Exceptions

Case law has engrafted several well-established exceptions upon the general privity rule, in addition to the statutory exceptions provided by Probate Code Sections 850 and 851.5. These exceptions are based upon sufficient connection or privity between the pending probate proceedings and the controversy at issue.<sup>25</sup>

First, sufficient connection to establish privity may arise out of the relationship between the parties to the controversy. Under the first exception the superior court sitting in probate can try the issue of title in a dispute between the estate and its personal representative claiming adversely *in his individual capacity*.<sup>26</sup> This exception is based on the rationale that the determination of such a controversy is incidental to the proper settlement of the estate.<sup>27</sup> All of the parties are in privity to the estate, and it is their distributive rights that are affected by the proceedings in probate. A judgment outside probate proceedings would be binding only on the parties thereto, whereas

23. 38 CAL. S.B.J. 499, 500 (1963); 36 CAL. S.B.J. 422 (1961); STATE BAR OF CALIFORNIA, 1960 CONFERENCE RESOLUTION No. 25.

24. 38 CAL. S.B.J. 499, 500 (1963).

25. *Central Bank v. Superior Court*, 45 Cal. 2d 10, 15, 285 P.2d 906, 909 (1955); Comment, *An Extension of Probate Jurisdiction*, *supra* note 6, at 275.

26. *Schlyen v. Schlyen*, 43 Cal. 2d 361, 372-73, 273 P.2d 897, 902-03 (1954); *Stevens v. Superior Court*, 155 Cal. 148, 150-51, 99 P. 512, 514-15 (1909); *Estate of Pieper*, 224 Cal. App. 2d 670, 681, 37 Cal. Rptr. 46, 54 (1964).

27. *Schlyen v. Schlyen*, 43 Cal. 2d 361, 373, 273 P.2d 897, 903 (1954), wherein the probate court had jurisdiction when children of a deceased brought an action against deceased's widow, who was also executrix under the will of the deceased, for cancellation of deeds which had been executed by deceased to make the widow and children joint tenants of two parcels. The widow claimed under the deeds, and the children alleged fraud and undue influence by the widow. In *Stevens v. Superior Court*, 155 Cal. 148, 150-51, 99 P. 512, 514 (1909), an executor was charged with failure to account for certain personal property which it was alleged belonged to the estate, for which reason it was sought to remove him.

the probate decree is conclusive against all persons interested in the estate.<sup>28</sup> Neither the resignation nor removal of the executor divests the court of jurisdiction over him prior to the settlement of his accounts.<sup>29</sup> However, where the representative claims on behalf of a third person and not in his individual capacity, the general rule governs.<sup>30</sup>

A second exception based on the theory of a sufficient relationship between the parties is that a probate court may determine whether an assignment or other transfer of an interest of an heir, legatee, or devisee to a third party is valid and order distribution accordingly.<sup>31</sup>

Sufficient connection to establish privity may also arise out of the nature of the claim to the property. The probate court has jurisdiction "where the property involved is conceded by both parties to be or to have been acquired by the claimant in the course of probate proceedings."<sup>32</sup> For example, such a situation exists where a distributee has received property of the estate under a decree which is afterwards set aside.<sup>33</sup>

The fourth exception contains a confusing distinction made with respect to the power of the probate court to determine whether or not property is community property. The superior court sitting in probate can determine the claim of a surviving wife to her share of the community property in the estate of her deceased husband and award it to her.<sup>34</sup> The theory is that where the wife survives, community property coming to her is *subject to administration*.<sup>35</sup> The wife's claim to her share of the community property is not that of a stranger, but is rather like the claim of an heir.<sup>36</sup>

However, there is no jurisdiction in the probate court to determine the claim of a surviving husband to community property because his

28. CAL. PROB. CODE §931.

29. *Waterland v. Superior Court*, 15 Cal. 2d 34, 98 P.2d 211 (1940); 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §165 (7th ed. 1960).

30. *Estate of Inghilleri*, 27 Cal. App. 2d 664, 81 P.2d 568 (1938) (executor claimed estate as trustee of a trust created by decedent during his lifetime).

31. Where an agreement embraces both property that is a part of the estate and property which is not a part of the estate, especially community property, the probate court has jurisdiction to decide the validity of the entire agreement. If jurisdiction over the entire controversy is denied delay, confusion, and uncertainty follow. *Estate of Stanley*, 34 Cal. 2d 311, 318-19, 209 P.2d 941, 945 (1949).

32. *Schecter v. Superior Court*, 49 Cal. 2d 3, 8, 314 P.2d 10, 13-14 (1957); *Central Bank v. Superior Court*, 45 Cal. 2d 10, 16-18, 285 P.2d 906, 909-10 (1955) (exception held inapplicable); *Estate of DeBarry*, 43 Cal. App. 2d 715, 725-26, 111 P.2d 728, 736 (1941).

33. Comment, *An Extension of Probate Jurisdiction*, *supra* note 6, at 276.

34. *Estate of Burdick*, 112 Cal. 387, 393-96, 44 P. 734, 735 (1896); *Colden v. Costello*, 50 Cal. App. 2d 363, 369, 122 P.2d 959, 963-64 (1942).

35. See CAL. PROB. CODE §§201, 202, 203.

36. 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §167 (7th ed. 1960).

share of community property vests in him *without administration*.<sup>37</sup> In this respect the husband is considered a stranger to his wife's estate, claiming adversely to it.<sup>38</sup> An argument may be made, especially in view of the proposed twenty-seventh amendment to the United States Constitution (equal rights amendment), that this distinction is artificial and may become unconstitutional if the amendment passes. Thus, arguably, the Probate Code needs to be changed in this area.

A fifth exception to the privity rule, in which there is the greatest conflicting case authority, concerns a probate court's jurisdiction to determine contractual claims that are adverse to an estate. In 1956 the California Supreme Court in *Woods v. Security First National Bank*<sup>39</sup> held that if a surviving spouse, husband or wife, invokes probate court jurisdiction by asserting a substantive right in property or assets as an heir, legatee, or devisee, jurisdiction is not lost if that spouse also presents an adverse contractual claim against the estate. He or she may also obtain a judgment in that court determining any additional claims that he asserts against those in privity with the estate in the same property. Subsequent to the *Woods* decision, and in conflict with it, two cases—*Sieroty v. Silver*<sup>40</sup> and *Smith v. Smith*<sup>41</sup>—held that probate court jurisdiction was lost by the presence of an adverse contractual claim.<sup>42</sup> Thus the answer to the problem of how

37. See 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property* §§77, 78 (7th ed. 1960).

38. Estate of Stone, 170 Cal. App. 2d 533, 339 P.2d 220 (1959); *Wilson v. Superior Court*, 101 Cal. App. 2d 592, 225 P.2d 1002 (1951); Estate of Kurt, 83 Cal. App. 2d 681, 683, 189 P.2d 528, 530 (1948).

39. 46 Cal. 2d 697, 299 P.2d 657 (1956). A wife, prior to marriage, made her will and, as alleged by her husband, entered into an oral agreement that if they were married all of her property would become community property and would become husband's property after the wife's death. The parties were married, but the wife neglected to change her will and did not part with control over her property nor transfer it to her husband. The wife then died. The supreme court held that the husband's claim as intestate heir under his wife's will (by Probate Code Section 70) was sufficient to invoke probate court jurisdiction initially, and that the court could then also litigate the validity of the oral agreement even though the claim was adverse to the wife's estate.

40. 58 Cal. 2d 799, 376 P.2d 563, 26 Cal. Rptr. 635 (1962). In an action between the executors of an estate and decedent's widow to obtain the proceeds of life insurance policies, the court held that the probate court did not have jurisdiction of the widow's claim because her claim was not in privity with the estate. The widow alleged that she and her husband had agreed to make mutual irrevocable wills and that her husband agreed to take out life insurance with his wife as beneficiary. The widow claimed the entire proceeds of the policy as her separate property. The court held that the probate court had no jurisdiction to decide this claim.

41. 220 Cal. App. 2d 30, 33 Cal. Rptr. 559 (1963). In an action for declaratory relief the court held that the probate court in heirship proceedings could not properly receive evidence concerning an alleged oral agreement to devise and bequeath property. The court lacked jurisdiction to determine the rights of the party claiming adversely to the estate. The rights of that party had to be determined in an independent action in equity in which the right to quasi-specific performance could be decided. The decree determining heirship was not *res judicata* of appellant's claims regarding the oral agreement.

42. Comment, *An Extension of Probate Jurisdiction*, *supra* note 6, at 278.



to treat an adverse contractual claim when jurisdiction was invoked initially by another claim remained unclear.

Against this background, the California Supreme Court decided the leading case of *Estate of Baglione*.<sup>43</sup> In that case, a widow sought to establish her right to succeed to real property in her deceased husband's estate by virtue of an alleged oral contract made between the husband and wife during their marriage. The court concluded that once the probate court determined that the wife was entitled to at least a community share of the property, it should have determined any other interests she had in the same property under the alleged oral contract with the deceased.<sup>44</sup>

Relying on *Woods*, the court indicated that a probate court has jurisdiction to determine a stranger's claim to property if such determination is necessary and proper to a complete judgment, but only if the stranger's claim bears a particular relationship to the estate.<sup>45</sup> Thus the court in *Baglione* allowed the probate court to retain jurisdiction over an adverse contractual claim when the spouse asserted other substantive rights to invoke probate jurisdiction.<sup>46</sup>

*Baglione* rationalized this exception to the general privity rule by permitting the probate court to retain jurisdiction in order to prevent multiplicity of suits and conserve the time, energy, and money of all concerned: "a claimant is not required to sever and litigate a multifaceted claim in separate proceedings once all the necessary parties are before the court."<sup>47</sup> Any contrary statements in *Sieroty* and *Smith* were disapproved.<sup>48</sup> If *Baglione* is not limited to its facts alone (alleged claim by surviving spouse to property of a decedent), the ambiguity in this area of probate court jurisdiction may be resolved by case law.<sup>49</sup> The holding in *Baglione* indicated that for the probate court to have jurisdiction the claimant need not necessarily be in privity with the estate.

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43. 65 Cal. 2d 192, 417 P.2d 683, 53 Cal. Rptr. 139 (1966). During their marriage husband and wife bought a parcel of real property with community property earnings and took title as joint tenants. Later the husband severed the joint tenancy during a period of domestic difficulty. The wife alleged that prior to the difficulty she and her husband had made an oral agreement that the survivor would succeed to all property acquired by the parties during the marriage. However, the husband made a will leaving his share of the real property to certain relatives.

44. *Id.* at 195, 417 P.2d at 686, 53 Cal. Rptr. at 143.

45. *Id.* at 196, 417 P.2d at 687, 53 Cal. Rptr. at 143. This relationship involves a situation that when a party invokes the jurisdiction of the probate court by asserting a substantive right in a particular piece of property or in certain assets as an heir, legatee, or devisee, he may also obtain a judgment in that court to determine any additional claims that he asserts against those in privity with the estate in the same property. Comment, *An Extension of Probate Jurisdiction*, *supra* note 6, at 275.

46. 65 Cal. 2d at 197, 417 P.2d at 687, 53 Cal. Rptr. at 143.

47. *Id.* at 197, 417 P.2d at 687, 53 Cal. Rptr. at 143.

48. *Id.*

49. See Comment, *An Extension of Probate Jurisdiction*, *supra* note 6, at 280-81.

In *In re Estate of Casella*<sup>50</sup> a widow alleged that all of her deceased husband's property was community property and that a quitclaim deed from the wife to her husband covering the wife's interest in joint tenancy property was fraudulently obtained. The court stated that it is clear that *Baglione* has changed the rule requiring privity with the estate in order to give the probate court jurisdiction to try claims of a surviving spouse to the property of the decedent. The probate court had jurisdiction to consider decedent's widow's claim to her spouse's joint tenancy property along with her petition to determine heirship (*i.e.*, status of decedent's property), notwithstanding the fact that the widow was claiming adversely to the estate and not in privity with it regarding the joint tenancy property. Certainly, based on *Casella* an argument can be made that *Baglione* may still be limited to its factual situation—*i.e.*, alleged contract or transfer between spouses.

However, it is important to note that *Baglione* will not solve the problem of a surviving husband who wishes to assert community property rights in his wife's estate without initially invoking probate court jurisdiction in some other manner since he is considered an adverse claimant to her estate. Nor would *Baglione* provide a solution to a case which did not involve breach of a contract by a spouse to leave property by will to the surviving spouse.

Finally, "something akin to an exception to the general rule of privity" was established in *Estate of Hart*.<sup>51</sup> In *Hart* a husband and wife died within a few days of each other, and the administratrix of the wife's estate took possession of assets which allegedly belonged to the husband's estate. The husband's administrator then commenced an action for their recovery. In the interim between the first and second accounts of the administratrix, the administrator of the husband's estate obtained a judgment declaring that he was the owner of almost the entire estate, and to the extent that the administrator was the judgment creditor for his costs of suit, he would have a right to appear and object as would any other creditor whose claim originally arose against the estate during the administration. The court held that after a stranger has established his title to an estate property by a judgment in a civil action, he is a person interested in the estate and entitled to appear in the probate proceedings and object to a repre-

50. 256 Cal. App. 2d 312, 64 Cal. Rptr. 259 (1967). The wife contended that she was entitled (as surviving joint tenant) to the property which was in joint tenancy with her husband. The devisees of the husband contended that the court had no jurisdiction to do anything other than to determine whether the properties of the estate were either community or separate property and had no right to vest the joint tenancy property in wife as surviving joint tenant.

51. 51 Cal. 2d 819, 337 P.2d 73 (1959). See generally, 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §164 (7th ed. 1960).

sentative's account.<sup>52</sup>

### ASSEMBLY BILL 1812

The large number of case law exceptions engrafted upon the general privity rule may have been an indication to the California Legislature and the State Bar of California that the general rule against allowing probate court jurisdiction in adverse claims to an estate was unsatisfactory and unworkable. As previously stated, prior to Assembly Bill 1812 a judgment made in probate bound all parties interested in an estate, but one who claimed adversely to the estate property was not bound by the probate court order of distribution, unless he qualified under one of the above-mentioned exceptions and could litigate the claim in the probate proceeding itself. His remedy was a civil suit in the superior court's general jurisdiction. However, the judgment in such a case bound only those actually joined therein. In *Estate of McLennan*<sup>53</sup> the court held that since the probate court's jurisdiction is concurrent with the superior court's jurisdiction in the exercise of its general equitable powers, the probate court may stay its proceeding pending the trial of the separate civil quiet title action.

An argument certainly can be made, as it was in several of the cases establishing the exceptions to the general rule, that this procedure creates multiplicity of suits and unnecessary time expended by all parties. One author has suggested, "When a party is before the probate court for one reason, any controversy related to the estate should also be litigated."<sup>54</sup> Perhaps this logic could be extended to include *all cases* in which the claimant could not get before the probate court for any reason but had an interest related to the estate which was adverse to it.

During the 1972 legislative session, the California Legislature specifically addressed itself to the above problem. The State Bar of California recommended amendments to Sections 851.5, 852, and 853 of the Probate Code.<sup>55</sup> These amendments authorized probate courts to determine title to real or personal property, title or possession of which is held by another, to which the decedent or a third party had a disputed claim.

As a result of these recommendations, Section 851.5 of the Probate Code has been amended to provide a procedure whereby "*any claimant*, not merely the personal representative, may file a petition to have

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52. 51 Cal. 2d at 825, 337 P.2d at 77.

53. 29 Cal. App. 2d 666, 85 P.2d 499 (1938).

54. Comment, *An Extension of Probate Jurisdiction*, *supra* note 6, at 281.

55. STATE BAR OF CALIFORNIA, 1967 CONFERENCE RESOLUTION No. 65.

his interest litigated in the probate proceedings, *even where the party asserting the interest is claiming adversely to the estate and not in privity with it.*"<sup>56</sup> The petitioner shall cause notice of the hearing to be published, pursuant to Section 6063 of the Government Code, in a newspaper published in the county where the proceedings are pending. If there is no such newspaper, notice shall be posted at three of the most public places in the county. A copy of the petition is to be mailed to all known heirs, devisees, legatees, and the personal representative of the estate, whether requested or not. Section 851.5 further states that any interested person may request, and the court shall grant, a continuance for a reasonable period of time to file a response.

Even under the new procedure set forth by Section 851.5, jurisdiction over controversies to try title is not exclusive in the probate court even when there is an adverse claimant. Prior to Assembly Bill 1812, as discussed above, the probate court did not have *exclusive* jurisdiction over controversies to try title.<sup>57</sup> This particular jurisdictional problem arose in 1954 in *Schlyen v. Schlyen*,<sup>58</sup> where the court held that the probate court did not have exclusive jurisdiction to litigate the validity of certain joint tenancy deeds claimed by decedent's children to have been fraudulently obtained from decedent by his widow, who claimed title to the property in her individual capacity and also acted as personal representative of the estate. Where the superior court has jurisdiction over the particular class of cases in question, it is the well-established rule that if no objection is timely made on the ground of another action pending or other appropriate grounds, the objection is deemed to be waived.<sup>59</sup> In this case, *i.e.*, trying title when the parties are in privity with the estate, the jurisdiction of the probate court is concurrent with that of the superior court exercising its general jurisdiction; if no timely objection is made, and the matter is being litigated in the general superior court, this type of jurisdiction (like venue matters) may be waived in favor of the superior court exercising its general jurisdiction.

This jurisdictional problem is explicitly referred to by language included in the amended Section 851.5. New language in that section states that any person having or claiming title to or an interest in the property which is the subject of the petition may, at or prior to the hearing, object to the hearing of the petition if such petition is filed in a court

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56. A.B. 1812, CAL. STATS. 1972, c. 641, at 1192 (emphasis added).

57. 1 CONTINUING EDUCATION OF THE BAR, CALIFORNIA DECEDENT ESTATE ADMINISTRATION §5.15 (1971).

58. 43 Cal. 2d 361, 273 P.2d 897 (1954).

59. *Schlyen v. Schlyen*, 43 Cal. 2d 361, 377, 273 P.2d 897, 905 (1954).

which is not the proper court under any other provision of law for the trial of a civil action seeking the same relief. If such objection is established, the court shall not grant relief. If any civil action is pending on the subject matter of such petition, the court shall abate the petition until the civil action is concluded.

Prior to Assembly Bill 1812, if a person died in County A and had a claim to property in County B, the interested parties who resided in County B could be compelled to come to County A to litigate the matter. This problem was resolved by Assembly Bill 1812 which permits one to object to venue, thereby causing the probate court to lose authority to continue the litigation. Under Assembly Bill 1812 the matter could now be litigated in County B by a court sitting in its general jurisdiction.

Sections 852 and 853 were also amended by Assembly Bill 1812 to conform the procedural details to the amended procedure of Section 851.5. Section 852 provides a procedure whereby a probate court, if satisfied that a conveyance, transfer, or other order should be made, shall make an order authorizing and directing the executor, administrator, or other claimant to execute same to the party entitled thereto, or grant appropriate relief; however, the probate court shall not grant a petition under Section 851.5 if it determines that the matter should be resolved by civil action in the superior court. Section 853 specifies that the order is prima facie evidence of the authority of the person to make the conveyance. After entry of the order, the person entitled thereunder has the right to possession of the property and to hold same according to the terms of the order as if it had already been conveyed. The conveyance or order shall pass title to the property as fully as if the decedent had executed it while living.

Assembly Bill 1812 amends Section 1240 of the Probate Code to provide that an appeal from an order adjudicating the merits of any claim under Sections 851.5, 852, and 853 may be made.

#### *A. Opposition to Assembly Bill 1812*

The State Bar Committee on Administration of Justice was opposed to the statutory changes created by Assembly Bill 1812 on the theory that *Baglione* and *Casella* had already expanded the jurisdiction of the probate court as far as could reasonably be expected.<sup>60</sup> The Committee reasoned that the matter of title or possession to estate property in contested matters should not be treated any differently than controversies involving persons in being simply because of involvement in

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60. STATE BAR OF CALIFORNIA, 1967 CONFERENCE RESOLUTION No. 65.

probate proceedings, *i.e.*, they should be left as civil actions and tried by courts having experience and an established routine to try title.<sup>61</sup> In this connection, it was expressed that to provide such summary procedure in the probate court would unduly prolong probate procedures, would deprive litigants of a jury trial and other rights inherent in contested litigation, and would unduly inflate attorneys' extraordinary fees at the expense of the estate beneficiaries who would otherwise not be involved.<sup>62</sup>

### 1. Jury Trial

The Committee on Administration of Justice merely attempted to point out that the right to a jury trial exists in certain proceedings to try title in both probate and civil courts and that such right may not be constitutionally denied if it does exist. Nothing in Sections 851.5, 852, or 853 specifically refers to this problem; however, by utilizing Sections 592 and 738 of the Code of Civil Procedure, it can be argued that this right still exists, and the new probate procedure should not be used to deny the right to a jury trial in cases where the right now exists.

Generally speaking, proceedings concerning probate and the administration of estates are conducted by the *judge* of the probate court.<sup>63</sup> The right to a jury trial is available in proceedings in the probate court in two cases:<sup>64</sup> (1) where expressly provided for by statute, *e.g.*, Probate Code Section 928 permits a jury trial whenever an allowed claim is contested by any person entitled to contest it; and (2) Probate Code Section 1230 applies the rules of civil procedure to the formulation of issues of fact in probate proceedings, including the right to a jury trial on such issues. This section states that when a party is entitled to a trial by jury, a jury is demanded, and the issues are not sufficiently made up by the written pleadings on file, the court on due notice must settle and frame the issues to be tried. If no jury trial is demanded, the court must try the issues joined and sign and file a written decision.

Section 592 of the Code of Civil Procedure, which would control the granting of a jury trial under Probate Code Section 1230, states that in actions for the recovery of specific real or personal property,

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61. STATE BAR OF CALIFORNIA, 1968 CONFERENCE COMMITTEE REPORT *re* 1967 CONFERENCE RESOLUTION No. 65.

62. STATE BAR OF CALIFORNIA, 1967 CONFERENCE RESOLUTION No. 65.

63. 4 WITKIN, CALIFORNIA PROCEDURE, *Trial* §79 (2d ed. 1971).

64. *See e.g.*, *Swift v. Superior Court*, 39 Cal. 2d 358, 361, 247 P.2d 6 (1952) (involves CAL. PROB. CODE §371); 4 WITKIN, CALIFORNIA PROCEDURE, *Trial* §79 (2d ed. 1971).

with or without damages, or for money claimed due upon a contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived or a reference is ordered as provided in the Code of Civil Procedure. If in these cases there are issues both of law and fact, the issue of law must be disposed of first.

Generally, as a matter of right, a party to a civil case is entitled to a jury trial on the issues raised by an action at law, but not regarding issues in equity.<sup>65</sup> However, the question of a jury trial is somewhat unclear concerning actions to quiet title to property. Section 738 of the Code of Civil Procedure states that in quiet title actions the right to a jury trial cannot be taken away in any case where the right is now given. The Committee on Administration of Justice recognized that a simple action to quiet title where *possession* of property is *not* involved is equitable, and there is no right to a jury trial.<sup>66</sup> However, under Probate Code Section 851.5 both questions of title and possession may be involved. If the right to recover possession is at issue, a jury trial is normally available.<sup>67</sup> Where the action is of hybrid character raising both legal and equitable issues, a party is entitled to a jury trial on the severable issues of fact.<sup>68</sup> If a prior resolution of the equitable issues is determinative of the legal issues, a jury trial of the legal issues might be obviated within the discretion of the court.<sup>69</sup> Unwarranted denial or curtailment of the right to a jury trial is not only reversible error, but is also an act in *excess of jurisdiction* subject to restraint by prohibition.<sup>70</sup>

## 2. Inflated Expenses

It was also argued by the Committee on Administration of Justice that the new procedure in probate would unduly inflate attorneys' extraordinary fees at the expense of the estate beneficiaries who would otherwise not be involved. Presently, Probate Code Section 902 al-

65. *Paularena v. Superior Court*, 231 Cal. App. 2d 906, 911, 42 Cal. Rptr. 366, 369 (1965). See also CAL. CONST. art. I, §7.

66. *Dills v. Delira Corp.*, 145 Cal. App. 2d 124, 302 P.2d 397 (1956); *McNeil v. Dow*, 89 Cal. App. 2d 370, 200 P.2d 859 (1949).

67. *Medeiros v. Medeiros*, 177 Cal. App. 2d 69, 72, 1 Cal. Rptr. 696, 698 (1960).

68. *Robinson v. Puls*, 28 Cal. 2d 664, 665, 171 P.2d 430, 431 (1946); *Veale v. Piercy*, 206 Cal. App. 2d 557, 562, 24 Cal. Rptr. 91, 94 (1962); 4 WITKIN, CALIFORNIA PROCEDURE, *Trial* §77 (2d ed. 1971).

69. *Jaffe v. Albertson Co.*, 243 Cal. App. 2d 592, 609, 53 Cal. Rptr. 25, 36 (1966).

70. *People v. One 1941 Chevrolet*, 37 Cal. 2d 283, 300, 231 P.2d 832, 844 (1951); *Redondo Beach v. Kumnick*, 216 Cal. App. 2d 830, 833, 839, 31 Cal. Rptr. 367, 371, 372 (1963); *Mallarino v. Superior Court*, 115 Cal. App. 2d 781, 785, 252 P.2d 993, 995 (1953); *Budde v. Superior Court*, 97 Cal. App. 2d 615, 622, 218 P.2d 103, 107 (1950); 1 WITKIN, CALIFORNIA PROCEDURE, *Jurisdiction* §§198, 270 (2d ed. 1971); CONTINUING EDUCATION OF THE BAR, CIVIL PROCEDURE DURING TRIAL, *Jury Selection* §5.3 *et seq.* (1960).

lows additional compensation to an *executor* or *administrator* for additional functions performed in connection with "contested or litigated claims against the estate," "litigation in regard to the property of the estate," "and such other litigation or special services as may be necessary for the executor or administrator to prosecute, defend or perform." This extra compensation is paid from the funds of the estate.

As far as attorneys' fees are concerned, Probate Code Section 910 authorizes such fees for conducting ordinary probate proceedings at a fixed sum—the same sum as authorized for executors and administrators in Probate Code Section 901. Section 910 also authorizes such extraordinary fees as the court may deem just and reasonable for extraordinary services. The Committee on Administration of Justice argued that by involvement in the new probate procedure in which title can be tried by any claimant, the attorney for the estate would then be entitled to receive extraordinary fees from the estate at the expense of the estate beneficiaries; the facility with which such issue could be brought before the probate court, as per Section 851.5, would cause an increase in such litigation, thus increasing fees.

### 3. Court Delay

Finally, the Committee argued that the procedure established by Section 851.5 may work a hardship on heirs who would otherwise receive distribution much earlier, since all adverse claims may now be litigated within the probate proceedings in addition to the normal probate matters.

#### B. Support of Assembly Bill 1812

The position adopted by the State Bar of California Committee on Probate and Trust Law, which favored amendment of Section 851.5, prevailed over dissenters thereto and resulted in Assembly Bill 1812. Apparently one of the decisive factors in this position was that the case of *Baglione* was unclear and recognized so many exceptions to the general privity rule that ascertainment of the precise limits of probate court jurisdiction had become increasingly difficult.

The rationale for the exceptions, as stated in *Baglione*, is the conservation of time, energy, and money of all concerned, and prevention of a multiplicity of actions. To deny a superior court sitting in probate the power to determine the whole controversy between the parties is pointless. The Committee argued that the procedure established by Section 851.5 will avoid multiple actions and, contrary to the statements of the Committee on Administration of Justice, will expedite disposi-



tions of title matters arising in probate proceedings rather than prolong them.<sup>71</sup> For example, a husband claiming adversely to a deceased wife's estate may have his adverse claim litigated in the probate court without initially invoking probate court jurisdiction in some other manner since pursuant to Section 851.5 that court already has jurisdiction over the controversy.<sup>72</sup>

Furthermore, the Committee argued that the probate court (which is presided over by a superior court judge) is as equally competent to decide title problems as a superior court sitting as the court of original jurisdiction,<sup>73</sup> and that the costs to heirs would *not* be increased but on the contrary should be diminished through disposition by the probate court rather than awaiting disposition on the more crowded general superior court calendars.<sup>74</sup> The shorter length of the trial in probate should result in even lower costs. In addition, it appears that the arguments advanced by the Committee on Administration of Justice concerning increased extraordinary fees for attorneys involved in trying title directly in the probate proceedings can be refuted. Whether in the probate court or the superior court exercising its general jurisdiction, the issue of title will be tried. The personal representative and the estate, through the attorney for the estate or some other attorney, would have to defend or litigate the title question in the regular civil action just as he would in the probate proceedings. Fees would be paid for this service. Thus it could be argued that fees for either procedure—trying title in the probate court or in the normal civil action in the superior court—would be approximately the same. In both cases, it would seem that the attorney would be paid from the funds of the estate for such services.<sup>75</sup> It is difficult to see how the new procedure established by Section 851.5 would increase these attorneys' fees.

Finally, in answer to the argument that a jury trial would be denied to the litigants who would normally have a right to one, the Committee on Probate and Trust Law stated that generally title problems are of such a technical nature that juries are not often invoked, especially in actions to merely quiet title to property.<sup>76</sup> However, again, nothing

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71. Letter from Brent M. Abel, Member of Board of Governors of the State Bar of California and past Chairman of the State Bar Committee on Probate and Trusts, to the *Pacific Law Journal*, Jan. 26, 1973; STATE BAR OF CALIFORNIA, 1967 CONFERENCE RESOLUTION No. 65.

72. See *Woods v. Security First Nat'l Bank*, 46 Cal. 2d 697, 299 P.2d 657 (1956); *In re Kurt's Estate*, 83 Cal. App. 2d 681, 189 P.2d 528 (1948).

73. Abel, *supra* 71.

74. *Id.*

75. CAL. PROB. CODE §§902, 910, 911.

76. Abel, *supra* 71.

in Assembly Bill 1812 expressly denies the right to a jury trial, and in cases where a jury may be demanded, that right seemingly still exists.

The confusing mass of case law exceptions to the general privity rule in California has been simplified into one procedure by Assembly Bill 1812. Under Assembly Bill 1812, any party, whether interested in or adverse to an estate, may have his claim to an estate asset litigated in the probate court. In the future, however, this simplified procedure may be in jeopardy by enactment in California of the Uniform Probate Code.

#### UNIFORM PROBATE CODE

The California Legislature has constantly updated and revised the California Probate Code. As a result, the existing probate procedure is more advanced than that of most other states.<sup>77</sup> The Board of Governors of the State Bar of California has had the Uniform Probate Code under intensive study for over three years since its promulgation by the National Conference of Commissioners on Uniform State Laws in August 1969.<sup>78</sup> In the 1973 Legislative Session a bill was introduced<sup>79</sup> which would repeal the present California Probate Code and replace it with the Uniform Probate Code.<sup>80</sup>

The heart of the Uniform Code is its "flexible administration" provisions, *i.e.*, the option by the personal representative to either seek court supervision or to act without it within the same proceeding.<sup>81</sup> In relation to these provisions, a report prepared by the State Bar of California<sup>82</sup> expressed the opinion that the Uniform Probate Code in California would not be in the best interest of the citizens of this state and would provide an inadequate safeguard of the public's interest:

The citizens of the State of California could profit from a form of independent administration to parallel its present supervised form of administration, but the form of independent administration suggested by the Uniform Probate Code is so devoid of fundamental safeguards that the advantages it offers in the ordinary, competently administered estate are far outweighed by the potential injury to the unwary in the incompetently or dishonestly administered estate.<sup>83</sup>

77. 46 CAL. S.B.J. 290 (1971).

78. STATE BAR OF CALIFORNIA, THE UNIFORM PROBATE CODE: ANALYSIS AND CRITIQUE 1 (Mar. 1973). This report is available at the office of the State Bar of California, 926 "J" Street, Sacramento, Calif., 95814.

79. S.B. 1, 1973 Regular Session, *as introduced*, Jan. 8, 1973.

80. See 8 UNIFORM PROBATE CODE, UNIFORM LAWS ANNOTATED (1972).

81. UNIFORM PROBATE CODE §3-301 *et seq.*, §3-501 *et seq.*, §3-701 *et seq.*

82. STATE BAR OF CALIFORNIA, *supra* note 78.

83. *Id.* at 2.

The State Bar of California recommends that California retain its "in rem" theory of probate. "To abandon it in favor of the personal jurisdiction of the informal procedure of the Uniform Probate Code is to create unnecessary delays and vexatious uncertainty in finally terminating liability."<sup>84</sup> The *Ad Hoc* Committee on The Uniform Probate Code concluded that to provide minimum safeguards, the administration of estates must include initiation of the proceedings by formal steps judicially supervised, and conclusion of the proceedings through final distributions ordered by the Court.<sup>85</sup> One specific reason for its insistence on these safeguards is that a proceeding which commences with requirements of notice to *all* persons having *any possible interest* in the estate is desirable to assure finality within constitutional limitations and to determine title to real and personal property with the certainty necessary to meet due process and related requirements.<sup>86</sup> Presumably this procedure would include notice to persons who may fall into the category of adverse claimants to title of an estate asset.

Just what effect the Uniform Probate Code, as codified by Senate Bill 1, would have on the probate court's jurisdiction to try title with an adverse claimant remains somewhat unclear. First, Section 3-105 of the Uniform Code states that *persons interested* in a decedent's estate may apply to the registrar for determination in the informal proceedings, and may petition the court for orders in formal proceedings within the court's jurisdiction including but not limited to those described in Division 3 of the Code. "Interested person" is defined in Section 1-201(t) as heirs, devisees, children, spouses, creditors, beneficiaries, and *any others having a property right in or claim against* a trust estate or the estate of a decedent, ward, or protected person which might be affected by the proceeding. It is arguable that "an interested person" could include a person with an adverse claim to property of the decedent, thus retaining probate court jurisdiction over such matters as is the case now under Probate Code Section 851.5. This contention is supported by the comment to Section 3-105 of the Uniform Probate Code which states that "the estate court, whatever it is called, should have unlimited power to hear and finally dispose of *all matters relevant to determination of the extent of the decedent's estate* and of the claims against it."

Section 3-105 further provides that the probate court has *exclusive* jurisdiction of formal proceedings to determine how decedent's estates subject to the laws of this state are to be administered, expended,

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84. 46 CAL. S.B.J. 291 (1971).

85. *Id.*

86. *Id.* at 292.

and distributed. It has *concurrent jurisdiction* of any other action or proceeding concerning a succession, or to which an estate, through a personal representative, may be a party, including *actions to determine title to property alleged to belong to the estate*. Construing this provision with the above discussion, and considering that the adverse claimant was not expressly precluded from consideration in the probate court on title matters, the Uniform Probate Code could be interpreted as allowing such litigation of adverse claimants in conformity with the present Section 851.5 of the Probate Code.

On the other hand, it should be noted that the "concurrent jurisdiction" procedure may indicate a retreat from this position, depending on how the courts will apply past case law to the jurisdiction issue. As mentioned above, prior to Assembly Bill 1812, an adverse claimant's remedy was a civil suit in the superior court's general jurisdiction, unless he could bring himself within one of the exceptions to the general privity rule. Since Senate Bill 1 will repeal the present Probate Code, and the Uniform Probate Code contains no section which specifically provides for the problem of an adverse claimant, the courts may be forced to rely on the old privity rule contained within case law and the various exceptions thereto, to litigate these title questions. Thus the disadvantages of that system as expressed by the proponents of Assembly Bill 1812 (*i.e.*, multiplicity of suits, unnecessary time expended by the parties) may resurface in the California law in that area of probate court jurisdiction.

The interpretation according to "pre-Assembly Bill 1812" law may be strengthened by Uniform Probate Code Section 3-106 and comment thereto, which concern the proper notice required to be given to parties involved in litigation in cases when the probate court has *exclusive jurisdiction*. Section 3-106 provides that in proceedings within the *exclusive jurisdiction* of the court where notice is required by this code or by rule, interested persons may be bound by the orders of the court in respect to property in or subject to the laws of this state by notice or in conformity with Section 1-401. Such order is binding as to all who are given notice of the proceeding though less than all interested persons are notified. Section 1-401 explains the procedural requirements for the giving of notice to any person interested in the subject of the hearing of a petition. The significance of Section 3-106 as it would concern an adverse claimant is contained in the comment to Section 3-106. The comment specifically addresses itself to the situation where probate matters are assigned to a branch of a *single court* of general jurisdiction—in that case, a division of

powers of the courts, *i.e.*, general superior court versus probate court, into "exclusive" and "concurrent" may be inappropriate. The comment suggests two different approaches to this situation. One of the suggestions is as follows:

Subject to general rules concerning the proper location of civil litigation and jurisdiction of persons, the court (meaning the probate division) may hear and determine *any other controversy* concerning a succession or to which an estate, through a personal representative, may be a party.

The comment expressly states that in the unusual circumstance where there is only one court of general jurisdiction to which probate matters are assigned, the probate court could then decide *any other controversy* concerning the estate. By implication, it is arguable that when there are two courts with concurrent jurisdiction (as per Section 3-105), the provision on concurrent jurisdiction could be interpreted to require something more than just "any title claim" to allow a claim to be litigated in the probate court. Again, however, no section of the Uniform Probate Code expressly precludes the probate court from litigating an adverse claim to the estate, and this issue would require interpretation by case law. Prior to Assembly Bill 1812, case law on this issue expressly limited the ability of an adverse claimant to try title in probate. If this would be the construction of Section 3-105 of the Uniform Probate Code, the whole issue of probate court jurisdiction would again be clouded with the general privity requirement as modified by the several exceptions previously mentioned. Section 3-105 grants broad subject matter jurisdiction to the probate court which covers a proceeding initiated for any purpose other than those covered by more explicit provisions (*i.e.*, testacy proceedings). But whether this broad subject matter jurisdiction would include the power of the probate court to litigate title when there is an adverse claimant to the estate is questionable.

The better approach, at least as far as California law is concerned, appears to be the procedure established by the present Probate Code Section 851.5, as recommended by the State Bar of California. The confusion in the past case law has been clarified; to revert back to that confusion by enactment of the Uniform Probate Code seems unnecessary and even detrimental to efficient probate court proceedings.

#### CONCLUSION

The rule established by Assembly Bill 1812, clarifying the law in California concerning trying title in probate proceedings when there

is an adverse claimant, provides that anyone with a claim to a decedent's property may now have it litigated in the probate proceedings if he complies with established procedures.

It appears that any uncertainty created by case law with regard to probate court jurisdiction to try title to property has been eliminated. The artificial distinction made in the case of husband and wife litigating the interest in the deceased spouse's estate has also been eliminated. The other exceptions included efforts by the courts to find some remote connection with the probate proceeding to establish the "requisite privity" to allow the adverse claimant to try title therein. This judicial backbending is now unnecessary under the new rule.

As stated by the State Bar Committee on Administration of Justice, any objections or problems raised concerning the new procedure may or may not have validity. Litigation in the area will provide the answer. Some special problems mentioned by the Committee which would be readily apparent are the harm to the parties for lack of a jury trial, the inflated attorneys' fees, and the delay in distribution to the beneficiaries of the deceased.

However, in light of the several exceptions engrafted upon the old privity rule which resulted in uncertainty and inconsistent procedures concerning probate court jurisdiction to try title, the simplified procedure of Assembly Bill 1812 seems to be the logical answer to provide a practical and workable solution, as opposed to a piecemeal and case-by-case treatment.

Considering the ambiguous provisions contained within the Uniform Probate Code relating to probate court jurisdiction in this area of adverse claimants to an estate asset, it is suggested that the legislature only adopt as much of the Code as will allow it to retain the specific procedure set forth in Section 851.5 of the present California Probate Code. This procedure would leave no room for the courts to interpret the Uniform Probate Code in line with the confusing case law exceptions which existed prior to Assembly Bill 1812 and would establish with some certainty the law in the area of trying title to assets in an estate in the probate court.

*Nancy Sweet*