

10/14/85
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Memorandum 85-103

Subject: Study L-1030 - Probate Code (Disposition of Estate Without Administration)

Attached is a staff draft of a Recommendation Relating to Disposition of Estate Without Administration. This Recommendation has been prepared in a form in which it could be submitted to the 1986 session of the Legislature if that is the Commission's desire.

The Recommendation is a revised draft of material considered at the May 1985 meeting:

(1) The portion of the material relating to passage of property to surviving spouse without administration (existing Sections 649.1 to 658, inclusive) incorporates Commission decisions made at the May 1985 meeting. Only a few minor changes are made in prior law.

(2) The portion of the material relating to collection or transfer of a small estate without administration (existing Sections 630 to 632, inclusive) was considered at the May 1985 meeting but the Commission did not review the details of the proposed legislation at that time. The Commission determined to abolish the "close relative" requirement, a requirement that limits the use of the affidavit procedure in an intestate succession case to cases where the successors are "close relatives" listed in the statute. Also the staff suggested that the proposed legislation presented for consideration at the May 1985 meeting be revised to adopt the basic approach suggested by the Executive Committee of the Estate Planning, Trust and Probate Law Section, and the Commission directed the staff to prepare a revised draft of the material along the lines suggested by the staff. The attached recommendation is prepared in compliance with that directive.

The proposed legislation relating to the affidavit procedure (existing Sections 630-632) is designed to deal with two matters of concern to probate practitioners:

(1) The existing affidavit procedure for collection or transfer of personal property lacks sufficient detail. For example, the existing statute does not specify the liability of the person who collects property or has title to property transferred. The proposed legislation contains provisions to fill in the gaps in the existing statute. With the increase in the value of a small estate from \$30,000 to \$60,000, it can be anticipated that the affidavit procedure will be used to a significantly greater extent than in the past, and the need to fill in the gaps becomes that much more important.

(2) The existing statute does not contain any provisions to permit a successor to real property of small value to obtain a marketable title to the property unless the estate is probated. The proposed legislation provides new summary procedures that permit the successor to obtain a marketable title.

Representatives of the Estate Planning, Trust and Probate Law Section have provided comments on earlier versions of this recommendation and their comments have been taken into account in preparing the recommendation. We are requesting the Section to provide detailed comments on the attached recommendation so they can be considered at the December meeting.

The last time the Commission considered this subject matter, the question was raised whether the existing statutory provision concerning the right of the surviving spouse to dispose of real property should be continued. See Sections 13540-13542 of the attached draft. As suggested by the Commission, the staff wrote to the California Land Title Association and asked whether the existing provision serves any useful purpose. In response, we received a letter (attached as Exhibit 1) indicating that the provision is useful. As suggested by the Commission at the May 1985 meeting, we have clarified the existing provision in Section 13540 to indicate when the provision applies. This will eliminate existing uncertainty and may reduce the scope of the existing provision. See O. McCarroll, 1 California Decedent Estate Administration Supplement § 4.69, at 133 (June 1985) ("Counsel should determine local title insurance practice before relying on Probate C §649.2, particularly if title to the real property in question stood only in the decedent's name.").

A DRAFTSMAN'S NOTE under various provisions of the proposed legislation identifies matters for your special attention.

Charles A. Collier, Jr. made a careful review of the provisions relating to passage of property to the surviving spouse without administration. We have made revisions in preparing the recommendation to deal with the matters he noted for attention.

One of Mr. Collier's comments concerns Section 13656 of the proposed legislation:

With reference to the Draftsman's Note, I believe the language relating to the authority of the court to make orders that may be necessary to cause ownership of the property to be confirmed or to cause delivery of the property to the surviving spouse should be retained. While it is true there may be instances where the court does not have jurisdiction over all the parties, in many cases the court will have that jurisdiction and can make an appropriate order. Any order of necessity is limited by the court's jurisdiction in any event.

The staff believes that Mr. Collier has made a good point, and we suggest that the deleted provisions be restored before the recommendation is approved.

The Department of Motor Vehicles called to ask why Assembly Bill 196 was amended to delete the 40-day delay requirement from the section relating to nonprobate transfer of vehicles. The staff advised that the Estate Planning, Trust and Probate Law Section had requested that this delay requirement be deleted. The department is concerned, because under Assembly Bill 196 as enacted, a boat trailer (a "vehicle") can be transferred without delay but the boat itself (a "vessel") cannot be transferred for 40 days. The result is that the person must appear twice at the department if the person does not wish to delay the transfer of the boat trailer. The department would prefer that either there be a 40-day delay for both the trailer and the boat or that there be no delay for either. Almost every state that has an affidavit procedure provides for a delay of 30 or more days. The conforming revisions included in this recommendation make a technical amendment in the sections relevant to vehicles and vessels. Does the Commission wish to deal with this problem in this recommendation?

The attached recommendation is prepared in a form in which it could be submitted for enactment in 1986. The new Division added to the Probate Code by the recommended legislation would keep the same numbers in the new Estates and Trusts Code. Submission of the recommendation in 1986 would permit it to be given careful study before enactment and would provide an opportunity to correct any defects that come to light after enactment. The staff anticipates that the heir tracers will oppose the recommendation insofar as it would eliminate the "close relative requirement." You will recall that the heir tracers appeared at a Commission meeting to request that the Commission recommend legislation to restrict the use of the affidavit procedure so that some relatives that can now use the procedure no longer would be able to use it. It would be good to resolve this policy issue in a bill in 1986 and avoid the need to resolve the issue when the new Estates and Trusts Code is proposed for enactment in 1987. Also, if this recommendation were enacted in 1986, it would reduce the burden of reviewing and understanding the new Estates and Trusts Code both before and after its enactment in 1987 or 1988.

Respectfully submitted,

John H. DeMouly
Executive Secretary

July 19, 1985

John H. DeMouilly,
Executive Secretary
California Land Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

Re: Law Revision Commission Probate Study

Dear Mr. DeMouilly:

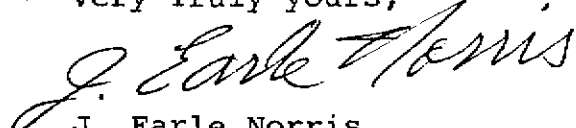
Thank you very much for your letter of June 25, 1985, enclosing a copy of your letter to Kenneth Cooley, of the California Land Title Association.

I sent copies of your correspondence to each of our sub-committee members asking for their comments. Each member that I talked with so far expresses some concern on having the newly revised sections 9520 and 9521 removed from the Probate Code as recommended by the Probate and Trust Law Section of the Los Angeles County Bar Association. We in the Title Industry feel a great deal of comfort when we have a specific code section to point to. Many times after we have insured a transaction attorneys call with claims of other interested parties in the real property, and it is quite helpful to refer to specific code sections which clearly apply to a transfer of property by a surviving spouse or other representative of the estate and that there are other sections in which that particular claimant could have protected themselves prior to the transfer.

I believe the present draft of both sections is clear and that it applies to community or quasi-community real property. Where the property is held of record by the surviving spouse and the deceased spouse as joint tenants the transfer of that real property can be handle with out the need of a Probate Code Section due to the survivorship rights of joint tenancy. The Probate and Trust Law Section of the Los Angeles County Bar Association may be concerned with recording an affidavit of death joint tenant in this type of transfer where, in reality, in the Probate of the deceased spouse they wish to claim that particular real property was held, in substance, by the spouses as community property. While this situation could be addressed by a separate code section it would be recommended that it be in the same area and still concern the forty (40) day rule of Section 9520 and also have recorded Notice of requirements of Section 9521.

If I can be of any further assistance with regards to these matters please do not hesitate to contact the undersigned.

Very Truly yours,


J. Earle Norris

JEN/eh

cc: Clark Staves
Bob Reyburn
James Wickline
Kenneth Cooley
Members of the Sub-Committee

STATE OF CALIFORNIA
CALIFORNIA LAW
REVISION COMMISSION

STAFF DRAFT
(not approved by Commission)

RECOMMENDATION
relating to
REVISION OF THE PROBATE CODE

DIVISION 8. DISPOSITION OF ESTATE WITHOUT ADMINISTRATION

Part 1. Collection or Transfer of Small Estate Without Administration

Part 2. Passage of Property to Surviving Spouse Without Administration

December 1985

CALIFORNIA LAW REVISION COMMISSION

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0328a



December 6, 1985

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

Probate Code Sections 630 to 632, inclusive, provide an affidavit procedure for the collection or transfer of personal property of small estates without administration. The Commission recommends legislation to fill in gaps in the existing procedure and to provide two new procedures to permit summary transfer of record title to real property of little value.

Probate Code Sections 649.1 to 658, inclusive, provide for the passage of property to a surviving spouse without administration. The Commission recommends legislation to restate and reorganize these provisions and to make a few substantive changes and additions.

The recommended legislation would be compiled in a new Division 8 to be added to the Probate Code.

This recommendation has been prepared pursuant to 1980 Cal. Stat. res. ch. 37.

Respectfully submitted,

Edwin K. Marzec
Chairperson

RECOMMENDATION

relating to

DIVISION 8. DISPOSITION OF ESTATE WITHOUT ADMINISTRATION

INTRODUCTION

The Commission recommends that a new Division 8 be added to the Probate Code. This new division, relating to disposition of estate without administration, would replace Probate Code Sections 630-632 (collection or transfer of personal property of small estate without administration) and Probate Code Sections 649.1-658 (passage of property to a surviving spouse without administration).

COLLECTION OR TRANSFER OF SMALL ESTATE WITHOUT ADMINISTRATION

EXISTING LAW

Section 630 of the Probate Code provides a summary means for the collection of a decedent's personal property where the gross value of the decedent's real and personal property in this state does not exceed \$60,000 and the gross value of the decedent's real property in this state does not exceed \$10,000.

In determining the value of the decedent's estate for the purposes of Section 630, all of the following property is excluded:

- Property held by the decedent as a joint tenant.¹
- Property in which the decedent had a life or other estate terminable upon the decedent's death.²
- Property which passed to the decedent's surviving spouse under the decedent's will or by intestate succession.³
- State registered property (vehicles, vessels, mobilehomes, manufactured homes, commercial coaches, and truck campers).⁴
- Amounts due the decedent for services in the armed forces of the United States.⁵
- Compensation not exceeding \$5,000 owing to the decedent for services from any employment.⁶

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1. Prob. Code § 632. See Prob. Code §§ 210-212 (recording affidavit or court order where title to real property affected by death of a person).
 2. Prob. Code § 632. The exclusion for life estates and estates terminable upon the decedent's death embraces life interests in trusts and contractual rights (such as life insurance or employee retirement) that terminate at death, as well as life interests in other property. See O. McCarroll, 1 California Decedent Estate Administration Supplement § 3.6, at 76 (Cal. Cont. Ed. Bar 1985). See also Prob. Code §§ 210-212 (recording affidavit or court order where title to real property affected by death of a person).
 3. Prob. Code § 632. See Prob. Code § 649.1 (property passing to surviving spouse). See also Prob. Code §§ 650-658 (determination or confirmation of property passing to surviving spouse).
 4. Prob. Code § 630. Special provisions permit transfer of registration of state registered property without probate if the decedent does not own other property that would require probate of the decedent's estate. See Health & Safety Code § 18102 (manufactured home, mobilehome, commercial coach, or truck camper); Vehicle Code §§ 5910 (vehicle), 9916 (vessel).
 5. Prob. Code § 630.
 6. Prob. Code § 630.

In most cases in which successors seek to settle the affairs of a decedent's estate without probate or administration, much of the decedent's personal property will be in their possession. The procedures of Section 630 do not deal directly with such property. Section 630 merely facilitates the transfer of property from third persons by enabling successors "without procuring letters of administration, or awaiting the probate of the will" to:

--"collect any money due the decedent."

--"receive the tangible personal property of the decedent."

--"have any evidences of a debt, obligation, interest, right, stock, or chose in action transferred" to them.

The claimant to the decedent's property makes an affidavit or declaration under penalty of perjury showing the claimant's right to the property and gives the affidavit or declaration to the debtor, custodian, registrar, or transfer agent.⁷ The claimant is then entitled to collect the money or property and to have any evidences of interest, indebtedness, or right transferred.⁸ The person making the payment or transfer need not inquire into the truth of the affidavit or declaration; the claimant's receipt is a sufficient discharge of liability.⁹

7. Prob. Code § 630.

8. Prob. Code § 630.

9. Prob. Code § 631. See also Prob. Code § 630(d) (transfer agent of security).

The summary procedure can be used only if the person who succeeds to the decedent's property is the sole beneficiary or all the beneficiaries under the decedent's will (whether or not related to the decedent) or is the decedent's surviving spouse, child, issue of a deceased child, parent, brother, sister, issue of a deceased brother or sister, or grandparent.¹⁰

The summary procedure is merely a collection mechanism and does not give title to the person collecting the property as against other claimants to the property.¹¹ Moreover, the collected property may be subjected to the possession and control of an executor or administrator¹² who may use the property to satisfy claims against

10. Prob. Code § 630. The summary procedure also may be used by any of the following: The guardian or conservator of the estate of any person bearing the required relationship to the decedent, a trustee named in a trust agreement executed by the decedent during his or her lifetime, the primary beneficiaries of which bear the required relationship to the decedent, and the custodian where the decedent's will nominates a custodian to receive a gift to a beneficiary under the Uniform Gifts to Minors Act or the Uniform Transfers to Minors Act of any state. Id.

11. See *Brezzo v. Brangero*, 51 Cal. App. 79, 81, 196 P. 87 (1921). See also *Estate of Kevil*, 98 Cal. App.2d 388, 220 P.2d 555 (1950).

12. An unpaid creditor or a person who takes a portion of the decedent's property by testate or intestate succession can institute a probate proceeding. See Prob. Code §§ 323 (persons entitled to have will probated), 422 (persons entitled to obtain letters of administration of the estate of person dying intestate). See also *In re Edwards' Estate*, 154 Cal. 91, 97 P. 23 (1908) (right of creditor to petition for probate of will).

the decedent's estate¹³ or distribute it to those persons entitled to succeed to the decedent's estate.¹⁴

RECOMMENDED LEGISLATION

The Commission recommends the addition of a new division to the Probate Code that will include a part that will fill in the gaps in the existing summary affidavit procedure for the collection or transfer of personal property and provide two new summary procedures to obtain a marketable title to real property.

Affidavit Procedure for Collection or Transfer of Personal Property

Size and type of estate. During recent years, the Commission has reviewed the provisions relating to the size and type of estate that qualifies to use the affidavit procedure for collection or transfer of personal property. Two recommendations were submitted to the Legislature as a result of this review.¹⁵ The enactment of the legislation proposed in these recommendations increased the maximum estate value, permitted collection or transfer of personal property even where the estate includes real property of small value, and excluded certain state registered property in determining the value of

13. Prob. Code § 300. See also Prob. Code § 631 (payment or transfer to the successor "shall not preclude administration when necessary to enforce payment of the decedent's debts").

14. See *Brezzo v. Brangero*, 51 Cal. App. 79, 196 P. 87 (1921).

15. Recommendation Relating to Distribution of Estates Without Administration, 17 Cal. L. Revision Comm'n Reports 421 (1984); Recommendation Relating to Transfer Without Probate of Certain Property Registered by the State, 18 Cal. L. Revision Comm'n Reports 129 (1986).

the decedent's estate.¹⁶ No further revision of this area of the law is recommended.¹⁷

Persons authorized to use affidavit procedure. Probate Code Section 630 permits use of the affidavit procedure by the person or persons who have the right to succeed to the property of the decedent if the person or persons are:

--The sole beneficiary or all of the beneficiaries under the will of the decedent, regardless of whether or not any beneficiary is related to the decedent.

--The decedent's surviving spouse, children, issue of deceased children, parents, brothers, sisters, issue of a deceased brother or sister, or grandparents.

--The guardian or conservator of the estate of any person bearing the required relationship to the decedent.

16. 1984 Cal. Stat. ch. 451 (increase in maximum estate value; permits affidavit procedure to be used even if estate includes real property interest of small value); 1985 Cal. Stat. ch. 982 (adds to the types of property excluded in determining gross value of decedent's property the following: all vehicles registered or titled under the Vehicle Code (instead of "motor vehicles"), vessels numbered under the Vehicle Code, and manufactured homes and truck campers registered under the Health and Safety Code).

17. California is one of the most liberal states in permitting use of the affidavit procedure, but it is difficult to compare California to other states because many of them do not use the gross value of the decedent's property but use the net value (gross value less liens and encumbrances). See, e.g., Ariz. Rev. Stat. Ann. § 14-3971 (value of all of the personal property in decedent's estate, less liens and encumbrances, does not exceed \$30,000; value of real property in decedent's estate (less liens and encumbrances against the real property as of the date of decedent's death) does not exceed \$15,000, the value of the decedent's interest in the real property being determined from the full cash value of the property as shown on the tax assessment rolls for the year in which the decedent died); Texas Prob. Code Ann. § 137 (Vernon supp. 1984) (value of the entire assets of the estate, not including homestead and exempt property, does not exceed \$50,000).

--The trustee named under a trust agreement executed by the decedent during his or her lifetime, the primary beneficiaries of which bear the required relationship to the decedent, if such person or persons has or have the right to succeed to the property of the decedent.

The relatives who are authorized to use the affidavit procedure have been broadened by a series of amendments since Section 630 was originally enacted.¹⁸ Section 630 now permits use of the affidavit procedure by almost any relative likely to inherit the decedent's property. Yet there will be occasional cases where the decedent dies without a will and the relative who takes by intestate succession is not one described in Section 630. In such a case, no matter how small the decedent's estate, it will be necessary to probate the estate in order to collect or transfer the estate of the decedent.

18. As originally enacted in 1931, Section 630 permitted use of the affidavit procedure by the decedent's surviving spouse, child, parent, brother, or sister. 1931 Cal. Stat. ch. 281, amended by 1931 Cal. Stat. ch. 1089 § 1. In 1937, "lawful issue of deceased children" was added. 1937 Cal. Stat. ch. 181, § 1. In 1959, "the lawful issue of a deceased brother or sister" was added. 1959 Cal. Stat. ch. 195. In 1976, "the trustee named under a trust agreement executed by the decedent during his lifetime, the primary beneficiaries of which bear such relationship to the decedent" was added. 1976 Cal. Stat. ch. 1028, § 1. In 1982, Section 630 was amended to make clear that beneficiaries under the decedent's will could use the summary procedure, "regardless of whether or not any beneficiary is related to the decedent." 1982 Cal. Stat. ch. 520, § 5. In 1984, "grandparents" was added. 1984 Cal. Stat. ch. 451, § 9.

The great majority of the states do not restrict use of their summary procedure for collection or transfer of estate property to a limited class of relatives; any successor in interest, whether by will or intestate succession, may use the procedure.¹⁹ By way of

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19. Alabama Code §§ 43-2-691, 43-2-692 (1982); Alaska Stat. §§ 13.16.680, 13.16.685 (Supp. 1984); Arizona Rev. Stat. Ann. §§ 14-3971, 14-3972 (1984); Arkansas Stat. Ann. §§ 62-2127 (Supp. 1983) 62-2128 (1971); Connecticut Gen. Stat. Ann. § 45-266 (West Supp. 1984); Florida Stat. Ann. § 735.301 (West Supp. 1984); Hawaii Rev. Stat. §§ 560:3-1201, 560:3-1202 (Supp. 1983); Idaho Code §§ 15-3-1201, 15-3-1202 (1979); Illinois Ann. Stat. ch. 110 1/2 § 25-1 (Smith-Hurd Supp. 1984); Indiana Code Ann. §§ 29-1-8-1, 29-1-8-2 (West 1979); Louisiana Code Civ. Proc. Ann. Arts. 3431, 3432, 3434 (West Supp. 1985); Maine Rev. Stat. Ann. tit. 18-A, §§ 3-1201, 3-1202 (1981); Missouri Ann. Stat. § 473.097 (Vernon Supp. 1984); Montana Code Ann. §§ 72-3-1101, 72-3-1102 (1983); Nebraska Rev. Stat. §§ 30-24, 125, 30-24, 126 (1979); New Jersey Rev. Stat. §§ 3:B10-3, 3:B10-4 (1984); New Mexico Stat. Ann. § 45-3-1201 (Supp. 1984), 45-3-1202 (1978); North Carolina Gen. Stat. § 28A-25-1 (1982); North Dakota Cent. Code § 30.1-23-01, 30.1-23-02 (1981); Oregon Rev. Stat. §§ 114.515, 114.525, 114.535 (1981); South Dakota Codified Laws Ann. § 30-11A-1 (1977); Tennessee Code Ann. §§ 30-4-103, 30-4-104 (1984); Texas Prob. Code Ann. §§ 137 (Vernon Supp. 1984), 139, 140 (Vernon 1980); Utah Code Ann. §§ 75-3-1201, 75-3-1202 (1978); Virginia Code §§ 64.1-132.2, 64.1-132.2 (1984); Wisconsin Stat. Ann. § 867.03 (West Supp. 1984); Wyoming Stat. § 2-1-210 (1981). See Uniform Probate Code § 3-1201 (1980) (no close relative requirement). See also Delaware Code Ann., tit. 12, §§ 2306 (Supp. 1984), 2307 (1979) (limited to spouse of the decedent or any person who is a grandparent of the decedent, a lineal descendant of a grandparent of the decedent, the personal representative of any of the foregoing who may be deceased, or the guardian or trustee of any of the foregoing who may be incapacitated, or the trustee of a trust created by the decedent); Massachusetts Gen. Laws Ann. ch. 195, § 16 (1981) (limited to decedent's surviving spouse, child, grandchild, parent, brother, sister, niece, nephew, aunt, or uncle and includes state department of mental health and state department of public welfare where decedent was receiving public assistance); Nevada Rev. Stat. § 146.080 (1979) (provision drawn from existing California law and limited to the surviving spouse, the children, issue of deceased children, parents, brothers and sisters of the decedent).

contrast, under Section 630, an intestate successor who does not bear the requisite relationship to the decedent can receive property to which the successor is entitled only after administration of the small estate. The new division follows the approach taken in the great majority of other states and permits any successor in interest to use the summary procedure, thereby fully implementing the policy of avoiding costs and delays of administration when a small estate is involved by permitting all entitled successors to collect personal property by affidavit or declaration. This approach is consistent with the existing California rule that a successor who takes under the decedent's will may use the summary procedure, whether or not the successor is related to the decedent.

Forty-day delay before summary procedure can be used. The new division includes a procedural requirement not found in existing law. The successors must wait 40 days before presenting the affidavit or declaration to the holder of the property. This new restriction insures a reasonable period during which persons who may be entitled to a decedent's property can learn of the decedent's death and determine whether administration of the estate is desirable.²⁰ In

20. The new 40-day delay requirement is consistent with existing Probate Code Section 649.2 (surviving spouse has power to deal with and dispose of real property after 40 days from the death of other spouse). For similar requirements, see Health & Safety Code § 18102 (requirement that 40 days have elapsed from death of owner to permit transfer of registration of manufactured home, mobilehome, commercial coach, or truck camper using affidavit procedure), Veh. Code § 9916 (requirement that 40 days have elapsed from death of owner to permit transfer of ownership of vessel using affidavit procedure). The new division contains a separate provision that permits a surviving spouse to collect salary owing to the deceased spouse without waiting for a 40-day period to elapse.

addition, a forced waiting period increases the likelihood that the decedent's debts--particularly those that are billed regularly--will come to the attention of the decedent's successors.

Presenting decedent's evidence of ownership. If the decedent had an instrument that evidences ownership (such as a stock certificate, bank passbook, or promissory note) and the evidence of ownership is not presented by the person seeking the delivery or transfer of the property, the person making the delivery or transfer may be liable to another person who later presents the outstanding evidence of ownership and requests delivery or transfer of the property. The existing statute does not deal with this problem.²¹

The new division requires that the affidavit or declaration be accompanied by the decedent's evidence of ownership, if available.²² If the evidence of ownership is not presented, the new division permits the holder of the property to require the person seeking the delivery or transfer of the property to provide a satisfactory indemnification or bond to hold the holder harmless.²³

Inventory and appraisalment. Under existing law, there is no requirement that there be an inventory and appraisalment in order to

21. Other statutes do deal with the problem. See the statutes cited in note 22 infra.

22. This requirement is consistent with Health & Safety Code § 18102 and Vehicle Code §§ 5910 and 9916 (transfer upon affidavit of manufactured home, mobilehome, commercial coach, truck camper, vehicle, or vessel upon furnishing affidavit and appropriate certificate of ownership or title and registration card, if available).

23. This provision is drawn in part from Financial Code Section 6652 (issuance of new evidence of account by savings and loan association).

collect or transfer property of a small estate.²⁴ The new division permits use of the summary procedure only if the affidavit or declaration is accompanied by an inventory and appraisement by a probate referee of any real property (but not personal property) in the decedent's estate. This new requirement recognizes that the value of real property may be difficult to determine. If the decedent's estate does not include any real property, no inventory and appraisement is required.

Proof of identity of claimants to estate. The existing statute does not deal with the problem of the proof of identity of the persons executing the affidavit or declaration. The new division includes a provision that is designed to provide clear rules as to the type of identification that reasonably may be relied upon to establish the identity of a person executing an affidavit or declaration.²⁵

Enforcement of duty to transfer property to successor. The existing statute does not expressly provide a remedy if the holder of the decedent's property refuses to surrender the property or to transfer the record title to the decedent's successor. The new division expressly provides a remedy against the holder who refuses to

24. An appraisement by a probate referee is not required for estates subject to summary probate proceedings pursuant to Section 630. Prob. Code § 605(a)(2)(B).

25. The new provision is drawn from Civil Code Section 1185 (acknowledgment of instrument by notary public) but does not permit a driver's license issued by a Canadian or Mexican public agency to be used as reasonable proof of identity.

pay, deliver, or transfer any personal property or evidence thereof when presented with the affidavit or declaration showing the right of the successor (together with any required evidence of ownership, inventory and appraisal, and proof of identity of the persons executing the affidavit or declaration). The person or persons entitled to the property may recover the property or compel its payment, delivery, or transfer in an action brought for that purpose against the holder of the property. And, if the court finds that the holder acted unreasonably in refusing to pay, deliver, or transfer the property, the person entitled to the property is also entitled to attorney's fees.

Liability of persons to whom payment, delivery, or transfer is made. Probate Code Section 631 provides that "payment or transfer shall not preclude administration when necessary to enforce payment of the decedent's debts." The existing statute contains no other provisions concerning the liability of the person who obtains possession of or title to property using the summary procedure. The new division includes comprehensive provisions governing this liability.

Under the new division, a person to whom payment, delivery, or transfer made is personally liable for the unsecured debts of the decedent. Any such debt may be enforced against the person in the same manner it could have been enforced against the decedent if the decedent had not died. The personal liability is limited: It shall not exceed the fair market value at the date of the decedent's death

of the property paid, delivered, or transferred to the person, less the amount of any liens and encumbrances on the property.

The new division also makes a person to whom payment, delivery, or transfer is made personally liable to any person having a superior right to the property by testate or intestate succession from the decedent. An action to enforce this liability must be commenced within five years after the affidavit or declaration was presented to the holder of the property. This five-year statute of limitation is comparable to that provided for recovery of property of a missing person if the missing person appears after the distribution of his or her property.²⁶

If proceedings for administration of the decedent's estate are commenced, the new division makes each person to whom payment, delivery, or transfer of the decedent's property is made and who still has the property liable for restitution of the property to the estate. If the person no longer has the property, the person is liable for restitution to the estate of the fair market value of the property as of the date of disposition of the property, together with the net income the person received from the property. A five-year statute of limitations is provided for enforcement of this liability.

The remedies described above are in addition to any remedies available by reason of any fraud or intentional wrongdoing.

26. Prob. Code § 1358.

Obtaining a Marketable Title to Real Property of
Small Value Without Probate

Unless the successor is the surviving spouse,²⁷ there is no summary procedure under existing California law to obtain a marketable title to a real property interest of small value. Therefore, in order to obtain marketable title to real property, whether the estate be large or small, there must be proceedings for the probate of the decedent's will or for administration of the decedent's estate.

If a decedent dies owning real property of minimal value (such as a desert lot or speculative undeveloped mineral rights) the property is sometimes abandoned by the decedent's heirs or devisees because the cost of administration may exceed the value of the property.

The new division provides two new procedures to deal with this problem. One procedure permits the successor of the decedent to obtain a court order determining that the real property passed to the successor where the estate is a small estate. The other procedure is an affidavit procedure available where the gross value of the real property does not exceed \$10,000 in value. The two new procedures are outlined below.

Court Order Determining Succession to Real Property of Small Estate. The new division contains a new procedure for obtaining,

27. In the case of a surviving spouse, a summary procedure is provided under Probate Code Sections 650-658 whereby the surviving spouse can obtain a marketable title to real property. See also Probate Code § 649.2 (right of surviving spouse to dispose of community and quasi-community real property after 40 days from the death of the other spouse).

without the need for a probate proceeding, a court order determining that real property of the decedent passed to one or more persons by intestate succession or under the decedent's will. The procedure can be used only to determine succession to real property, whether or not the decedent's estate includes personal property, and only where the gross value of the real and personal property in the decedent's estate does not exceed \$60,000.²⁸

The new procedure is drawn from existing Probate Code Sections 650-655, which provide for an order determining that property passed to a surviving spouse. An inventory and appraisal by a probate referee of the real property is required. The person who receives the property pursuant to the court order is personally liable for the unsecured debts of the decedent. This liability is limited to the fair market value (at the date of the decedent's death) of the real property received by the person on whom liability is imposed, less the amount of any liens and encumbrances on the property.

Affidavit Procedure for Transfer of Real Property Not Exceeding \$10,000 in Value. The new division includes a new procedure, drawn from a recently enacted Arizona statute,²⁹ that permits use of an

28. The property described supra in the text accompanying notes 1-6 is excluded in determining the value of the decedent's estate.

29. The Arizona statute was enacted in 1983. See Ariz. Rev. Stat. Ann. §§ 14-3971, 14-3972 (Supp. 1984-85). For a discussion of the Arizona statute, see Effland, Handling Real and Personal Property At Death Without Administration Under the 1983 Amendments to the Arizona Probate Code, Ariz. B. J., Dec.-Jan. 1984, at 34, 36.

affidavit to transfer title to real property as of record where the gross value of all real property in the decedent's estate located in California, as shown by an inventory and appraisal by a probate referee, does not exceed \$10,000.³⁰ The procedure can be used only after six months from the death of the decedent. The affidavit is filed in the superior court and must have attached an inventory and appraisal of the real property and must contain a notary public's certificate of acknowledgment identifying each person executing the affidavit.

Upon receipt of the affidavit and the required fee, the court clerk, after determining that the affidavit is complete and has the required attachments, files the affidavit and attachments and issues a certified copy of the affidavit without the attachments. The certified copy of the affidavit is recorded in the office of the county recorder of the county where the real property is located.

A good faith purchaser, lessee, or lender has the same rights and protections as a purchaser, lessee, or lender would have if the person designated as a successor in the recorded certified copy of the affidavit had been named as a distributee of the real property in a decree of distribution that had become final.

The person designated as the successor to property in the certified copy of the affidavit is personally liable for the unsecured

30. The value of the real property described supra in the text accompanying notes 1-6 is excluded in determining the value of the real property in the decedent's estate.

debts of the decedent. The person also is personally liable to any person having a superior right of the property by testate or intestate succession. If proceedings for administration of the decedent's estate are commenced, the person is liable for restoration of the property or its value. These liabilities are limited. If restoration to the estate is required, the person is liable for restoration of the real property to the estate. If the person no longer has the real property, the person is liable for restitution to the estate of the fair market value of the interest the person received in the property as of the date of its disposition, together with the net income the person received from the property. In other cases, the liability is limited to the fair market value at the date of the decedent's death of the property received, less the amount of any liens and encumbrances on the property.

PASSAGE OF PROPERTY TO SURVIVING SPOUSE WITHOUT ADMINISTRATION

EXISTING LAW

When a married person dies, the property which passes to the surviving spouse is not subject to probate administration unless the surviving spouse elects to have it administered.³¹ The surviving spouse³² may obtain a court order determining that all or part of

31. Prob. Code § 649.1.

32. In addition to the surviving spouse, the personal representative, guardian, or conservator of the surviving spouse's estate may obtain an order. Prob. Code § 650.

the decedent's estate is property passing to the surviving spouse.³³ The court order may also confirm the surviving spouse's ownership of the surviving spouse's one-half share of the community and quasi-community property.³⁴ The order may be obtained without the need for probate administration.³⁵ Although the surviving spouse is not required to petition for the order, such an order is sometimes required by a title insurance company or a stock transfer agent.³⁶

Unless the interests of both spouses are probated, the surviving spouse is personally liable for the deceased spouse's debts that are chargeable against the community or quasi-community property.³⁷ The

33. The procedure for obtaining an order determining that separate, community, and quasi-community property passed to a surviving spouse is found in Probate Code Sections 650-658. An order determining that separate property passed to the surviving spouse may only be obtained under those sections where the decedent died after 1984. The same procedure can be used to obtain an order confirming the surviving spouse's ownership of the surviving spouse's one-half share of the community and quasi-community property.

34. Prob. Code §§ 650, 655.

35. Prob. Code §§ 650, 655.

36. See 17 Cal. L. Revision Comm'n Reports 426 (1984).

37. Prob. Code § 649.4. Funeral expenses and expenses of last illness are not charged to the community share of the surviving spouse. Prob. Code § 951.1. For rules governing liability of community and quasi-community property for the debts of a spouse, see Civil Code Sections 5120.010-5122.

surviving spouse also is personally liable for the debts of the deceased spouse that are chargeable against the separate property passing to the surviving spouse without administration.³⁸ This personal liability is limited. The liability does not exceed the value at the date of death (less the amount of any liens and encumbrances) of the total of the following:

(1) The surviving spouse's one-half share of the community and quasi-community property that is not exempt from the enforcement of a money judgment.

(2) The deceased spouse's one-half share in the community and quasi-community property that passes to the surviving spouse without administration.

(3) The separate property of the deceased spouse that passes to the surviving spouse without administration.³⁹

After 40 days from the death of a spouse, the surviving spouse has full power to sell, lease, mortgage, or otherwise deal with and dispose of the community and quasi-community real property, unless a notice is recorded in the county in which the property is situated to the effect that an interest in the property is claimed by another under the will of the deceased spouse.⁴⁰

38. See note 37 supra.

39. Prob. Code § 649.4(b).

40. Prob. Code § 649.2. The personal representative, guardian, or conservator of the estate of the surviving spouse has the same power. Id.

RECOMMENDED LEGISLATION

The new division restates and reorganizes the existing law summarized above with a few substantive changes and additions. The significant changes and additions are described below.⁴¹

Collection of deceased spouse's earnings. The new division includes provisions that give the surviving spouse the right immediately to collect not more than \$5,000 of the earnings owed by an employer to the deceased spouse. Payment is made upon receipt of an affidavit (or declaration under penalty of perjury) executed by or on behalf of the surviving spouse. This new procedure is drawn from the existing affidavit procedure for collection of a small estate.⁴² However, the surviving spouse may use the new procedure without regard to the value of the estate. Use of this new procedure will provide the surviving spouse with funds until a probate proceeding can be commenced and a family allowance obtained.

Right of surviving spouse to dispose of real property. The new division limits the existing provision⁴³ giving the surviving spouse full power to sell, lease, mortgage, or otherwise deal with and dispose of the community or quasi-community real property to the following cases:

- (1) Where the property is held as of record in the name of the surviving spouse only.

41. Minor changes are indicated in the Comments to the sections of the new division.

42. Prob. Code §§ 630-632.

43. Prob. Code § 649.2.

(2) Where the property is held as of record by the deceased spouse and the surviving spouse as joint tenants.

(3) Where the property is held as of record by the deceased spouse and the surviving spouse as community property.

This new limitation will make clear when the provision applies, thereby giving the surviving spouse a marketable title.⁴⁴

Right to probate only portion of surviving spouse's interest in community or quasi-community property. The new division makes clear that the surviving spouse may elect to probate only a portion of the surviving spouse's one-half of the community or quasi-community property. This will permit, for example, probate of all of a block of stock that is community property without the need to probate the surviving spouse's one-half share of the other community and quasi-community property.⁴⁵

44. The application of the existing provision is uncertain. See O. McCarroll, 1 California Decedent Estate Administration Supplement § 4.69, at 133 (June 1985) ("Counsel should determine local title insurance practice before relying on Prob C §649.2, particularly if title to the real property in question stood only in decedent's name."). The new provision makes clear that it does not apply where community or quasi-community property is held as of record only in the name of the deceased spouse. The new provision will not affect the validity of dispositions made under Probate Code Section 649.2 prior to the operative date of the new division.

45. The rights of creditors will not be adversely affected. The existing personal liability of the surviving spouse for the debts of the deceased spouse chargeable against the community or quasi-community property will continue, reduced by the fair market value of the community and quasi-community property administered in the estate of the deceased spouse.

Procedural changes. The new division makes several changes in the procedure for obtaining an order determining that all or part of the decedent's estate is property passing to or belonging to the surviving spouse:

(1) The existing requirement⁴⁶ that a copy of the petition be served with the notice of hearing on the petition for the order is not continued. This change is consistent with the general practice in probate proceedings not to serve a copy of the petition with the notice of hearing on the petition.⁴⁷

(2) The general requirement⁴⁸ applicable to notices of hearings--that the notice of hearing be served not less than 10 days before the hearing--is adopted in place of the existing requirement⁴⁹ that notice of hearing be given not less than 20 days before the hearing.

(3) An inventory and appraisalment is not required in order to obtain the order, but the petitioner has the option to file an

46. Prob. Code § 653. A copy of the petition is not required to be served under existing law if all of the deceased spouse's property passes to the surviving spouse under the deceased spouse's will and no contingencies in the will remain to be satisfied at the time of the filing of the petition. Prob. Code § 653(b).

47. See Prob. Code § 1200.5.

48. Prob. Code § 1200.5(b).

49. Prob. Code § 653.

inventory and appraisalment in the proceeding if the petitioner so desires. The existing authority of the court to require an inventory and appraisalment where the interests of justice require⁵⁰ is limited to cases where the filing of an inventory and appraisalment is necessary to protect the interests of creditors of an unincorporated business which the deceased spouse was operating or managing at the time of death.⁵¹

(4) The provision of existing law⁵² for court approval of the attorney's fee for services performed in connection with the obtaining of a court order determining that property is property passing to or belonging to the surviving spouse is not continued. Under the new division, the attorney's fee for services performed in connection with obtaining the court order is to be determined by private agreement between the attorney and the client and is not subject to approval by the court. This replaces the existing law which provides for court approval of a portion only of the legal fees that are likely to be

50. Prob. Code § 657.

51. See Prob. Code § 656. A provision expressly giving the court authority to require the filing of an inventory and appraisalment will be added to the provision of the new division that continues the substance of existing Probate Code Section 656.

52. See Prob. Code § 910(b).

involved in the disposition without administration of the estate of a deceased spouse.⁵³

53. Existing law provides only for court approval of the fee for filing a petition and obtaining a court order determining that all or part of the decedent's estate is property passing to or belonging to the surviving spouse. See Prob. Code § 910(b). No provision is made in existing law for court approval of the attorney's fee for other legal work in connection with the estate (such as, for example, tax work, joint tenancy termination, transfer of registered ownership of corporate shares or other registered personal property, or collection of insurance proceeds); those matters are left to private agreement between the attorney and client. The new division leaves the entire matter of legal fees to private agreement between the attorney and client where there is no election by the surviving spouse to probate the estate of the deceased spouse.

DIVISION 8. DISPOSITION OF ESTATE WITHOUT ADMINISTRATION

PART 1. COLLECTION OR TRANSFER OF SMALL ESTATE WITHOUT ADMINISTRATION

CHAPTER 1. DEFINITIONS

- § 13000. Construction of words and phrases
- § 13002. Holder of the decedent's property
- § 13006. Successor of the decedent

CHAPTER 2. GENERAL PROVISIONS

- § 13050. Exclusions in determining property or estate of decedent or its value
- § 13051. Authority of guardian, conservator, trustee, or custodian

CHAPTER 3. AFFIDAVIT PROCEDURE FOR COLLECTION OR TRANSFER OF PERSONAL PROPERTY

- § 13100. Transfer of personal property without probate
- § 13101. Furnishing of affidavit
- § 13102. Presenting decedent's evidence of ownership
- § 13103. Inventory and appraisement of real property required
- § 13104. Proof of identity of persons executing the affidavit
- § 13105. Transfer of property to successor
- § 13106. Protection of transferor from liability
- § 13107. Claim against estate in probate
- § 13108. No pending probate proceeding; later probate proceeding not precluded
- § 13109. Personal liability for decedent's unsecured debts
- § 13110. Personal liability to person having superior right
- § 13111. Restitution if estate proceeding commenced
- § 13112. Limitation on liability
- § 13113. Other remedies not affected
- § 13114. Payment of costs and fees of public administrator
- § 13115. Chapter does not apply to real property

CHAPTER 4. COURT ORDER DETERMINING SUCCESSION TO REAL PROPERTY

- § 13150. No pending probate proceeding
- § 13151. Petition for court order determining succession to real property
- § 13152. Contents of petition; inventory and appraisement
- § 13153. Notice of hearing
- § 13154. Court order
- § 13155. Finality of order
- § 13156. Personal liability of petitioners
- § 13157. Attorney's fee

CHAPTER 5. AFFIDAVIT PROCEDURE FOR REAL PROPERTY
OF SMALL VALUE

- § 13200. Filing affidavit in superior court
- § 13201. Filing fee
- § 13202. Issuance and recording of certified copy of affidavit
- § 13203. Effect of recorded affidavit
- § 13204. Personal liability for decedent's unsecured debts
- § 13205. Personal liability to person having superior right
- § 13206. Restitution if estate proceeding commenced
- § 13207. Limitation on liability
- § 13208. Other remedies not affected

PART 2. PASSAGE OF PROPERTY TO SURVIVING SPOUSE
WITHOUT ADMINISTRATION

CHAPTER 1. GENERAL PROVISIONS

- § 13500. Necessity of administration
- § 13501. Property subject to administration
- § 13502. Election of administration
- § 13503. Election to transfer property to trustee
- § 13504. Property held in a revocable trust
- § 13505. Application of this part
- § 13506. Reference in written instrument to repealed statutory provisions

CHAPTER 2. RIGHT OF SURVIVING SPOUSE TO DISPOSE OF
REAL PROPERTY

- § 13540. Right of surviving spouse to dispose of real property
- § 13541. Recording notice of interest in property
- § 13542. Dispositions under former law not affected

CHAPTER 3. LIABILITY FOR DEBTS OF DECEASED SPOUSE

- § 13550. Personal liability of surviving spouse
- § 13551. Limitation on liability
- § 13552. Effect of commencement of proceedings for administration of estate of deceased spouse
- § 13553. Enforcement of liability

CHAPTER 4. COLLECTION BY AFFIDAVIT OF COMPENSATION
OWED TO DECEASED SPOUSE

- § 13600. Collection of salary or other compensation, not exceeding \$5,000, by affidavit
- § 13601. Payment of earnings by employer
- § 13602. Protection of employer from liability

- § 13603. Enforcement of payment
- § 13604. Rights of heirs or devisees of deceased spouse not affected
- § 13605. Other methods of collecting compensation not affected

CHAPTER 5. DETERMINATION OR CONFIRMATION OF PROPERTY
PASSING OR BELONGING TO SURVIVING SPOUSE

- § 13650. Filing of petition
- § 13651. Contents of petition
- § 13652. Filing petition in pending proceeding
- § 13653. Joining petition with petition for probate proceeding
- § 13654. Probate of will or administration not precluded by petition
- § 13655. Notice of hearing
- § 13656. Court order
- § 13657. Effect of court order
- § 13658. Protection of interests of creditors of business of deceased spouse
- § 13659. Inventory and appraisement
- § 13660. Attorney's fee

DIVISION 8. DISPOSITION OF ESTATE WITHOUT ADMINISTRATION

PART 1. COLLECTION OR TRANSFER OF SMALL ESTATES
WITHOUT ADMINISTRATION

CHAPTER 1. DEFINITIONS

§ 13000. Construction of words and phrases

13000. Unless the provision or context otherwise requires, the words and phrases defined in this chapter govern the construction of this part.

Comment. Sections 13002-13006 provide definitions of terms used in this part.

§ 13002. Holder of the decedent's property

13002. "Holder of the decedent's property" means the person owing money to the decedent, having custody of tangible personal property of the decedent, or acting as registrar or transfer agent of the evidences of a debt, obligation, interest, right, security, or chose in action belonging to the decedent.

Comment. Section 13002 is drawn from language of a portion of subdivision (b) of former Probate Code Section 630. A person owing money to the decedent includes a financial institution. See Section 56 (defining "person").

CROSS-REFERENCES

Definitions

- Person § 56
- Personal property § 58
- Security § 70

§ 13006. Successor of the decedent

13006. (a) "Successor of the decedent" means:

(1) If the decedent died leaving a will, the sole beneficiary or all of the beneficiaries who succeeded to the property of the decedent under the decedent's will. For the purposes of this part, the trustee of a trust created during the decedent's lifetime is a beneficiary

under the decedent's will if the trust succeeds to the property of the decedent under the decedent's will.

(2) If the decedent died without a will, the sole person or all of the persons who succeeded to the property of the decedent under Sections 6401 and 6402.

(b) For the purposes of this section, "the property of the decedent" means the particular property of the decedent which is sought to be collected, received, or transferred under Chapter 3 (commencing with Section 13100) or the real property described in the court order under Section 13154 or the real property described in an affidavit under Section 13200.

Comment. Paragraph (1) of subdivision (a) of Section 13006 is drawn from a portion of subdivision (b) of former Probate Code Section 630. A guardian, conservator, or custodian may act on behalf of the person entitled to the property. See Section 13051. A trustee of a trust created by the will of the decedent is not a beneficiary under the decedent's will for the purposes of this part. See the Comment to Section 13051.

Paragraph (2) of subdivision (a) expands the provision of subdivision (b) of former Probate Code Section 630 which limited the heirs who could use the former summary affidavit procedure to the following relatives of the decedent: surviving spouse, children, issue of deceased children, parents, brothers or sisters, issue of deceased brothers or sisters, and grandparents. Under paragraph (2), the persons who can use the summary provisions of this part are not so limited.

Subdivision (b) is new. The definition of "successor of the decedent" requires that an affidavit or declaration be executed by all of the persons who succeed to the particular property sought to be collected, received, or transferred (see Sections 13100 and 13200) and that a petition be verified by all of the persons who succeed to the particular real property that is the subject of the petition (see Section 13151).

DRAFTSMAN'S NOTE. Subdivision (a)(2) of Section 13006 does not continue the "close relative" requirement of former law. The Commission decided at the January 1985 meeting not to continue this requirement in the new statute and considered and reaffirmed this decision at the May 1985 meeting.

CROSS-REFERENCES

Definitions

Property § 62
Surviving spouse § 78
Trust § 82
Trustee § 84
Will § 88
Persons who may act for successor § 13051

CHAPTER 2. GENERAL PROVISIONS

§ 13050. Exclusions in determining property or estate of decedent or its value

13050. (a) For the purposes of this part:

(1) Any property or interest or lien thereon which, at the time of the decedent's death, was held by the decedent as joint tenant, or in which the decedent had a life or other interest terminable upon the decedent's death, or which was held by the decedent and passed to the decedent's surviving spouse pursuant to Section 13500, shall be excluded in determining the property or 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 property or 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 meaning given those terms by Section 5101.

(b) For the purposes of this part, all of the following property shall be excluded in determining the property or estate of the decedent or its value:

(1) Any vehicle registered under Division 3 (commencing with Section 4000) of the Vehicle Code or titled under Division 16.5 (commencing with Section 38000) of the Vehicle Code.

(2) Any vessel numbered under Division 3.5 (commencing with Section 9840) of the Vehicle Code.

(3) Any manufactured home, mobilehome, commercial coach, or truck camper registered under Part 2 (commencing with Section 18000) of Division 13 of the Health and Safety Code.

(c) For the purpose of this part, the value of the following property shall be excluded in determining the value of the decedent's property in this state:

(1) Any amounts due to the decedent for services in the armed forces of the United States.

(2) The amount, not exceeding five thousand dollars (\$5,000), of salary or other compensation, including compensation for unused vacation, owing to the decedent for personal services from any employment.

Comment. Paragraph (1) of subdivision (a) of Section 13050 continues former Probate Code Section 632 without substantive change. It should be noted that the exclusion for an interest that terminates at death embraces life interests in trusts and contractual rights (such as insurance and employee retirement or death benefits) that terminate at death, as well as life interests in other property. O. McCarroll, 1 California Decedent Estate Administration Supplement § 3.6, at 76 (Cal. Cont. Ed. Bar 1985).

Paragraph (2) of subdivision (a) is new and is the same in substance as subdivision (b) of former Probate Code Section 647. Paragraph (2) is a special application of paragraph (1) of subdivision (a) of Section 13050 and continues prior law by making clear that funds in a multiple-party account as defined in Section 5101 are excluded in determining the property or estate of the decedent or its value to the extent that the funds belong after the death of the decedent to a surviving party, P.O.D. payee, or beneficiary. Under former Probate Code Section 632 (now paragraph (1) of subdivision (a) of Section 13050), joint tenancy accounts were expressly excluded from the decedent's estate, and Totten trust accounts and P.O.D. accounts were presumably also excluded as an estate terminable upon the decedent's death. Paragraph (2) excludes multiple-party account funds, whether or not they are community property under Section 5305, to the extent that the funds pass to a surviving party, P.O.D. payee, or beneficiary. To the extent that the funds do not belong after the death of the decedent to a surviving party, P.O.D. payee, or beneficiary, the funds are includable in the decedent's estate for the purpose of this part. Cf. Estate of Pezzola, 112 Cal. App.3d 752, 169 Cal. Rptr. 464 (1980).

Subdivision (b) continues without substantive change the portion of subdivision (a) of former Probate Code Section 630 that excluded certain state registered property in determining the estate or its value. The excluded property can be transferred, without probate, under special statutory provisions. See Health & Safety Code § 18102 (manufactured homes, mobilehomes, commercial coaches, and truck campers), Veh. Code §§ 5910 (vehicles), 9916 (vessels).

Subdivision (c) continues without substantive change the portion of subdivision (a) of former Probate Code Section 630 that provided a salary exclusion in determining the value of the decedent's property. Although this exclusion does not prevent the use of the affidavit procedure under Sections 13100-13115 to collect salary owed to the decedent, other procedures for collection of the salary owed to the decedent may be available. See, e.g., Gov't Code §§ 12479 (designation by state employee of person to receive warrants upon employee's death), 53245 (designation by public employee of person to

receive warrants upon employee's death). See also Probate Code Sections 160 (payment of money due to decedent to person designated by decedent), 13600 (collection by surviving spouse of compensation, not exceeding \$5,000, owed by employer to decedent).

CROSS-REFERENCES

Definitions

Community property § 28
Personal property § 58
Property § 62
Real property § 68
Surviving spouse § 78

§ 13051. Authority of guardian, conservator, trustee, or custodian

13051. For the purposes of this part:

(a) A guardian or conservator of the estate of a person entitled to any of the decedent's property may act on behalf of the person without authorization or approval of the court in which the guardianship or conservatorship proceeding is pending.

(b) A trustee of a trust created during the decedent's lifetime may act on behalf of the trust.

(c) If the decedent's will nominates a custodian to receive a devise to a beneficiary under the Uniform Gifts to Minors Act or the Uniform Transfer to Minors Act of any state and the nomination has not been revoked, the custodian may act on behalf of the beneficiary until such time as the custodianship terminates.

Comment. Subdivision (a) of Section 13051 is drawn from subdivision (d) of former Probate Code Section 650 and is consistent with the portion of subdivision (b) of former Probate Code Section 630 which referred to the guardian or conservator of the estate. Subdivision (b) is new and supersedes the portion of subdivision (b) of former Probate Code Section 630 which referred to a trustee. The trustee must be the trustee of a living trust created by the decedent or by another during the decedent's lifetime or of a testamentary trust created by another who died during the decedent's lifetime; the trustee of a trust created by the decedent's will is not included under subdivision (b). Subdivision (c) is drawn from subdivision (c) of former Probate Code Section 630.

CROSS-REFERENCES

Definitions

Property § 62
Trust § 82
Trustee § 84
Will § 88

Uniform Transfers to Minors Act §§ 3900-3925

CHAPTER 3. AFFIDAVIT PROCEDURE FOR COLLECTION OR TRANSFER OF PERSONAL PROPERTY

§ 13100. Transfer of personal property without probate

13100. Excluding the property described in Section 13050, if the gross value of the decedent's real and personal property in this state does not exceed sixty thousand dollars (\$60,000) and the gross value of the decedent's real property, if any, in this state does not exceed ten thousand dollars (\$10,000) and if 40 days have elapsed since the death of the decedent, the successor of the decedent to the decedent's interest in the property may do any one or more of the following without procuring letters of administration or awaiting the probate of the will:

(a) Collect any money due the decedent.

(b) Receive any tangible personal property of the decedent.

(c) Have any evidences of a debt, obligation, interest, right, security, or chose in action belonging to the decedent transferred, whether or not secured by a lien on real property.

Comment. Section 13100 continues without substantive change a portion of former Probate Code Section 630 with the addition of the requirement that 40 days have elapsed since the death of the decedent. The new 40-day requirement is consistent with Section 13540 (surviving spouse has power to deal with and dispose of real property after 40 days from the death of other spouse). For similar requirements, see Health & Safety Code § 18102 (requirement that 40 days have elapsed from death of owner to permit transfer of registration of manufactured home, mobilehome, commercial coach, or truck camper using affidavit procedure), Veh. Code § 9916 (requirement that 40 days have elapsed from death of owner to permit transfer of ownership of vessel using affidavit procedure). For a provision permitting a surviving spouse to collect salary owing to the deceased spouse without waiting for a 40-day period to elapse, see Section 13600.

The procedure provided by this chapter can be used only if all of the following conditions are satisfied:

(1) The gross value of the decedent's real and personal property in this state (excluding certain property) does not exceed \$60,000. See Section 13100. See also Section 13050 (exclusions).

(2) The gross value of the decedent's real property in this state (excluding certain property) does not exceed \$10,000. See Section 13100. See also Section 13050 (exclusions).

(3) No proceeding for the administration of the decedent's estate is pending or has been conducted in California. See Section 13108.

(4) Not less than 40 days have elapsed since the death of the decedent. See Section 13100.

(5) The person who seeks to collect the money, receive the property, or have the evidences transferred is the successor of the decedent. See Section 13101. The affidavit or declaration required by Section 9531 must be executed by all the successors who have an interest in the property sought to be collected, received, or transferred. See Section 13006 (defining "successor of the decedent").

The procedure under this chapter cannot be used for real property. See Section 13115. For a procedure for obtaining, without probate, a court order determining the persons who succeed to real property of a decedent (limited to a case where the gross value of decedent's real and personal property in this state does not exceed \$60,000), see Sections 13150-13157. For an affidavit procedure for obtaining marketable title to real property of a decedent without probate (limited to a case where the gross value of decedent's real property in this state does not exceed \$10,000), see Sections 13200-13208. For a procedure permitting a surviving spouse to obtain a court order that real property passed to the surviving spouse (without limit as to the value of the real property), see Sections 13650-13660. See also Sections 13540-13542 (right of surviving spouse to dispose of real property).

CROSS-REFERENCES

Definitions

Personal property § 58

Property § 62

Real property § 68

Security § 70

Successor of the decedent § 13006

Will § 88

Persons authorized to act on behalf of successor § 13051

DRAFTSMAN'S NOTE. Section 13100 includes a new requirement that 40 days have elapsed since the death of the decedent before the affidavit procedure can be used to collect personal property. No such delay is required by existing law.

Other states that have a summary procedure generally require that 30 or more days have elapsed after the death of the decedent before the procedure can be used. Some of these states are Arizona, Delaware, Missouri, and Texas. Arkansas has a 45-day delay requirement. Transfer in California of title of certain state registered property is subject to a 40-day delay requirement. California also has a 40-day delay requirement under existing Section

649.2 (surviving spouse has power to deal with and dispose of real property after 40 days from the death of other spouse). The delay requirement allows time for persons interested in the estate to take some action before a summary distribution is made.

If there is to be a 40-day delay in collection of personal property by affidavit, we need to deal with the needs of a surviving spouse during the interim. The draft statute includes a special provision (Sections 13600-13605) to permit a surviving spouse to collect compensation owing to the deceased spouse without delay. The amount that could be collected under that special provision may not exceed \$5,000. This amount could be collected by affidavit without regard to the value of the decedent's estate.

§ 13101. Furnishing of affidavit

13101. To collect money, receive tangible personal property, or have evidences transferred under this chapter, an affidavit or a declaration under penalty of perjury under the laws of the State of California shall be furnished to the holder of the decedent's property stating all of the following:

(a) The decedent's name.

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

(c) "At least 40 days have elapsed since the death of the decedent."

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

(e) "The gross value of the decedent's real and personal property in California, excluding the property described Section 13050 of the California Probate Code, does not exceed sixty thousand dollars (\$60,000)."

(f) "The gross value of the decedent's real property in California, excluding any real property described in Section 13050 of the California Probate Code, does not exceed ten thousand dollars (\$10,000)."

(g) A description of the property of the decedent that is to be paid, transferred, or delivered to the affiant or declarant.

(h) The name of the successor of the decedent (as defined in Section 13006 of the California Probate Code) to the described property.

(i) "The affiant or declarant is the successor of the decedent (as defined in Section 13006 of the California Probate Code) to the decedent's interest in the described property" or "The affiant or declarant is authorized under Section 13051 of the California Probate Code to act on behalf of the successor of the decedent (as defined in Section 13006 of the California Probate Code) to the decedent's interest in the described property."

(j) "No other person has a right to the interest of the decedent in the described property."

(k) "I request that the described property be paid, transferred, or delivered to me."

(l) "I affirm or declare that all of the statements in this affidavit or declaration are true and I further acknowledge that any false statement may subject me to penalties relating to perjury."

Comment. Section 13101 supersedes portions of subdivision (b) of former Probate Code Section 630. The portions of Section 13101 prescribing the contents of the affidavit or declaration are new and replace the provision of former Probate Code Section 630 that required that the person or persons furnish an affidavit or declaration "showing the right of the person or persons to receive such money or property, or to have such evidences transferred." The affidavit or declaration must be executed by all successors of the decedent who have an interest in the property sought to be collected, received, or transferred. See Section 13006 (defining "successor of the decedent").

CROSS-REFERENCES

Definitions

Holder of the decedent's property § 13002
Person § 56
Personal property § 58
Property § 62
Successor of the decedent § 13006
Real property § 68
Persons authorized to act on behalf of successor § 13051

§ 13102. Presenting decedent's evidence of ownership

13102. (a) If the decedent had evidence of ownership of property described in the affidavit (such as a stock certificate, bank passbook, or promissory note), the evidence of ownership, if available, shall be presented with the affidavit or declaration to the holder of the decedent's property.

(b) If the decedent had evidence of ownership of property described in the affidavit or declaration and the evidence of ownership is not presented with the affidavit or declaration to the holder of the decedent's property, the holder may require, as a condition for the payment, delivery, or transfer of the property, an indemnification or bond in a reasonable amount determined by the holder to be sufficient to indemnify the holder against all liability, claims, demands, loss, damages, costs, and expenses that the holder may incur or suffer by reason of the payment, delivery, or transfer of the property.

Comment. Section 13102 is new. Subdivision (a) is comparable to Health & Safety Code § 18102 and Vehicle Code §§ 5910 and 9916 (transfer upon affidavit of manufactured home, mobilehome, commercial coach, truck camper, vehicle, or vessel upon furnishing affidavit and appropriate certificate of ownership or title and registration card, if available). See also Financial Code Section 6950 (payment of deposit account upon presentation of evidence of ownership of account, if any). Subdivision (b) is included to protect the holder against the possible claim of another where there is outstanding evidence of ownership. The provision is drawn in part from Financial Code Section 6652 (issuance of new evidence of account by savings and loan association).

CROSS-REFERENCES

Definitions

Holder of the decedent's property § 13002
Property § 62

DRAFTSMAN'S NOTE. Existing law does not deal with the problem of an outstanding instrument that evidences ownership, such as a stock certificate, bank passbook, or promissory note. The existing provisions relating to transfer of title to state registered property require the presentation of the registration or title document, if available. Section 13102 deals with this matter and requires presentation of the evidence of ownership, if available. If the evidence of ownership is not presented, the holder of the property may require the person seeking the delivery or transfer of the property to provide a satisfactory indemnification or bond to hold the holder harmless.

§ 13103. Inventory and appraisal of real property required

13103. If the estate of the decedent includes any real property, the affidavit or declaration shall be accompanied by an inventory and appraisal of the real property. The appraisal shall be made as set forth in Chapter 9 (commencing with Section 600) of Division 3.

Comment. Section 13103 is new. Under former law, the affidavit or declaration alone was sufficient. Even though the procedure provided in this chapter may be used to collect or transfer personal property only, if the estate includes any real property (not including real property held in joint tenancy or other real property described in Section 13050), an appraisal of the real property by a probate referee is required. Even though an appraisal of the real property is required, the inventory and appraisal need not include an inventory and appraisal of the personal property in the decedent's estate. If the decedent's estate does not include any real property, no inventory and appraisal is required. For provisions relating to real property, see Chapter 4 (commencing with Section 13150) (court order determining succession to real property) and Chapter 5 (commencing with Section 13200) (affidavit procedure for transfer of real property of small estate).

CROSS-REFERENCES

Definitions

Real property § 68

Exclusions in determining estate of decedent § 13050

DRAFTSMAN'S NOTE. Section 13103 imposes a new requirement not found in existing law. Under existing law, an affidavit or declaration alone is sufficient to collect or transfer personal property in a small estate (not exceeding \$60,000 with not exceeding \$10,000 in real property). Section 13103 requires that the affidavit or declaration be accompanied by an appraisal by a probate referee if the estate includes any real property, even though only personal property may be collected or transferred pursuant to such affidavit or declaration.

§ 13104. Proof of identity of persons executing the affidavit

13104. (a) Reasonable proof of the identity of each person executing the affidavit or declaration shall be provided to the holder of the decedent's property.

(b) Reasonable proof of identity is provided for the purposes of this section if both of the following requirements are satisfied:

(1) The person executing the affidavit or declaration is personally known to the holder.

(2) The person executes the affidavit or declaration in the presence of the holder.

(c) If the affidavit or declaration is executed in the presence of the holder, a written statement under penalty of perjury by a person personally known to the holder affirming the identity of the person executing the affidavit or declaration is reasonable proof of identity for the purposes of this section.

(d) If the affidavit or declaration is executed in the presence of the holder, the holder may reasonably rely on any of the following as reasonable proof of identity for the purposes of this section:

(1) An identification card or driver's license issued by the California Department of Motor Vehicles that is current or has been issued within five years.

(2) A passport issued by the Department of State of the United States that is current or has been issued within five years.

(3) Any of the following documents if the document is current or has been issued within five years and contains a photograph and description of the person named on it, is signed by the person, and bears a serial or other identifying number:

(A) A passport issued by a foreign government that has been stamped by the United States Immigration and Naturalization Service.

(B) A driver's license issued by a state other than California.

(C) An identification card issued by a state other than California.

(D) An identification card issued by any branch of the armed forces of the United States.

(e) For the purposes of this section, a notary public's certificate of acknowledgment identifying the person executing the affidavit or declaration is reasonable proof of identity of the person executing the affidavit or declaration.

(f) Unless the affidavit or declaration contains a notary public's certificate of acknowledgment of the identity of the person, the holder shall note on the affidavit or declaration either that the person executing the affidavit or declaration is personally known or a description of the identification provided by the person executing the affidavit or declaration.

Comment. Section 13104 is a new provision that is designed to provide clear rules as to the type of identification that reasonably may be relied upon to establish the identity of a person executing an affidavit or declaration. The section is drawn from Civil Code Section 1185 (acknowledgment of instrument by notary public) but does not permit a driver's license issued by a Canadian or Mexican public agency to be used as reasonable proof of identity.

Under subdivision (f), the holder must make a notation as required by subdivision (f) for each person executing the affidavit or declaration, but such a notation is not required for the person or persons for whom the affidavit or declaration contains a notary public's certificate of acknowledgment of identity.

CROSS-REFERENCES

Definitions

Holder of the decedent's property § 13002

Property § 62

State § 74

DRAFTSMAN'S NOTE. The existing statute does not deal with the problem of the requirement of proof of identity of the persons executing the affidavit or declaration. Section 13104 is intended to make clear the extent of the responsibility of the holder of the property to identify the person or persons to whom the property is to be delivered. Section 13104 is drawn from the provision governing the duty of the notary public to reasonably identify the person acknowledging an instrument. The section is similar to Civil Code Section 2511 which permits a witness to a durable power to attorney to rely for evidence of identify of the principal upon the same evidences that are listed in Section 13104 except that Civil Code Section 2511 allows the witness to a durable power of attorney to rely upon a driver's license issued by a Canadian or Mexican public agency as reasonable proof of identity but Section 13104 does not permit reliance upon Canadian or Mexican driver's licenses.

§ 13105. Transfer of property to successor

13105. (a) If the requirements of Sections 13100 to 13104, inclusive, are satisfied:

(1) The person or persons executing the affidavit or declaration are entitled to have the property described in the affidavit or declaration paid, delivered, or transferred to them.

(2) A transfer agent of a security described in the affidavit or declaration shall change the registered ownership on the books of the corporation from the decedent to the person or persons executing the affidavit or declaration.

(b) If the holder of the decedent's property refuses to pay, deliver, or transfer any personal property or evidence thereof, the person or persons entitled to the property may recover the property or compel its payment, delivery, or transfer in an action brought for that purpose against the holder of the property. If an action is brought against the holder under this section, the court shall award attorney's fees to the persons bringing the action if the court finds that the holder of the decedent's property acted unreasonably in refusing to pay, deliver, or transfer the property to them as required by subdivision (a).

Comment. Section 13105 is a new provision comparable to Section 13603 (collection by affidavit by surviving spouse of compensation owed to deceased spouse).

Subdivision (a) of Section 13105 is drawn from portions of former Probate Code Section 630. The person paying, delivering, or transferring the property is protected from liability. See Section 13106. See also Section 13102(b) (providing bond to protect person paying, delivering, or transferring property). Payment or transfer pursuant to Section 13105 does not preclude later administration of the decedent's estate. See Section 13108. As to the liabilities of the person receiving the property, see Sections 13109-13113.

Subdivision (b) is new and makes clear that the duty imposed by subdivision (a) can be enforced by an action against the holder. This remedy is in addition to the remedies against the holder if the decedent's estate is probated. See also Section 13656 (court order determining that property is property belonging to or passing to a surviving spouse).

CROSS-REFERENCES

Definitions

Holder of the decedent's property § 13002
Personal property § 58
Property § 62
Security § 70

DRAFTSMAN'S NOTE. Section 13105 is a new provision that imposes a duty on the holder to transfer the property to the successors of the decedent if the statutory requirements are satisfied and permits the successors to bring an action to recover the property or to compel the transfer if the holder does not comply with the statute. The provision is drawn from the Arizona statute and statutes of other states.

§ 13106. Protection of transferor from liability

13106. If the requirements of Sections 13100 to 13104, inclusive, are satisfied, receipt by the holder of the decedent's property of the affidavit or declaration constitutes sufficient acquittance for the payment of money, delivery of property, or changing registered ownership of property pursuant to this chapter and discharges the holder from any further liability with respect to the money or property. The holder has no duty to see to the application of the property or evidence thereof or to inquire into the truth of any statement in the affidavit or declaration.

Comment. Section 13106 continues the first sentence of former Probate Code Section 631 without substantive change but with the addition of the clarifying introductory clause and the addition of the language drawn from Section 3916 (Uniform Transfers to Minors Act) that makes clear that the holder has no duty to see to the application of the property or evidence thereof. See also Section 13102(b) (bond to protect person paying, delivering, or transferring property).

CROSS-REFERENCES

Definitions

Holder of the decedent's property § 13002
Property § 62

§ 13107. Claim against estate in probate

13107. When the money or property claimed in an affidavit or declaration presented under this chapter is that of a deceased heir or devisee of a deceased person whose estate is being administered in this state, the personal representative of the person whose estate is being administered shall present the affidavit or declaration to the court in which the estate is being administered. The court shall direct the personal representative to pay the money or deliver the property to the person or persons who furnished the affidavit or declaration to the extent that the decree of distribution determines that the deceased heir or devisee was entitled to the money or property under the will or the laws of succession.

Comment. Section 13107 continues former Probate Code Section 631.1 without substantive change.

CROSS-REFERENCES

Definitions

Devisee § 34

Heirs § 44

Personal representative § 60

Property § 62

Will § 88

§ 13108. No pending probate proceeding; later probate proceeding not precluded

13108. (a) The procedure provided by this chapter may be used only if no proceeding for the administration of the decedent's estate is pending or has been conducted in California.

(b) Payment, delivery, or transfer of a decedent's property pursuant to this chapter does not preclude later proceedings for administration of the decedent's estate.

Comment. Subdivision (a) of Section 13108 is a new provision that is consistent with the last sentence of former Probate Code Section 631. See generally Broll, Summary Administration, in 1 California Decedent's Estate Administration § 3.14, at 124 (Cal. Cont. Ed. Bar 1971).

Subdivision (b) is drawn from the last sentence of former Probate Code Section 631. See generally *Brezzo v. Brangero*, 51 Cal. App. 79, 81, 196 P. 87 (1921); Evans, Comments on the Probate Code of California, 19 Calif. L. Rev. 602, 607 (1931).

CROSS-REFERENCES

Definitions

Property § 62

§ 13109. Personal liability for decedent's unsecured debts

13109. Subject to Section 13112, a person to whom payment, delivery, or transfer of the decedent's property is made under this chapter is personally liable for the unsecured debts of the decedent. Any such debt may be enforced against the person in the same manner as it could have been enforced against the decedent if the decedent had not died. In any action based upon the debt, the person may assert any defenses, cross-complaints, or setoffs that would have been available to the decedent if the decedent had not died.

Comment. The first sentence of Section 13109 is drawn from Section 6611 (small estate set-aside), but Section 13109 does not include the one-year limitation on the duration of personal liability provided by Section 6611. Instead, Section 13109 follows Section 13553 (enforcement of liability of deceased spouse against surviving spouse) and Section 13156 (enforcement of debt against petitioners who receive low value real property under court order made in summary proceeding). Section 13109 (by providing that any action based on the debt is subject to the same defenses that would have been available to the decedent if the decedent had not died) adopts the same statute of limitations that would have applied in an action against the decedent on the debt had the decedent not died. The liability under Section 13109 is limited. See Section 13112.

CROSS-REFERENCES

Definitions

Property § 62

DRAFTSMAN'S NOTE. The existing statute does not deal with the situation where the decedent's estate is probated after personal property has been paid, delivered, or transferred pursuant to an affidavit or declaration. Nor does it deal with the liability of the person who receives property using the affidavit or declaration procedure if there later proves to be a person with a superior right to the property or if there are unpaid unsecured creditors. This chapter contains provisions governing these matters. See Sections 13109-13113.

§ 13110. Personal liability to person having superior right

13110. Subject to Section 13112, a person to whom payment, delivery, or transfer of the decedent's property is made under this chapter is personally liable to any person having a superior right to the property by testate or intestate succession from the decedent. An action to enforce the liability under this section is forever barred five years after the affidavit or declaration was presented under this chapter to the holder of the decedent's property.

Comment. Section 13110 is new. The section makes clear that a person having a superior right to the property by testate or intestate succession can bring an action against the person who received the property. This remedy is an alternative to petitioning for the probate of the decedent's estate. See Section 13111. The liability under Section 13110 is limited. See Section 13112. The five-year statute of limitations is comparable to that provided under Section [1358] for recovery of property of a missing person if the missing person appears after the distribution of his or her property.

CROSS-REFERENCES

Definitions

Holder of the decedent's property § 13002

Property § 62

§ 13111. Restitution if estate proceeding commenced

13111. Subject to Section 13112, if proceedings for the administration of the decedent's estate are commenced, each person to whom payment, delivery, or transfer of the decedent's property is made under this chapter and who still has the property is liable for restitution of the property to the estate, or, if the person no longer has the property, is liable for restitution to the estate of the fair market value of the property as of the date of disposition of the property, together with the net income the person received from the property. An action to enforce the liability under this section is forever barred five years after the affidavit or declaration was presented under this chapter to the holder of the decedent's property.

Comment. Section 13111 requires restitution to the decedent's estate if probate proceedings are commenced. This liability is limited. See Section 13112. The five-year statute of limitations is comparable to that provided under Section 1358 for recovery of property of a missing person if the missing person appears after the distribution of his or her property.

CROSS-REFERENCES

Definitions

Holder of the decedent's property § 13002
Property § 62

§ 13112. Limitation on liability

13112. (a) A person to whom payment, delivery, or transfer of the decedent's property has been made under this chapter is not liable under Section 13109 or 13110 if proceedings for the administration of the decedent's estate are commenced and the person restores the property or its fair market value and net income to the estate in compliance with Section 13111.

(b) The property or amount required to be restored to the estate under Section 13111 shall be reduced by any property or amount paid by the person to satisfy a liability under Sections 13109 or 13110.

(c) The aggregate of the personal liability of a person under Sections 13109 and 13110 shall not exceed the fair market value at the date of the decedent's death of the decedent's property paid, delivered, or transferred under this chapter to that person, less the amount of any liens and encumbrances on the property.

Comment. Section 13112 is new and limits the liability of a person to whom payment, delivery, or transfer of the decedent's property is made under this chapter to the property or amount received.

CROSS-REFERENCES

Definitions

Property § 62

§ 13113. Other remedies not affected

13113. The remedies available under Sections 13109 to 13112, inclusive, are in addition to any remedies available by reason of any fraud or intentional wrongdoing.

Comment. Section 13113 is a new provision that makes clear that the remedies provided in this chapter for creditors and persons having a superior right to the property do not limit any other remedies that are available by reason of fraud or intentional wrongdoing.

§ 13114. Payment of costs and fees of public administrator

13114. A public administrator who has taken charge of the estate of a decedent as provided in Section 1140 may refuse to pay money or deliver property pursuant to this chapter if payment of the costs and fees described in Section 1144.5, subject to the dollar limitations specified in that section, has not first been made or adequately assured to the satisfaction of the public administrator.

Comment. Section 13114 continues subdivision (e) of former Probate Code Section 630 without substantive change.

CROSS-REFERENCES

Definitions

Property § 62

§ 13115. Chapter does not apply to real property

13115. The procedure provided in this chapter may not be used to obtain possession or the transfer of real property.

Comment. Section 13115 continues the last sentence of subdivision (b) of former Probate Code Section 630 with language changes for clarification only and without substantive change. For provisions relating to real property, see Chapter 4 (court order determining succession to real property) and Chapter 5 (affidavit procedure for real property of small value).

CROSS-REFERENCES

Definitions

Real property § 68

CHAPTER 4. COURT ORDER DETERMINING SUCCESSION TO REAL PROPERTY

DRAFTSMAN'S NOTE. This chapter provides a new procedure for obtaining, without the need for a probate proceeding, a court order determining that real property of the decedent passed to one or more persons by intestate succession or under the decedent's will. The procedure is drawn from existing Sections 650-655 (order determining that property passed to surviving spouse).

Unlike the existing Section 650 procedure, this chapter does not permit the petitioner to obtain an order determining that personal property is property passing to the petitioner. Under this chapter, only an order determining that real property is property passing to the petitioner may be obtained. An earlier draft would have allowed

the petitioner to obtain an order with respect to both real and personal property, but objection was made to that provision insofar as it related to personal property. The objection was based on the fear that including provision for personal property would result in financial institutions becoming unwilling to rely on an affidavit to release moneys. The Commission should determine whether it wishes to preclude use of the procedure provided in this chapter in a case where the registrar of record title to personal property will not transfer title of record upon receipt of an affidavit or declaration furnished by the successor of the decedent. Is there a justification for limiting the procedure under this chapter to real property when the procedure for a surviving spouse applies to both real and personal property?

§ 13150. No pending probate proceeding

13150. The procedure provided by this chapter may be used only if no proceeding is being or has been conducted in this state for administration of the decedent's estate.

Comment. Section 13150 makes the procedure provided by this chapter an alternative to the probate of a small estate.

§ 13151. Petition for court order determining succession to real property

13151. Exclusive of the property described in Section 13050, if a decedent dies leaving real property in this state and the gross value of the decedent's real and personal property in this state does not exceed sixty thousand dollars (\$60,000) and 40 days have elapsed since the death of the decedent, the successor of the decedent to the real property, without procuring letters of administration or awaiting the probate of the will, may file a petition in the superior court of the county in which the estate of the decedent may be administered requesting a court order determining that the petitioner has succeeded to the real property and that administration of the decedent's estate is unnecessary.

Comment. Sections 13150-13156 are new and provide a procedure for obtaining, without the need for a probate proceeding, a court order determining that real property of the decedent passed to one or more persons by intestate succession or under the decedent's will. The new procedure is drawn from Sections 13650-13660 (order determining that property passed to surviving spouse).

The procedure provided by this chapter can be used only if all of the following conditions are satisfied:

(1) The gross value of the decedent's real and personal property in this state (excluding certain property) does not exceed \$60,000. See Sections 13151 and 13152. See also Section 13050 (excluded property). Unlike Section 13100 (affidavit or declaration procedure), the procedure provided by this chapter may be used even if the gross value of the real property in the decedent's estate exceeds \$10,000, the only limitation for use of this chapter being that the gross value of the real and personal property not exceed \$60,000.

(2) No proceeding is pending or has been conducted in this state for administration of the decedent's estate. See Section 13150.

(3) The decedent died leaving real property in this state and 40 days have elapsed since the death of the decedent. See Section 13151.

(4) The petition is joined in by all those who have succeeded to the real property by intestate succession or under the decedent's will. See Section 13151. See also Section 13006 (defining "successor of the decedent").

(5) The petition is accompanied by an inventory and appraisalment by a probate referee. See Section 13152.

(6) Notice is given to all heirs and devisees of the decedent, to the executor named in the decedent's will, and to all other persons named in the decedent's will, so far as known to the petitioner. See Section 13153.

CROSS-REFERENCES

Definitions

Real property § 68

Successor of the decedent § 13006

Will § 88

Persons authorized to act on behalf of successor § 13051

§ 13152. Contents of petition; inventory and appraisalment

13152. (a) The petition shall be verified by each of the petitioners, shall contain a request that the court make an order under Chapter 4 (commencing with Section 13150) of Part 1 of Division 8 determining that the real property described in the petition is property passing to the petitioners and that no administration of the decedent's estate is necessary, and shall state all of the following:

(1) The facts necessary to determine that the petition is filed in the proper county.

(2) The gross value of the decedent's real and personal property in California, excluding the property described in Section 13050 of the Probate Code, as shown by the inventory and appraisalment attached to the petition, does not exceed sixty thousand dollars (\$60,000).

(3) A description of the real property in this state which the petitioners allege is property of the decedent passing to the petitioners.

(4) The facts upon which the petitioners based the allegation that the described real property property is property passing to the petitioners.

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

(6) Whether estate proceedings for the decedent have been commenced in any other jurisdiction and, if so, where such proceedings are pending or were conducted.

(7) The names, addresses, relationships, and ages of the heirs and devisees of the decedent, the names and addresses of all persons named as executors of the will of the decedent, and the names and addresses of all other persons named in the will of the decedent, so far as known to any petitioner.

(b) There shall be attached to the petition an inventory and appraisement in the form set forth in Section 600 of the decedent's real and personal property in this state, excluding the property described in Section 13050. The appraisement shall be made as set forth in Chapter 9 (commencing with Section 600) of Division 3. The petitioner may appraise the assets which a personal representative could appraise under Section 605.

(c) If the petitioners base the allegation that the described property is property passing to the petitioners under the will of the decedent, a copy of the will shall be attached to the petition.

Comment. Section 13152 is drawn in part from Section 13651 (petition for order determining property is property passing to surviving spouse). A guardian, conservator, trustee, or custodian is authorized to act as petitioner on behalf of the person to whom the real property passes. See Section 13051.

CROSS-REFERENCES

Definitions

Devisee § 34

Heirs § 44

Person § 56

Personal property § 58

Real property § 68

Will § 88

Persons authorized to act on behalf of successor § 13051

§ 13153. Notice of hearing

13153. The clerk shall set the petition for hearing, and notice of the hearing on the petition shall be personally served upon or mailed, postage prepaid, to each of the persons named in the petition pursuant to Section 13152, addressed to each such person at the person's residence or mailing address as set forth in the petition, otherwise at the county seat of the county where the proceedings are pending.

Comment. Section 13153 is drawn from subdivision (b) of Section 13655 (petition for order determining property is property passing to surviving spouse).

§ 13154. Court order

13154. (a) If the court makes the findings required under subdivision (b), the court shall issue an order determining (1) that real property, to be described in the order, of the decedent is property passing to the petitioners and the specific property interest of each petitioner in the described property and (2) that no administration of the decedent's estate is necessary.

(b) The court may make an order under this section only if the court makes all of the following findings:

(1) The gross value of the decedent's real and personal property in California, excluding the property described in Section 13050, does not exceed sixty thousand dollars (\$60,000).

(2) Not less than 40 days have elapsed since the death of the decedent.

(3) No proceeding is now being or has been conducted in this state for administration of the decedent's estate.

(4) The real property described in the order is property of the decedent passing to the petitioners.

(c) If the petition has attached an inventory and appraisalment that satisfies the requirements of subdivision (b) of Section 13152, the finding required by paragraph (1) of subdivision (b) of this section shall be made on the basis of the verified petition and the attached inventory and appraisalment unless evidence is offered by a person opposing the petition that the gross value of the decedent's real and personal property in California, excluding the property described in Section 13050, exceeds sixty thousand dollars (\$60,000).

Comment. Section 13154 states the findings required for a court order determining that the real property described in the order is property of the decedent passing to the petitioners.

The court does not make a finding under Section 13154 as to the value of specific items or parcels of property; the court makes a finding only that "the gross value of the decedent's real and personal property in California, excluding the property described in Section 13050 of the Probate Code, does not exceed \$60,000."

CROSS-REFERENCES

Definitions

Personal property § 58

Real property § 68

DRAFTSMAN'S NOTE. Section 13154 provides for a court order determining that the real property of the decedent described in the order is property passing to the petitioner. The order may not be issued unless 40 days have elapsed since the death of the decedent. The court determines only that the gross value of the decedent's real and personal property in this state (excluding certain property) does not exceed \$60,000. No determination is made of the value of individual items of property. An inventory and appraisalment of the real and personal property is required. Except for items that the personal representative is authorized generally to appraise, the appraisalment must be made by a probate referee.

§ 13155. Finality of order

13155. Upon becoming final, an order under this chapter determining that real property is property passing to the petitioners is conclusive on all persons, whether or not they are in being.

Comment. Section 13155 is drawn from Section 13657 (property passing to surviving spouse).

CROSS-REFERENCES

Definitions

Person § 56

Real property § 68

§ 13156. Personal liability of petitioners

13156. (a) Subject to subdivisions (b) and (c), the petitioners who receive the decedent's property pursuant to an order under this chapter are personally liable for the unsecured debts of the decedent.

(b) The personal liability of any petitioner shall not exceed the fair market value at the date of the decedent's death of the property received by that petitioner pursuant to an order under this chapter, less the amount of any liens and encumbrances on the property.

(c) In any action or proceeding based upon an unsecured debt of the decedent, the petitioners may assert any defense, cross-complaint, or setoff which would have been available to the decedent if the decedent had not died.

Comment. Section 13156 is drawn from Section 6611 (small estate set aside), but Section 13156 does not include the one-year limitation on the duration of personal liability provided by Section 6611. See the discussion in the Comment to Section 13109.

§ 13157. Attorney's fee

13157. The attorney's fee for services performed in connection with the filing of a petition and obtaining a court order under this chapter shall be determined by private agreement between the attorney and the client and is not subject to approval by the court.

Comment. Section 13157 is comparable to Section 13660 (determination or confirmation of property passing or belonging to surviving spouse). See the Comment to Section 13660.

CHAPTER 5. AFFIDAVIT PROCEDURE FOR REAL PROPERTY OF SMALL VALUE

DRAFTSMAN'S NOTE. This chapter provides a new procedure that permits use of an affidavit to transfer title of real property of record where the real property does not have gross value in excess of \$10,000. The procedure is drawn from the Arizona statute. The Arizona statute does not require that the affidavit contain a certificate of acknowledgment

of a notary public identifying each person executing the affidavit; this is required by the provisions of the new chapter. Nor does the Arizona statute require an inventory and appraisal of the real property by a probate referee; this is required by the provisions of the new chapter. The affidavit is filed with the court clerk who issues a certified copy of the affidavit (without the attachments). The certified copy is recorded in the property records in the county to clear the title to the property.

Although Chapter 4 (commencing with Section 13150) permits the court order determining ownership of real property to be made if 40 days have elapsed from the date of the decedent's death, the affidavit procedure for real property under this chapter cannot be used until six months have elapsed from the date of the decedent's death. This follows the Arizona statute and recognizes that the court proceeding involves notice to the heirs and devisees of the decedent but the affidavit procedure does not. The delay of six months allows persons interested in the decedent's estate to commence a proceeding to probate the estate.

§ 13200. Filing affidavit in superior court

13200. (a) After six months from the death of a decedent, a person or persons claiming as successor of the decedent to the decedent's interest in real property may file in the superior court in the county in which the decedent was domiciled at the time of death, or if the decedent was not domiciled in this state at the time of death then in any county in which real property of the decedent is located, an affidavit stating all of the following:

(1) The name of the decedent.

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

(3) A description of the real property and the interest of the decedent therein.

(4) "The gross value of all real property in the decedent's estate located in California, as shown by the inventory and appraisal attached to this affidavit, excluding the real property described in Section 13050 of the California Probate Code, does not exceed ten thousand dollars (\$10,000)."

(5) "At least six months have elapsed since the death of the decedent as shown in a certified copy of decedent's death certificate attached to this affidavit."

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

(7) "Funeral expenses, expenses of last illness, and all unsecured debts of the decedent have been paid."

(8) "I am the successor of the decedent (as defined in Section 13006 of the California Probate Code) to the decedent's interest in the described property, and no other person has a superior right to the interest of the decedent in the described property."

(9) "I affirm that all statements in this affidavit are true and I further acknowledge that any false statement may subject me to penalties relating to perjury."

(b) For each person executing the affidavit, the affidavit shall contain a notary public's certificate of acknowledgment identifying the person.

(c) There shall be attached to the affidavit an inventory and appraisement in the form set forth in Section 600 of the decedent's real property in this state, excluding the real property described in Section 13050. The appraisement shall be made as set forth in Chapter 9 (commencing with Section 600).

(d) If the person or persons executing the affidavit claim under the decedent's will, a copy of the will shall be attached to the affidavit.

Comment. Sections 13200-13208 provide a new procedure for obtaining a marketable title to real property in which the decedent's interest is shown by a probate referee's appraisal not to exceed \$10,000 gross value. The new procedure is drawn in part from a statute enacted in Arizona in 1983. See Ariz. Rev. Stat. Ann. §§ 14-3971, 14-3972 (Supp. 1984-85). For a discussion of the Arizona statute, see Effland, Handling Real and Personal Property At Death Without Administration Under the 1983 Amendments to the Arizona Probate Code, Ariz. B. J., Dec.-Jan 1984, at 34, 36.

CROSS-REFERENCES

Definitions

Person § 56

Real property § 68

Successor of the decedent § 13006

Will § 88

Persons authorized to act on behalf of successor § 13051

§ 13201. Filing fee

13201. Notwithstanding any other provision of law, the total fee for the filing of an affidavit under Section 13200 and the issuance of

one certified copy of the affidavit under Section 13202 is thirty-five dollars (\$35).

Comment. The fee provided by Section 13201 is the total fee. No additions to the \$35 fee are to be made for such fees as a law library fee, judges' retirement fee, reporter's fee, or the like.

DRAFTSMAN'S NOTE. Is \$35 an appropriate fee?

§ 13202. Issuance and recording of certified copy of affidavit

13202. Upon receipt of the affidavit and the required fee, the court clerk, upon determining that the affidavit is complete and has the required attachments, shall file the affidavit and attachments and shall issue a certified copy of the affidavit without the attachments. The certified copy shall be recorded in the office of the county recorder of the county where the real property is located. The county recorder shall index the certified copy in the index of grantors and grantees. The decedent shall be indexed as the grantor and each person designated as a successor to the property in the certified copy shall be indexed as a grantee.

Comment. See the Comment to Section 13200.

CROSS-REFERENCES

Definitions

Real property § 68

§ 13203. Effect of recorded affidavit

13203. (a) A good faith purchaser or lessee of real property for value from, or a good faith lender to, a person designated as a successor to the property in a certified copy of an affidavit issued under Section 13202 and recorded in the county in which the real property is located has the same rights and protections as the purchaser, lessee, or lender would have if the person designated as a successor in the recorded certified copy of the affidavit had been named as a distributee of the real property in a decree of distribution that had become final.

(b) The issuance and recording of a certified copy of an affidavit under this chapter does not preclude later proceedings for administration of the decedent's estate.

Comment. Subdivision (a) of Section 13203 is designed to give the successors designated in the certified copy of the affidavit a marketable title to the real property. Good faith purchasers, lessees, and lenders are protected to the same extent as they are protected when they deal with the distributee under a final decree of distribution. See Section 1021 (effect of final decree of distribution). Although Section 13203 protects good faith purchasers, lessees, and lenders, it does not preclude later probate proceedings. See subdivision (b). The successor designated in the recorded affidavit has a duty to restore the property, or its value if the property has been disposed of, to the estate if proceedings are later commenced for administration of the decedent's estate. See Section 13206. The successor also is liable to an unsecured creditor (Section 13204) or to a person having a superior right to the property (Section 13205). This liability is limited. See Section 13207.

CROSS-REFERENCES

Definitions

Real property § 68

§ 13204. Personal liability for decedent's unsecured debts

13204. Subject to Section 13207, each person who is designated as a successor to property in a certified copy of an affidavit issued under Section 13202 is personally liable for the unsecured debts of the decedent. Any such debt may be enforced against the person in the same manner as it could have been enforced against the decedent if the decedent had not died. In any action based upon the debt, the person may assert any defense, cross-complaint, or setoff that would have been available to the decedent if the decedent had not died.

Comment. Section 13204 is the same in substance as Section 13109. See the Comment to that section. The liability under Section 13204 is limited. See Section 13207.

§ 13205. Personal liability to person having superior right

13205. Subject to Section 13207, each person who is designated as a successor to property in a certified copy of an affidavit issued under Section 13202 is personally liable to any person having a superior right to the property by testate or intestate succession from

the decedent. An action to enforce the liability under this section is forever barred five years after the certified copy of the affidavit is issued under Section 13202.

Comment. Section 13205 is comparable to Section 13110. The liability under Section 13205 is limited. See Section 13207.

CROSS-REFERENCES

Definitions

Person § 56

§ 13206. Restitution if estate proceeding commenced

13206. Subject to Section 13207, if proceedings for administration of the decedent's estate are commenced, each person who is designated as a successor to property in a certified copy of an affidavit issued under Section 13202 and who still has his or her interest in the property is liable for restitution of that interest to the estate, or, if the person no longer has the interest, is liable for restitution to the estate of the fair market value of the interest as of the date of its disposition, together with the net income the person received from the property. An action to enforce the liability under this section is forever barred five years after the certified copy of the affidavit is issued under Section 13202.

Comment. Section 13206 is comparable to Section 13111. See the Comment to that section. The five-year statute of limitations is comparable to the five-year statute of limitations for adverse possession. See Code Civ. Proc. § 318.

CROSS-REFERENCES

Definitions

Person § 56

§ 13207. Limitation on liability

13207. (a) A person designated as a successor to property in a certified copy of an affidavit issued under Section 13202 is not liable under Section 13204 or 13205 if proceedings for the administration of the decedent's estate are commenced and the person restores his or her interest in the property or its fair market value and net income to the estate in compliance with Section 13206.

(b) The interest in the property or amount required to be restored to the estate under Section 13206 shall be reduced by any property or amount paid by the person to satisfy a liability under Sections 13204 or 13205.

(c) The aggregate of the personal liability of a person under Sections 13204 and 13205 shall not exceed the fair market value at the date of the decedent's death of the decedent's property received by that person under this chapter, less the amount of any liens and encumbrances on that property.

Comment. Section 13207 is comparable to Section 13112.

CROSS-REFERENCES

Definitions

Person § 56

§ 13208. Other remedies not affected

13208. The remedies available under Sections 13204 to 13207, inclusive, are in addition to any remedies available by reason of any fraud or intentional wrongdoing.

Comment. Section 13208 makes clear that the remedies provided in this chapter for creditors and persons having a superior right to the property by testate or intestate succession do not limit any other remedies that are available by reason of fraud or intentional wrongdoing.

0304a

PART 2. PASSAGE OF PROPERTY TO SURVIVING SPOUSE WITHOUT ADMINISTRATION

CHAPTER 1. GENERAL PROVISIONS

§ 13500. Necessity of administration

13500. Except as provided in this chapter, when a husband or wife dies intestate leaving property that passes to the surviving spouse under Section 6401, or dies testate and by his or her will devises all or a part of his or her property to the surviving spouse, the property passes to the survivor subject to the provisions of Chapter 2 (commencing with Section 13540) and Chapter 3 (commencing with Section 13550), and no administration is necessary.

Comment. Section 13500 restates subdivision (a) of former Section 649.1 without substantive change.

CROSS-REFERENCES

Definitions

Property § 62
Surviving spouse § 78
Will § 88

§ 13501. Property subject to administration

13501. The following property of the decedent is subject to administration under Division 3 (commencing with Section 300):

(a) Property passing to someone other than the surviving spouse under the decedent's will or by intestate succession.

(b) Property disposed of in trust under the decedent's will.

(c) Property in which the decedent's will limits the surviving spouse to a qualified ownership. For the purpose of this subdivision, a devise to the surviving spouse that is conditioned on the spouse surviving the decedent by a specified period of time is not a "qualified ownership" interest if the specified period of time has expired.

Comment. Section 13501 restates former Section 649.3 without substantive change. Administration of property described in Section 13501 may be avoided under Part 1 (commencing with Section 13000) (collection or transfer of small estates without administration) if the requirements of that part are satisfied. See also Chapter 6 (commencing with Section 6600) of Part 3 of Division 6 (small estate set-aside).

CROSS-REFERENCES

Definitions

Property § 62
Surviving spouse § 78
Trust § 82
Will § 88

§ 13502. Election of administration

13502. (a) Upon the election of the surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse, the following property may be administered under Division 3 (commencing with Section 300):

(1) The one-half of the community property that belongs to the decedent under Section 100, the one-half of the quasi-community

property that belongs to the decedent under Section 101, and the separate property of the decedent.

(2) Both the property described in paragraph (1) and all of the following property:

(A) The one-half of the community property that belongs to the surviving spouse under Section 100.

(B) The one-half of the quasi-community property that belongs to the surviving spouse under Section 101.

(3) Both the property described in paragraph (1) and a specific portion but less than all of the following property:

(A) The one-half of the community property that belongs to the surviving spouse under Section 100.

(B) The one-half of the quasi-community property that belongs to the surviving spouse under Section 101.

(b) The election shall be made by a writing specifically evidencing the election filed in the proceedings for the administration of the estate of the deceased spouse within four months after the issuance of letters testamentary or of administration, or within such further time as the court may allow upon a showing of good cause, and before entry of an order under Section 13656.

Comment. Section 13502 continues subdivisions (b) and (c) of former Section 649.1 without substantive change with the addition of paragraph (3) of subdivision (a). Paragraph (3) of subdivision (a) makes clear that the surviving spouse may elect to probate only a portion of the surviving spouse's one-half of the community or quasi-community property. This is consistent with the practice under prior law and permits, for example, probate of all of a block of stock that is community property without the need to probate the surviving spouse's one-half share of the other community property.

CROSS-REFERENCES

Definitions

Community property § 28

Personal representative § 60

Quasi-community property § 66

Surviving spouse § 78

Personal liability of surviving spouse for debts of deceased spouse

§§ 13550-13553

Transmutation of nature of property, Civil Code § 5110.730

DRAFTSMAN'S NOTE. Section 13502 makes clear that the surviving spouse may elect to probate only a portion of the surviving spouse's one half of the community or quasi-community property. This is consistent with the practice under existing law and permits, for example, probate of all of a block of stock that is community property without the need to probate the surviving spouse's one-half share of the other community property.

§ 13503. Election to transfer property to trustee

13503. (a) The surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse may file an election and agreement to have all or part of the one-half of the community property that belongs to the surviving spouse under Section 100 and the one-half of the quasi-community property that belongs to the surviving spouse under Section 101 transferred by the surviving spouse or the surviving spouse's personal representative, guardian, or conservator to the trustee under the will of the deceased spouse or the trustee of an existing trust identified by the will of the deceased spouse, to be administered and distributed by the trustee.

(b) The election and agreement shall be filed in the proceedings for the administration of the estate of the deceased spouse and before the entry of the decree of final distribution in the proceedings.

Comment. Section 13503 continues subdivision (d) of former Section 649.1 without substantive change.

CROSS-REFERENCES

Definitions

Community property § 28
Personal representative § 60
Quasi-community property § 66
Surviving spouse § 78
Trust § 82
Trustee § 84
Will § 88

§ 13504. Property held in a revocable trust

13504. Notwithstanding the provisions of this part, community property held in a revocable trust described in Section 5113.5 of the Civil Code is governed by the provisions, if any, in the trust for disposition in the event of death.

Comment. Section 13504 continues former Section 649.5 without substantive change.

CROSS-REFERENCES

Definitions

Community property § 28

§ 13505. Application of this part

13505. (a) Except as provided in subdivision (b), this part applies whether the deceased spouse died before, on, or after January 1, 1987.

(b) Chapter 5 (commencing with Section 13650) applies only to cases where the deceased spouse died on or after January 1, 1985, and if the deceased spouse died before that date, the case shall be governed by the law made applicable to the case under former Section 658.

Comment. Section 13505 makes this part, except for Chapter 5, applicable whether the deceased spouse died before, on, or after the operative date of this part. Subdivision (b) preserves the effect of former Section 658 for cases where the deceased spouse died before January 1, 1985.

DRAFTSMAN'S NOTE. The Commission has not considered whether Chapter 4 (commencing with Section 13600) should apply to cases pending on the operative date of this part. Subdivision (b) of Section 13505 has not been considered by the Commission. Section 13505 would make the provisions of this part apply without regard to when the deceased spouse died except that subdivision (b) would retain existing law under former Section 658. Collier comments approve subdivision (b).

§ 13506. Reference in written instrument to repealed statutory provisions

13506. On and after January 1, 1987, a reference in a written instrument, including a will or trust, to a provision of former Sections 202 to 206, inclusive, repealed by Chapter 527 of the Statutes of 1984, of the Probate Code, or former Sections 649.1 to 649.5, inclusive, of the Probate Code, shall be deemed to be a reference to the comparable provision of this part.

Comment. Section 13506 is drawn from and supersedes former Section 649.6.

CROSS-REFERENCES

Definitions
Trust § 82
Will § 88

CHAPTER 2. RIGHT OF SURVIVING SPOUSE TO DISPOSE OF
REAL PROPERTY

§ 13540. Right of surviving spouse to dispose of real property

13540. (a) Except as provided in Section 13541, after 40 days from the death of a spouse, the surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse has full power to sell, lease, mortgage, or otherwise deal with and dispose of the community or quasi-community real property, and the right, title, and interest of any grantee, purchaser, encumbrancer, or lessee shall be free of rights of devisees or creditors of the deceased spouse to the same extent as if the property had been owned as the separate property of the surviving spouse, in any of the following cases:

(1) Where the property is held as of record in the name of the surviving spouse only.

(2) Where the property is held as of record by the deceased spouse and the surviving spouse as joint tenants.

(3) Where the property is held as of record by the deceased spouse and the surviving spouse as community property.

(b) Nothing in this section affects or limits the liability of the surviving spouse under Sections 13550 to 13553, inclusive.

Comment. Section 13540 continues the first portion and the last sentence of former Section 649.2 with the addition of language at the end of the section making clear the cases where the section applies. The effect of the section is to permit the surviving spouse to convey a marketable title to the property where the property is held as of record in one of the three forms of title specified in the section, without the need to obtain a court order under Chapter 5 (commencing with Section 13650) determining that the property of the deceased spouse is property passing to the surviving spouse. The added language makes clear that the section does not apply, for example, if the property is community or quasi-community property held as of record only in the name of the deceased spouse or where the property is held by the spouses as tenants in common. As to the prior law, see O. McCarroll, 1 California Decedent Estate Administration Supplement § 4.69, at 133 (June 1985) ("Counsel should determine local title insurance practice before relying on Prob C §649.2, particularly if title to the real property in question stood only in decedent's name."). See also Section 13542 (disposition under former law not affected).

Subdivision (b) of Section 13540 makes clear that Section 13540 does not affect or limit the liability of a surviving spouse under Sections 13550-13553. Although Section 13540 may preclude a devisee or creditor for enforcing his or her rights against a grantee, purchaser, encumbrancer, or lessee or the property interest transferred to the grantee, purchaser, encumbrancer, or lessee, the section does not relieve the surviving spouse of any liability under Sections 13550-13553. If the surviving spouse is liable under those sections and the devisee or creditor obtains a judgment against the surviving spouse, the judgment may be enforced against any property of the surviving spouse (including the proceeds of the disposition described in Section 13540) that is subject to the enforcement of a judgment.

DRAFTSMAN'S NOTE. At the May 1985 meeting, the Commission directed the staff to revise this section to state the cases to which the section applies. Should the protection this section affords to a grantee, purchaser, encumbrancer, or lessee be limited to a good faith purchaser or lessee for value or a good faith lender? Compare this section with Section 13203.

CROSS-REFERENCES

Definitions

Community property § 28
Devisee § 34
Personal representative § 60
Quasi-community property § 66
Surviving spouse § 78

§ 13541. Recording notice of interest in property

13541. (a) Section 13540 does not apply if, within 40 days from the death of the spouse, a notice that satisfies the requirements of this section is recorded in the county in which the property is situated.

(b) The notice shall contain all of the following:

(1) A description of the property in which an interest is claimed.

(2) A statement that an interest in the property is claimed by a named person under the will of the deceased spouse.

(3) The name or names of the owner or owners of the record title to the property.

(c) There shall be endorsed on the notice instructions that it shall be indexed by the recorder in the name or names of the owner or owners of record title to the property, as grantor or grantors, and in the name of the person claiming an interest in the property, as grantee.

Comment. Section 13541 restates a portion of former Section 649.2 without substantive changes except that Section 13541 contains additional language to make clear that the notice must be recorded within 40 days from the death of the spouse. This clarification is consistent with language in *Wilson v. Superior Court*, 101 Cal. App.2d 592, 595, 225 P.2d 1002 (1951).

§ 13542. Dispositions under former law not affected

13542. The repeal of former Section 649.2 does not affect any sale, lease, mortgage, or other transaction or disposition of real property made prior to January 1, 1987, to which that section applied, and such sale, lease, mortgage, or other transaction or disposition shall continue to be governed by the provisions of former Section 649.2 notwithstanding the repeal of that section.

Comment. Section 13542 is a new provision that saves dispositions made under former Section 649.2 even where the property disposed of is not held as of record in one of the three forms described in Section 13540. The application of former Section 649.2 was unclear. See the Comment to Section 13540.

CHAPTER 3. LIABILITY FOR DEBTS OF DECEASED SPOUSE

§ 13550. Personal liability of surviving spouse

13550. (a) Except as provided in this chapter and in Section 951.1, upon the death of a married person, the surviving spouse is personally liable for the debts of the deceased spouse chargeable against the property described in Section 13551.

(b) The surviving spouse is not liable under this section if all the property described in paragraphs (1) and (2) of subdivision (a) of Section 13502 is administered under Division 3 (commencing with Section 300).

Comment. Section 13550 continues subdivisions (a) and (c) of former Section 649.4 without substantive change.

CROSS-REFERENCES

Definitions

Surviving spouse § 78

§ 13551. Limitation on liability

13551. (a) Subject to subdivision (b), the liability imposed by Section 13550 shall not exceed the fair market value at the date of death, less the amount of any liens and encumbrances, of the total of the following:

(1) The one-half of the community and quasi-community property that belongs to the surviving spouse under Sections 100 and 101 that is not exempt from enforcement of a money judgment.

(2) The one-half of the community and quasi-community property that belongs to the decedent under Sections 100 and 101 that passes to the surviving spouse without administration.

(3) The separate property of the decedent that passes to the surviving spouse without administration.

(b) In computing the total under subdivision (a), the fair market value of any of the community and quasi-community property that is administered under Division 3 (commencing with Section 300) shall be excluded.

Comment. Section 13551 continues the substance of subdivision (b) of former Section 649.4 without substantive change but with the addition of language to make clear that (1) "value" means "fair market value and (2) the value of community and quasi-community property administered in the estate of the deceased spouse under Division 3 is excluded in determining the extent of the liability of the surviving spouse. See Section 13502(a)(3) (election to administer only a portion of the community and quasi-community property that belongs to the surviving spouse).

CROSS-REFERENCES

Definitions

Community property § 28

Property § 62

Quasi-community property § 66

Surviving spouse § 78

§ 13552. Effect of commencement of proceedings for administration of estate of deceased spouse

13552. If proceedings are commenced in this state for the administration of the estate of the deceased spouse and the time for filing or presenting claims has commenced, any action upon the liability of the surviving spouse pursuant to Section 13550 is barred to the same extent as provided for claims under Article 1 (commencing with Section 700) of Chapter 12 of Division 3, except as to the following:

(a) Creditors who had commenced judicial proceedings for the enforcement of the debts and had served the surviving spouse with process prior to the expiration of the time for filing or presenting claims.

(b) Creditors who secure the acknowledgment in writing of the liability of the surviving spouse for the debts.

(c) Creditors who file a timely claim in the proceedings for the administration of the estate of the deceased spouse.

Comment. Section 13552 continues subdivision (d) of former Section 649.4 without substantive change.

CROSS-REFERENCES

Definitions

Surviving spouse § 78

§ 13553. Enforcement of liability

13553. (a) Except as otherwise 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.

(b) In any action based upon the debt, the surviving spouse may assert any defense, cross-complaint, or setoff which would have been available to the deceased spouse if the deceased spouse had not died.

Comment. Section 13553 continues subdivision (e) of former Section 649.4 without substantive change.

CROSS-REFERENCES

Definitions

Surviving spouse § 78

CHAPTER 4. COLLECTION BY AFFIDAVIT OF COMPENSATION OWED TO DECEASED SPOUSE

§ 13600. Collection of salary or other compensation, not exceeding \$5,000, by affidavit

13600. (a) To collect salary or other compensation owed by an employer for personal services of a decedent, including compensation for unused vacation, not in excess of five thousand dollars (\$5,000), an affidavit or a declaration under penalty of perjury under the laws of the State of California shall be furnished to the employer. Not more than five thousand dollars (\$5,000) in the aggregate may be collected under this section from all of the employers of the decedent. An affidavit or declaration under this section may be furnished to the employer at any time after the death of the decedent.

(b) The affidavit or declaration under this section shall state all of the following:

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

(3) "The affiant or declarant is the surviving spouse of the decedent" or "The affiant or declarant is authorized to act on behalf of the surviving spouse of the decedent."

(4) "The surviving spouse of the decedent is entitled to the earnings of the decedent under the decedent's will or by intestate succession and no one else has a superior right to the earnings."

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

(6) "Sections 13600 to 13605, inclusive, of the California Probate Code require that the earnings of the decedent, including compensation for unused vacation, not in excess of five thousand dollars (\$5,000), be paid to the affiant or declarant."

(7) "Neither the surviving spouse, nor anyone acting on behalf of the surviving spouse, has a pending request to collect compensation owed by another employer for personal services of the decedent under Sections 13600 to 13605, inclusive, of the California Probate Code."

(8) "Neither the surviving spouse, nor anyone acting on behalf of the surviving spouse, has collected any compensation owed by an employer for personal services of the decedent under Sections 13600 to 13605, inclusive, of the California Probate Code except the sum of \$ _____ which was collected from _____."

(9) "The affiant or declaration requests that he or she be paid the salary or other compensation owed by you for personal services of the decedent, including compensation for unused vacation, not to exceed five thousand dollars (\$5,000), less the amount of \$ _____ which was previously collected."

(10) "I affirm or declare that all the statements in this affidavit or declaration are true and I further acknowledge that any false statement may subject me to penalties relating to perjury."

(c) Reasonable proof of the identity of the surviving spouse shall be provided to the employer. If another person is acting for the surviving spouse, reasonable proof of the identity of that person shall also be provided to the employer. Proof of identity that is sufficient under Section 13103 is sufficient proof of identity for the purposes of this subdivision.

(d) If a person presenting the affidavit or declaration is a person claiming to be acting for the surviving spouse under this chapter, the employer shall be provided with reasonable proof, satisfactory to the employer, of the authority of the person to act for the surviving spouse.

Comment. Section 13600 is a new provision designed to provide a clear and simple procedure that permits a surviving spouse immediately to collect not more than \$5,000 of the earnings owed by an employer to the deceased spouse. The purpose of this section is to provide funds until the probate proceeding is commenced and a family allowance may be obtained.

If the employer does not personally know the surviving spouse, reasonable proof of identity must be provided to the employer. The kinds of proof of identity that may be relied on are specified in Section 13103.

Section 13600 permits the affidavit or declaration to be executed by a person acting on behalf of the surviving spouse. This permits the conservator of the estate of the surviving spouse to use this chapter to collect compensation owing to the deceased spouse. If the person executing the affidavit or declaration claims to be acting for the surviving spouse under this chapter, the employer must be provided with reasonable proof of the identity of the person acting for the surviving spouse and with reasonable proof, satisfactory to the employer, of the authority of the person to act for the surviving spouse. Letters of the conservator of the estate of the surviving spouse would be reasonable proof of authority to act for the surviving spouse.

This chapter is drawn from Sections 13100-13114 (affidavit procedure for collection or transfer of property of small estate where death occurred not less than 40 days before affidavit presented to holder of property). However, use of the procedure under this chapter applies without regard to the amount of the decedent's estate; use of the procedure is not limited to cases where the estate is a small estate. And use of the procedure under this chapter is permitted without any delay after the death of the decedent; use of the procedure is not limited to cases where the decedent died not less than 40 days before the affidavit or declaration is presented to the employer.

CROSS-REFERENCES

Definitions

Surviving spouse § 78

DRAFTSMAN'S NOTE. Sections 13600 to 13605 are new provisions that give the surviving spouse the right immediately to collect not more than \$5,000 of the earnings owed by the employer to the deceased spouse. Charles Collier asked whether a surviving spouse could collect \$5,000 for each employer if the decedent held two jobs. We have drafted the section so that it would permit only \$5,000 in the aggregate to be collected where the decedent had more than one employer. However, the \$5,000 limitation makes the section exceeding complex. We have noted other states that have a comparable provision do not have a \$5,000 limit. Elimination of the \$5,000 limit would make the affidavit much simpler to understand and use. Should the \$5,000 limit be retained? What purpose does it serve?

§ 13601. Payment of earnings by employer

13601. If the requirements of Section 13600 are satisfied, the person executing the affidavit or declaration is entitled to have the earnings of the decedent, including compensation for unused vacation, not in excess of five thousand dollars (\$5,000), paid to him or her.

Comment. Section 13601 is a new provision comparable to subdivision (a) of Section 13104. The employer who pays the decedent's earnings to the person presenting the affidavit or declaration is protected from liability. See Section 13602. Payment pursuant to Section 13601 does not preclude later administration of the decedent's estate. See Section 13604. As to the liability of the person receiving the payment, see Section 13604.

§ 13602. Protection of employer from liability

13602. If the requirements of Section 13600 are satisfied, receipt by the employer of the affidavit or declaration constitutes sufficient acquittance for the compensation paid pursuant to this chapter and discharges the employer from any further liability with respect to the compensation paid. The employer has no duty to see to the application of the money paid or to inquire into the truth of any statement in the affidavit or declaration.

Comment. Section 13602 is a new provision that protects the employer who pays to the affiant or declarant compensation owing to the deceased spouse. To obtain this protection, the affidavit or declaration must satisfy the requirements of Section 13600 and must be accompanied by reasonable proof of the identity of the person presenting the affidavit as the surviving spouse or person acting for the surviving spouse and, if someone claims to be acting for the surviving spouse, must be accompanied by reasonable proof of the authority of the person to act for the surviving spouse. See Section 13600 and Comment thereto. Section 13602 is comparable to Section 13105 and is drawn from the first sentence of former Section 631.

§ 13603. Enforcement of payment

13603. (a) If the employer refuses to pay as required by this chapter, the surviving spouse may recover the amount the surviving spouse is entitled to receive under this chapter in an action brought for that purpose against the employer.

(b) If an action is brought against the employer under this section, the court shall award attorney's fees to the surviving spouse if the court finds that the employer acted unreasonably in refusing to pay as required by this chapter.

Comment. Section 13603 is a new provision comparable to subdivision (b) of Section 13104. Section 13603 makes clear that the duty imposed by Section 13601 may be enforced by an action against the employer. This remedy is in addition to the remedies against the employer if the estate of the deceased spouse is probated. See also Section 13656 (court order determining that property passed to surviving spouse made in proceeding to determine or confirm property passing or belonging to surviving spouse).

CROSS-REFERENCES

Definitions

Surviving spouse § 78

§ 13604. Rights of heirs or devisees of deceased spouse not affected

13604. Nothing in this chapter limits the rights of the heirs or devisees of the deceased spouse. Payment of a decedent's compensation pursuant to this chapter does not preclude later proceedings for administration of the decedent's estate. Any person to whom payment is made under this chapter is answerable and accountable therefor to the personal representative of the decedent's estate and is liable for the amount of the payment to any other person having a superior right to the payment received.

Comment. Section 13604 is a new provision that makes clear that the surviving spouse takes under this chapter subject to the rights of any person having a superior right and has the duty to restore the payment received to the decedent's estate if the estate is probated.

CROSS-REFERENCES

Definitions

Devisee § 34

Heirs § 44

Personal representative § 60

§ 13605. Other methods of collecting compensation not affected

13605. The procedure provided in this chapter is in addition to and not in lieu of any other method of collecting compensation owed to a decedent.

Comment. Section 13605 makes clear that the procedure provided by this chapter is in addition to and not in lieu of any other method of collecting unpaid compensation owed to a decedent. See, e.g., Section 160 (payment of money due to decedent to person designated by decedent), 13100-13114 (affidavit procedure for collection or transfer of personal property of a small estate), 6600-6613 (small estate set-aside), 13650-13660 (court order determining that property passed to surviving spouse). See also Gov't Code §§ 12479 (designation by state employee of person to receive warrants upon employee's death), 53245 (designation by public employee of person to receive warrants upon employee's death).

CHAPTER 5. DETERMINATION OR CONFIRMATION OF PROPERTY
PASSING OR BELONGING TO SURVIVING SPOUSE

§ 13650. Filing of petition

13650. (a) A surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse may file a petition in the superior court of the county in which the estate of the deceased spouse may be administered requesting an order that administration of all or part of the estate is not necessary for the reason that all or part of the estate is property passing to the surviving spouse. The petition may also request an order confirming the ownership of the surviving spouse of property belonging to the surviving spouse under Section 100 or 101.

(b) To the extent of the election, this section does not apply to property that the petitioner has elected as provided in Section 13502 to have administered under Division 3 (commencing with Section 300).

(c) A guardian or conservator may file a petition under this section without authorization or approval of the court in which the guardianship or conservatorship proceeding is pending.

Comment. Subdivision (a) of Section 13650 continues the first sentence of subdivision (a) of former Section 650 without substantive change but subdivision (a) of Section 13650 uses language drawn from subdivision (c) of former Section 655 in place of the language of the first sentence of subdivision (a) of former Section 650 which referred to the allegation in the petition. Subdivision (b) of Section 13650 continues subdivision (c) of former Section 650 without substantive change. Subdivision (c) of Section 13650 continues subdivision (d) of former Section 650 without substantive change.

CROSS-REFERENCES

Clerk to set petition for hearing § ____

Definitions

Personal representative § 60

Property § 62

Surviving spouse § 78

§ 13651. Contents of petition

13651. (a) The petition shall be verified, shall allege that administration of all or a part of the estate of the deceased spouse is not necessary for the reason that all or a part of the estate is property passing to the surviving spouse, and shall set forth the following information:

(1) If proceedings for the administration of the estate are not pending, the facts necessary to determine the county in which the estate of the deceased spouse may be administered.

(2) A description of the property of the deceased spouse which the petitioner alleges is property passing to the surviving spouse, including the trade or business name of any property passing to the surviving spouse that consists of an unincorporated business or an interest in an unincorporated business which the deceased spouse was operating or managing at the time of death.

(3) The facts upon which the petitioner bases the allegation that all or a part of the estate of the deceased spouse is property passing to the surviving spouse.

(4) A description of any interest in the community property or quasi-community property, or both, which the petitioner requests the court to confirm to the surviving spouse as belonging to the surviving spouse pursuant to Section 100 or 101.

(5) The names, ages, and addresses of the heirs and devisees of the deceased spouse, the names and addresses of all persons named as executors of the will of the deceased spouse, and the names and addresses of all persons appointed as personal representatives of the deceased spouse, which are known to the petitioner.

(b) If the petitioner bases the allegation that all or part of the estate of the deceased spouse is property passing to the surviving spouse upon the will of the deceased spouse, a copy of the will shall be attached to the petition.

Comment. Section 13651 continues a portion of subdivision (a) and all of subdivision (b) of former Section 650 without substantive change except that paragraph (2) of subdivision (a) has been revised to make clear that it is limited to an unincorporated business.

CROSS-REFERENCES

Definitions

Community property § 28
Devisee § 34
Heirs § 44
Personal representative § 60
Quasi-community property § 66
Surviving spouse § 78
Will § 88

Protection of creditors of deceased spouse's business § 13658

Verification of petition § _____

§ 13652. Filing petition in pending proceeding

13652. If proceedings for the administration of the estate of the deceased spouse are pending, a petition under this chapter shall be filed in those proceedings without the payment of an additional fee.

Comment. Section 13652 continues the first sentence of former Section 651 without substantive change.

§ 13653. Joining petition with petition for probate proceeding

13653. If proceedings for the administration of the estate of the deceased spouse are not pending, a petition under this chapter may, but need not, be joined with a verified petition for probate of the will of the deceased spouse or for administration of the estate of the deceased spouse.

Comment. Section 13653 restates the second sentence of former Section 651 without substantive change. If proceedings for the administration of the estate of the deceased spouse are not pending, the petition may be joined with a petition for the probate of the will of the deceased spouse or the appointment of a personal representative of the estate of the deceased spouse or the petition may be a separate petition filed in the superior court of the county in which the estate of the deceased spouse may be administered. See Section 13650.

CROSS-REFERENCES

Definitions

Personal representative § 60
Will § 88

§ 13654. Probate of will or administration not precluded by petition

13654. The filing of a petition under this chapter does not preclude the court from admitting the will of the deceased spouse to probate or appointing a personal representative of the estate of the deceased spouse upon the petition of any person legally entitled, including any petition for probate of the will or for administration of the estate which is joined with a petition filed under this chapter.

Comment. Section 13654 restates former Section 652 without substantive change.

CROSS-REFERENCES

Definitions

Personal representative § 60

Will § 88

§ 13655. Notice of hearing

13655. (a) If a petition filed under this chapter is joined with a petition for probate of the deceased spouse's will, notice of the hearing on the petition shall be given in the manner prescribed by Sections 327 and 328 and shall be included in the notice required by those sections. If the petition filed under this chapter is joined with a petition for administration of the estate of the deceased spouse, notice of the hearing on the petition shall be given in the manner prescribed by Section 441 and shall be included in the notice required by that section.

(b) If proceedings for the administration of the estate of the deceased spouse are pending at the time a petition is filed under this chapter or, if the proceedings are not pending and if the petition filed under this chapter is not joined with a petition for probate of the deceased spouse's will or for administration of the estate of the deceased spouse, the clerk shall set the petition for hearing. At least 10 days before the hearing, notice of the hearing on the petition filed under this chapter shall be personally served upon the following persons by the petitioner or mailed, postage prepaid, by the petitioner to the following persons, addressed to the addresses given in their request for special notice or notice of appearance, the addresses of their offices or places of residence, or, if neither of these addresses is known to the petitioner, the county seat of the county in which the proceedings are pending:

- (1) Any personal representative who is not the petitioner.
- (2) All devisees and known heirs of the deceased spouse.
- (3) All persons or their attorneys who have requested special notice pursuant to Section 1202.
- (4) All persons or their attorneys who have given notice of appearance.

(5) The Attorney General, addressed to the office of the Attorney General at Sacramento, California, if the petitioner bases the allegation that all or part of the estate of the deceased spouse is property passing to the surviving spouse upon the will of the deceased spouse and the will involves or may involve (A) a testamentary trust

of property for charitable purposes other than a charitable trust with a designated trustee, resident in this state, or (B) a devise for a charitable purpose without an identified devisee or beneficiary.

(6) All other persons who are named in the will of the deceased spouse, if the petitioner bases the allegation that all or part of the estate of the deceased spouse is property passing to the surviving spouse upon the will.

Comment. Subdivision (a) of Section 13655 restates the substance of former Section 654 with two omissions:

(1) The last sentence of former Section 654, which required that a copy of the petition also be served, is not continued.

(2) The requirement of former Section 654 that notice of the hearing be given at least 20 days prior to the date of the hearing is not continued. By adopting the provisions of Sections 328 and 441, subdivision (a) of Section 13655 incorporates the requirement of those sections that notice of hearing be given at least 10 days before the hearing on the petition.

Subdivision (b) of Section 13655 restates the substance of former Section 653 with the following changes:

(1) The requirement of former Section 653 that a copy of the petition be served is not continued.

(2) The requirement of former Section 653 that notice of hearing be given at least 20 days prior to the hearing is replaced by a requirement that notice of hearing be given at least 10 days before the hearing.

CROSS-REFERENCES

Clerk to set petition for hearing § ____

Definitions

Devisee § 34

Heirs § 44

Personal representative § 60

Surviving spouse § 78

Will § 88

Verification of petition § ____

DRAFTSMAN'S NOTE. The requirement that a copy of the petition be served with notice of hearing is not continued. The requirement that notice of hearing be given at least 20 days before the hearing is replaced by a requirement that notice of hearing be given at least 10 days before the hearing.

§ 13656. Court order

13656. (a) If the court finds that all of the estate of the deceased spouse is property passing to the surviving spouse, the court shall issue an order describing the property, determining that the property is property passing to the surviving spouse, and determining that no administration is necessary.

(b) If the court finds that all or part of the estate of the deceased spouse is not property passing to the surviving spouse, the court shall issue an order (1) describing any property which is not property passing to the surviving spouse, determining that that property does not pass to the surviving spouse, and determining that that property is subject to administration under Division 3 (commencing with Section 300) and (2) describing the property, if any, which is property passing to the surviving spouse, determining that that property passes to the surviving spouse, and determining that no administration of that property is necessary.

(c) If the petition filed under this chapter includes a description of the interest of the surviving spouse in the community or quasi-community property, or both, which belongs to the surviving spouse pursuant to Section 100 or 101 and the court finds that the interest belongs to the surviving spouse, the court shall issue an order describing the property and confirming the ownership of the surviving spouse.

Comment. Section 13656 continues subdivisions (a) and (b) of former Section 655 without substantive change except for the omission of the provisions of former Section 655 authorizing the court to make any further orders as may be necessary to cause delivery of the property or its proceeds to the surviving spouse or to cause ownership of the property to be confirmed in the surviving spouse.

The order under subdivision (b) of Section 13656 determines that property which is not property passing to the surviving spouse is subject to administration under Division 3. But administration of this property may be avoided under Part 1 (commencing with Section 13000) (collection or transfer of small estates without administration) if the requirements of that part are satisfied. See also Sections 6600-6613 (small estate set-aside).

DRAFTSMAN'S NOTE. In accord with a decision made at the May 1985 meeting, Section 13656 omits provisions of existing law that give the court authority to make any orders that may be necessary to cause ownership of the property to be confirmed in the surviving spouse or to cause delivery of the property or its proceeds to the surviving spouse. These provisions are omitted because the Commission concluded that the order would not be effective if directed to a person that was not a party to the proceeding and would be unnecessary to cause a change in registered title because a change in registered title would be made if a court order is issued confirming the title of the surviving spouse to the registered property. Charles Collier would restore the omitted provisions so they will be available for use in cases where the court does have jurisdiction over the person to whom the order is directed.

CROSS-REFERENCES

Definitions

Community property § 28
Property § 62
Quasi-community property § 66
Surviving spouse § 78

§ 13657. Effect of court order

13657. Upon becoming final, an order under Section 13656 (1) determining that property is property passing to the surviving spouse or (2) confirming the ownership of the surviving spouse of property belonging to the surviving spouse under Section 100 or 101 shall be conclusive on all persons, whether or not they are in being.

Comment. Section 13657 continues subdivision (c) of former Section 655 without substantive change.

CROSS-REFERENCES

Definitions

Person § 56
Property § 62
Surviving spouse § 78

§ 13658. Protection of interests of creditors of business of deceased spouse

13658. If the court determines that all or a part of the property passing to the surviving spouse consists of an unincorporated business or an interest in an unincorporated business which the deceased spouse was operating or managing at the time of death, the court shall require the surviving spouse to file a list of all of the known creditors of the business and the amount owing to each of them. The court may issue any order necessary to protect the interests of the creditors of the business, including but not limited to the filing of (1) an undertaking and (2) an inventory and appraisalment in the form set forth in Section 600 and made as set forth in Chapter 9 (commencing with Section 600) of Division 3.

Comment. Section 13658 continues former Section 656 without substantive change except that the provision is limited to creditors of an "unincorporated" business and language (drawn from former Section 657) is added to give the court specific authority to require the filing of an inventory and appraisalment where necessary to protect the creditors of the business.

CROSS-REFERENCES

Definitions

Property § 62

Surviving spouse § 78

§ 13659. Inventory and appraisalment

13659. Except as provided in Section 13658, no inventory and appraisalment of the estate of the deceased spouse shall be required in a proceeding under this chapter. However, within three months after the filing of a petition under this chapter, or within such further time as the court or judge for reasonable cause may allow, the petitioner may file with the clerk of the court an inventory and appraisalment in the form set forth in Section 600. The appraisalment shall be made as set forth in Chapter 9 (commencing with Section 600) of Division 3. The petitioner may appraise the assets which a personal representative could appraise under Section 605.

Comment. The first sentence of Section 13659 is drawn from former subdivision (a)(2)(A) of Section 605 and supersedes the last sentence of former Section 657. The remainder of Section 13659 is drawn from the first three sentences of former Section 657.

An inventory and appraisal is not required to obtain an order under this chapter. However, Section 13659 gives the petitioner the option to file an inventory and appraisal in a proceeding under this chapter if the petitioner so desires. This option permits the petitioner to obtain an independent appraisal made by a probate referee if such an appraisal is desired by the petitioner. But see Section 13658 (authority of court to require the filing of an inventory and appraisal to protect creditors of unincorporated business of deceased spouse).

DRAFTSMAN'S NOTE. Section 13659 should be reviewed to determine that it is a satisfactory statement of the Commission's decision at the May 1985 meeting. We have added the first sentence to Section 13659 to continued the substance of a provision of existing Section 605 which provides in part:

"(a) The appraisal shall be made by the executor or administrator and a probate referee as follows:

(1) [omitted]

(2) All assets other than those appraised by the executor or administrator pursuant to paragraph (1) shall be appraised by a probate referee appointed by the court or judge, except with respect to the following;

(A) Interspousal transfers, as provided in Section 650."

§ 13660. Attorney's fee

13660. The attorney's fee for services performed in connection with the filing of a petition and obtaining of a court order under this chapter shall be determined by private agreement between the attorney and the client and is not subject to approval by the court.

Comment. Section 13660 eliminates the provision of prior law for court approval of the attorney's fee for services performed in connection with the filing of a petition and obtaining a court order under former Sections 650-658. See former subdivision (b) of Section 910. No provision was made under former law for court approval of the attorney's fee for other legal work in connection with the estate of the deceased spouse (such as, for example, tax work, joint tenancy termination, or collection of insurance proceeds), and those matters were left to private agreement between the attorney and the client. Section 13660 leaves the entire matter of the legal fees to private agreement between the attorney and the client in the case of a petition and order under this chapter, thereby avoiding the provision for court approval of a portion only of the legal fees that are likely to be involved in the disposition of the estate of a deceased spouse.

CONFORMING CHANGES

Health & Safety Code § 18102 (amended). Transfer of manufactured home, mobilehome, commercial coach, or truck camper without probate

18102. (a) If 40 days have elapsed since the death of a registered or legal owner of a manufactured home, mobilehome, commercial coach, or truck camper registered under this part, without the decedent leaving other property necessitating probate, and irrespective of the value of the manufactured home, mobilehome, commercial coach, or truck camper the following person may secure a transfer of registration of the title or interest of the decedent:

(1) The ~~surviving husband or wife or other heir in the order named in Section 630~~ sole person or all of the persons who succeeded to the property of the decedent under Sections 6401 and 6402 of the Probate Code,, unless the manufactured home, mobilehome, commercial coach, or truck camper is, by will, otherwise bequeathed.

(2) The sole beneficiary who takes or all of the beneficiaries who succeeded to the manufactured home, mobilehome, commercial coach, or truck camper under the will of the decedent, where the manufactured home, mobilehome, commercial coach, or truck camper is, by will, so bequeathed.

(b) The person authorized by subdivision (a) may secure a transfer of registration of the title or interest of the decedent upon presenting to the department all of the following:

(1) The appropriate certificate of title and registration card, if available.

(2) A certificate of the heir or beneficiary under penalty of perjury containing the following statements:

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

(B) The decedent left no other property necessitating probate and no probate proceeding is now being or has been conducted in this state for the decedent's estate.

(C) The declarant is entitled to the manufactured home, mobilehome, commercial coach, or truck camper either (i) as the ~~surviving heir or heir named in Section 630~~ sole person or all of

the persons who succeeded to the property of the decedent under Sections 6401 and 6402 of the Probate Code if the decedent left no will or (ii) as the beneficiary or beneficiaries under the decedent's last will if the decedent left a will, and no one has a right to the decedent's manufactured home, mobilehome, commercial coach, or truck camper that is superior to that of the declarant.

(D) There are no unsecured creditors of the decedent or, if there are, the unsecured creditors of the decedent have been paid in full or their claims have been otherwise discharged.

(3) If required by the department, a certificate of the death of the decedent.

(4) If required by the department, the names and addresses of any other heirs or beneficiaries.

Probate Code § 605 (amended). Appraisement

CONFORMING AMENDMENT TO BE DRAFTED

Probate Code § 910 (amended). Attorneys' fees

910. (a) Attorneys for executors and administrators shall be allowed out of the estate, as fees for conducting the ordinary probate proceedings, the same amounts as are allowed by the previous article as commissions to executors and administrators; and such further amount as the court may deem just and reasonable for extraordinary services.

~~(b) Attorneys may charge a reasonable fee in representing the person filing a petition under Section 630, subject to approval by the court.~~

Vehicle Code § 5910 (amended). Transfer of vehicle without probate

5910. (a) Upon the death of an owner or legal owner of a vehicle registered under this code, without the decedent leaving other property necessitating probate, and irrespective of the value of the vehicle, the following person may secure transfer of registration of the title or interest of the decedent:

(1) The ~~surviving husband or wife or other heir in the order named in Section 630~~ sole person or all of the persons who succeeded to the property of the decedent under Sections 6401 and 6402 of the Probate Code unless the vehicle is, by will, otherwise bequeathed.

(2) The sole beneficiary ~~and heirs~~ or all of the beneficiaries who succeeded to the vehicle under the will of the decedent where the vehicle is, by will, so bequeathed.

(b) The person authorized by subdivision (a) may secure a transfer of registration of the title or interest of the decedent upon presenting to the department all of the following:

(1) The appropriate certificate of ownership and registration card, if available.

(2) A certificate of the heir or beneficiary under penalty of perjury containing the following statements:

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

(B) The decedent left no other property necessitating probate and no probate proceeding is now being or has been conducted in this state for the decedent's estate.

(C) The declarant is entitled to the vehicle either (i) as the ~~surviving heir or heirs named in Section 630~~ sole person or all of the persons who succeeded to the property of the decedent under Sections 6401 and 6402 of the Probate Code if the decedent left no will or (ii) as the beneficiary or beneficiaries under the decedent's last will if the decedent left a will, and no one has a right to the decedent's vehicle that is superior to that of the declarant.

(D) There are no unsecured creditors of the decedent or, if there are, the unsecured creditors of the decedent have been paid in full or their claims have been otherwise discharged.

(3) If required by the department, a certificate of the death of the decedent.

(4) If required by the department, the names and addresses of any other heirs or beneficiaries.

(c) The department may prescribe a combined form for use under this section and Section 9916.

Vehicle Code § 9916 (amended). Transfer of vessel without probate

9916. (a) If 40 days have elapsed since the death of an owner or legal owner of any vessel numbered under this division without the decedent leaving other property necessitating probate, and irrespective of the value of the vessel, the following person may secure a transfer of ownership of the title or interest of the decedent:

(1) The ~~surviving husband or wife or other heir or heirs named in Section 630~~ sole person or all of the persons who succeeded to the property of the decedent under Sections 6401 and 6402 of the Probate Code unless the vessel is, by will, otherwise bequeathed.

(2) The sole beneficiary ~~who takes~~ or all of the beneficiaries who succeeded to the vessel under the will of the decedent where the vessel is, by will, so bequeathed.

(b) The person authorized by subdivision (a) may secure a transfer of ownership of the title or interest of the decedent upon presenting to the department all of the following:

(1) The appropriate certificate of ownership and certificate of number, if available.

(2) A certificate of the heir or beneficiary under penalty of perjury containing the following statements:

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

(B) the decedent left no other property necessitating probate and no probate proceeding is now being or has been conducted in this state for the decedent's estate.

(C) The declarant is entitled to the vessel either (i) as the ~~surviving heir or heirs named in Section 630~~ sole person or all of the persons who succeeded to the property of the decedent under Sections 6401 and 6402 of the Probate Code if the decedent left no will or (ii) as the beneficiary or beneficiaries under the decedent's last will if the decedent left a will, and no one has a right to the decedent's vessel that is superior to that of the declarant.

(D) There are no unsecured creditors of the decedent or, if there are, the unsecured creditors of the decedent have been paid in full or their claims have been otherwise discharged.

(3) If required by the department, a certificate of the death of the decedent.

(4) If required by the department, the names and addresses of any other heirs or beneficiaries.

Note. The Department of Motor Vehicles would like to eliminate the 40 day waiting period so that both a vehicle and the boat could be transferred at the same time.

DISPOSITION OF REPEALED PROBATE CODE SECTIONS

Probate Code § 630 (repealed). Affidavit procedure for estates not exceeding \$60,000 [as amended by 1985 Cal Stats. ch. 982]

Comment. The portion of subdivision (a) of Section 630 describing the size of the estate to which the affidavit procedure applies is continued in Section 13100 without substantive change. The portion of subdivision (a) which excluded certain state registered property is continued in Section 13050(b) without substantive change. The portions of subdivision (a) which excluded amounts due for services in the armed forces of the United States and not exceeding \$5,000 in compensation owing to the decedent for services from any employment is continued in Section 13050(c) without substantive change.

The portion of subdivision (b) of Section 630 that limited use of the affidavit procedure in intestate succession cases to the relatives of the decedent listed in the subdivision is not continued. See Sections 13006 (defining "successor of the decedent"), 13100 (persons authorized to use affidavit procedure).

The portion of subdivision (b) relating to the guardian or conservator of the estate is superseded by Section 9511(a). The portion of subdivision (b) relating to a trustee is superseded by the last sentence of subdivision (a)(1) of Section 13006 and by Section 13051(b). The reference in subdivision (b) to the beneficiaries under the decedent's will is continued in Section 13006(a)(1) and by the use of the defined term "successor of the decedent" in Sections 13100-13115 which supersede former Probate Code §§ 630-632. The portion of subdivision (b) that required that the person or persons listed has or have a right to succeed to the property of the decedent is continued in effect under Section 13006 (defining "successor of the decedent").

The portion of subdivision (b) of Section 630 granting authority to collect money, receive tangible personal property, or have evidences transferred without probate is continued in Est. & Trusts Code § 13100, but is made subject to a 40-day delay and to other requirements. See the Comment to Section 13100.

The reference in subdivision (b) of Section 630 to a "financial institution" has been omitted as unnecessary because a financial institution is included within the definition of "holder of the decedent's property" in Section 13002 as a person "owing money to the decedent." See also Section 65 (defining "person"). The phrase "person, representative, corporation, officer or body" in subdivision (b) has been omitted as unnecessary in view of the broad definition of "person" in Section 56.

The reference in subdivision (b) of Section 630 to the "person . . . owing the money, having custody of such property or acting as registrar or transfer agent of such evidences of debt, obligation, interest, right, stock, or chose in action" is continued in the definition of "holder of the decedent's property" in Section 13002 and by use of the defined term in Sections 13100-13115 which supersede former Probate Code §§ 630-632.

The portion of subdivision (b) of Section 630 referring to furnishing an affidavit or declaration under penalty of perjury showing the right of the person or persons to receive the money or property or to have the evidences transferred is superseded by Section 13101 which specifies the contents of the affidavit or declaration. See also Sections 13102 (presenting decedent's evidence of ownership), 13103 (inventory and appraisal of real property), 13104 (proof of identity).

The last sentence of subdivision (b) of Section 630 is restated in Section 13115 without substantive change.

Subdivision (c) of Section 630 is restated in Section 13051 without substantive change.

Subdivision (d) of Section 630 is continued in Section 13105(a)(2) without substantive change.

Subdivision (e) of Section 630 is continued in Section 13114 without substantive change.

Probate Code § 631 (repealed). Effect of receipt of affidavit

Comment. The first sentence of Section 631 is continued without substantive change in Section 13106 with the addition of clarifying language. See the Comment to Section 13106. The last sentence is continued without substantive change in Section 13108(b). See the Comment to that section.

Probate Code § 631.1 (repealed). Claim against estate in probate

Comment. Section 631.1 is continued without substantive change in Section 13107.

Probate Code § 632 (repealed). Exclusion of estate terminable upon death and of property passing to surviving spouse

Comment. Section 632 is continued without substantive change in Section 13050(a)(1).

Probate Code § 649.1 (repealed). Necessity of administration; election of administration; transfer of property to trustee

Comment. Former Section 649.1 is continued in substance by the following provisions of the Probate Code: Subdivision (a) is continued in Section 13500; subdivisions (b) and (c) are continued in Section 13502; subdivision (d) is continued in Section 13503.

Probate Code § 649.2 (repealed). Right of surviving spouse to dispose of property

Comment. Former Section 649.2 is continued in substance by the following provisions of the Probate Code: The first sentence is continued in Sections 13540 and 13541, the second and third sentences are continued in Section 13541, and the fourth sentence is continued in Section 13540.

Probate Code § 649.3 (repealed). Property subject to administration

Comment. Former Section 649.3 is continued without substantive change in Section 13501.

Probate Code § 649.4 (repealed). Liability for debts of deceased spouse

Comment. Former Section 649.4 is continued in substance by the following provisions of the Probate Code: Subdivisions (a) and (c) are continued in Section 13550; subdivision (b) is continued in Section 13551; subdivision (d) is continued in Section 13552; subdivision (e) is continued in Section 13553.

Probate Code § 649.5 (repealed). Property held in revocable trust

Comment. Former Section 649.5 is continued in substance in Section 13504.

Probate Code § 649.6 (repealed). Reference in written instrument to repealed statutory provisions

Comment. Former Section 649.6 is continued in substance in Section 13506.

Probate Code § 650 (repealed). Contents of petition by surviving spouse

Comment. Former Section 650 is continued without substantive change by the following provisions of the Probate Code: The first sentence of subdivision (a) is continued in subdivision (a) of Section 13650 and the introductory clause of subdivision (a) of Section 13651; the remainder of subdivision (a) and all of subdivision (b) are continued in Section 13651; subdivision (c) is continued in subdivision (b) of Section 13650; subdivision (d) is continued in subdivision (c) of Section 13650.

Probate Code § 651 (repealed). Filing petition in pending proceeding or joining petition with petition for probate

Comment. The first sentence of former Section 651 is continued without substantive change in Section 13652. The second sentence is continued in Section 13653 without substantive change.

Probate Code § 652 (repealed). Probate not precluded by petition

Comment. Former Section 652 is continued without substantive change in Section 13654.

Probate Code § 653 (repealed). Hearing on petition; notice of hearing

Comment. Former Section 653 is superseded by subdivision (b) of Section 13655. See the Comment to Section 13655.

Probate Code § 654 (repealed). Notice of hearing on petition joined with petition for probate

Comment. Former Section 654 is superseded by subdivision (a) of Section 13655. See the Comment to Section 13655.

Probate Code § 655 (repealed). Court order

Comment. Subdivisions (a) and (b) of former Section 655 are continued without substantive change in Section 13656, except that the provisions of former Section 655 that authorized the court to make any further orders as may be necessary to cause ownership of the property to be confirmed in the surviving spouse or the cause delivery of the property or its proceeds to the surviving spouse are not continued. The court order authorized by the omitted provisions could not have been made applicable to persons who were not parties to the proceeding and was not necessary to cause registered title to be transferred to the surviving spouse. The registrar of title would transfer registered title upon presentation of the court order confirming title in the surviving spouse but the order could not be enforced by contempt against the registrar who was not a party to the proceeding in which the order was obtained. Subdivision (c) is superseded by Section 13657.

Probate Code § 656 (repealed). Protection of creditors of business of deceased spouse

Comment. Former Section 656 is continued without substantive change in Section 13658.

Probate Code § 657 (repealed). Filing of inventory and appraisalment

Comment. The first three sentences of former Section 657 are continued without substantive change in Section 13659. The last sentence is superseded by the first sentence of Section 13659 and the last portion of Section 13658. See also former subdivision (a)(2)(A) of Section 605 (appraisal not required for interspousal transfers under former Section 650), superseded by first sentence of Section 13659.

Probate Code § 658 (repealed). Applicability of article as amended

Comment. Former Section 658 is superseded by subdivision (b) of Section 13505.