

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATIONS

relating to

Probate Law

**Disposition of Estate Without Administration
Small Estate Set-Aside
Proration of Estate Taxes**

December 1985

**CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739**

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NOTE

The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 18 of the Commission's *Reports, Recommendations, and Studies* which is scheduled to be published late in 1986.

Cite this pamphlet as *Recommendations Relating to Probate Law*, 18 Cal. L. Revision Comm'n Reports 1001 (1986).

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NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Disposition of Estate Without Administration*, 18 Cal. L. Revision Comm'n Reports 1005 (1986).

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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

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 estates 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

¹ Prob. Code § 632. See also 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).

—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

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 for the

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, truck camper, or floating home); Vehicle Code §§ 5910 (vehicle), 9916 (vessel).

⁵ Prob. Code § 630.

⁶ Prob. Code § 630.

⁷ Prob. Code § 630.

⁸ Prob. Code § 630.

property paid, delivered, or transferred is a sufficient discharge of liability.⁹

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 the decedent's estate¹³ or distribute it to those persons¹⁴ entitled to succeed to the decedent's estate.

RECOMMENDATIONS

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

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

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 Estate of Edwards*, 154 Cal. 91, 97 P. 23 (1908) (right of creditor to petition for probate of will).

¹³ See 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).

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 the decedent's estate.¹⁶

Only two technical revisions in this area of the law are recommended:¹⁷

(1) Existing law contains two limitations on the use of the affidavit procedure to collect or transfer personal property. The gross value of the decedent's real and personal property in this state may not exceed \$60,000, and the gross value of the decedent's real property in this state may not exceed \$10,000. The second limitation—that the gross value of the real property not exceed \$10,000—is not continued in the new division. Retaining this second

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).

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). See also 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).

limitation would in some cases require that the estate be probated merely in order to collect or transfer the personal property, even though there would be no need to probate the estate in order to obtain a marketable title to the real property in the estate.¹⁸

(2) In determining the value of the decedent's estate for the purposes of the affidavit procedure for collection or transfer of personal property, certain state registered property (manufactured homes, mobilehomes, commercial coaches, and truck campers) is excluded.¹⁹ Section 18102 of the Health and Safety Code provides a special affidavit procedure for the transfer of registration of the title or interest of the decedent in this state registered property. Section 18102 was amended in 1985²⁰ to add "floating homes" to the types of property to which Section 18102 applies.²¹ To conform to this addition, the new division excludes floating homes in determining the value of the decedent's estate for purposes of the general affidavit procedure for collection or transfer of personal property.

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:

¹⁸ The new division contains a new procedure that permits the successor to the decedent's interest in real property to obtain a court order determining that the property has passed to the successor if the real and personal property of the decedent in this state does not exceed \$60,000. There is no limit on the value of the real property, so long as the gross value of the real and personal property together do not exceed the \$60,000 limit. Use of this new procedure permits the successor to obtain a marketable title to the real property without the need for probate of the estate. However, even though the successor is able to obtain a marketable title to the real property in a case where the real property has a gross value in excess of \$10,000, it would still be necessary to probate the decedent's estate in order to collect or transfer the personal property if the affidavit procedure for collection or transfer of personal property were to remain subject to the limitation that the procedure cannot be used where the property of the decedent in this state includes real property having a gross value in excess of \$10,000. To avoid this result, the \$10,000 limit for real property should be eliminated, leaving only the limitation that the affidavit procedure for collection or transfer of personal property can be used only where the real and personal property of the decedent in this state does not have a gross value in excess of \$60,000.

¹⁹ Prob. Code § 630.

²⁰ 1985 Cal. Stat. ch. 1467, § 27.

²¹ For a definition of "floating home," see Health and Safety Code § 18075.55.

—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.

—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.²² 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.

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.²³

²² 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, "grandparent" was added. 1984 Cal. Stat. ch. 451, § 9.

²³ Alabama Code §§ 43-2-691, 43-2-692 (1975); Alaska Stat. §§ 13.16.680, 13.16.685 (Supp. 1985); Arizona Rev. Stat. Ann. §§ 14-3971, 14-3972 (Supp. 1985-86); Arkansas Stat. Ann. §§ 62-2127 (Supp. 1985), 62-2128 (1971); Connecticut Gen. Stat. Ann. § 45-266

By way of 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

(West Supp. 1985); Florida Stat. Ann. § 735.301 (West Supp. 1984); Hawaii Rev. Stat. §§ 560:3-1201, 560:3-1202 (Supp. 1984); Idaho Code §§ 15-3-1201, 15-3-1202 (1979); Illinois Ann. Stat. ch. 110½ § 25-1 (Smith-Hurd Supp. 1985); Indiana Code Ann. §§ 29-1-8-1, 29-1-8-2 (Supp. 1985); 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. 1985-86); Montana Code Ann. §§ 72-3-1101, 72-3-1102 (1985); Nebraska Rev. Stat. §§ 30-24, 125, 30-24, 126 (1979); New Jersey Rev. Stat. §§ 3B:10-3, 3B:10-4 (Supp. 1985); New Mexico Stat. Ann. § 45-3-1201 (Supp. 1985), 45-3-1202 (1978); North Carolina Gen. Stat. § 28A-25-1 (Supp. 1985); North Dakota Cent. Code § 30.1-23-01, 30.1-23-02 (Supp. 1985); Oregon Rev. Stat. §§ 114.515, 114.525, 114.535 (1984); South Dakota Codified Laws Ann. § 30-11A-1 (1984); Tennessee Code Ann. §§ 30-4-103, 30-4-104 (1984); Texas Prob. Code Ann. §§ 137 (Vernon Supp. 1986), 139, 140 (Vernon 1980); Utah Code Ann. §§ 75-3-1201, 75-3-1202 (Supp. 1985); Virginia Code §§ 64.1-132.2, 64.1-132.3 (Supp. 1985); Wisconsin Stat. Ann. § 867.03 (West Supp. 1985); 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 (Supp. 1985) (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).

entitled to a decedent's property can learn of the decedent's death and determine whether administration of the estate is desirable.²⁴ In 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. The decedent may have had an evidence of ownership (such as a stock certificate) and would have been required to present the evidence of ownership before the duty of the holder or registrar to pay, deliver, or transfer the property would arise. If the holder or registrar were to pay, deliver, or transfer the property to the successor of the decedent without obtaining the evidence of ownership, the holder or registrar might be liable to another person who later presents the outstanding evidence of ownership and requests payment, delivery, or transfer of the property. The existing statute does not deal with this problem.²⁵

The new division requires that the affidavit or declaration be accompanied by the decedent's evidence of ownership, if available.²⁶ If the evidence of ownership is not presented, the new division permits the holder of the property to require the person seeking the payment, delivery, or transfer of the property to provide a satisfactory indemnification agreement or a bond to hold the holder harmless.²⁷

Inventory and appraisal. Under existing law, there is no requirement that there be an inventory and

²⁴ 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 a similar requirement, see 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.

²⁵ Other statutes do deal with the problem. See the statutes cited in note 26 *infra*.

²⁶ 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).

²⁷ This provision is drawn in part from Financial Code Section 6652 (issuance of new evidence of account by savings and loan association).

appraisement in order to collect or transfer property of a small estate.²⁸ 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.²⁹

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 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 appraisement, and proof of identity of the persons executing the affidavit or declaration). The person 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.

²⁸ An appraisal by a probate referee is not required for estates subject to summary probate proceedings pursuant to Section 630. Prob. Code § 605(a)(2)(B).

²⁹ 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.

Liability of person 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 is made 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 can not exceed the fair market value 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. If the person used the affidavit procedure fraudulently, the person is liable to the person having the superior right for three times the value of the property. 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.³⁰

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 together with the net income from the property. 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

³⁰ Prob. Code § 1358. The five-year period under the new division is tolled during the minority of the person having the superior right but is not tolled for any other reason.

the person received from the property and interest from the date of disposition at the rate of 10 percent on the fair market value of the property. If the person used the affidavit procedure fraudulently, the person is liable to the estate for three times the value of the property. A three-year statute of limitations is provided for enforcement of this liability.³¹

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

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

Unless the successor is the surviving spouse,³² 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. 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, without the need for a probate proceeding,

³¹ The three-year period is not tolled for any reason.

³² 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).

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 \$60,000.³³

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,³⁴ that permits use of an 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 \$10,000.³⁵ 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

³³ The property described *supra* in the text accompanying notes 1-6 is excluded in determining the value of the decedent's estate.

³⁴ 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.

³⁵ 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.

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 debts of the decedent. The person also is personally liable to any person having a superior right to 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 liability provisions are comparable to the liability provisions that apply under the new division when the affidavit procedure is used to collect or transfer personal property.³⁶

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.³⁷ The surviving spouse³⁸ may obtain a court order determining that all or part of the decedent's estate is property passing to the surviving spouse.³⁹ The court order may also confirm the surviving spouse's ownership of

³⁶ See the discussion in the text, *supra*, under heading "Liability of person to whom payment, delivery, or transfer is made."

³⁷ Prob. Code § 649.1.

³⁸ 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.

³⁹ 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

the surviving spouse's one-half share of the community and quasi-community property.⁴⁰ The order may be obtained without the need for probate administration.⁴¹ 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.⁴²

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.⁴³ The 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.⁴⁴ 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.⁴⁵

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

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.

⁴⁰ Prob. Code §§ 650, 655.

⁴¹ Prob. Code §§ 650, 655.

⁴² See 17 Cal. L. Revision Comm'n Reports 426 (1984).

⁴³ 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.

⁴⁴ Prob. Code § 649.4.

⁴⁵ Prob. Code § 649.4(b).

that an interest in the property is claimed by another under the will of the deceased spouse.⁴⁶

RECOMMENDATIONS

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.⁴⁷

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.⁴⁸ 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 provision⁴⁹ 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.

(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.

⁴⁶ Prob. Code § 649.2. The personal representative, guardian, or conservator of the estate of the surviving spouse has the same power. *Id.*

⁴⁷ Minor changes are indicated in the Comments to the sections of the new division.

⁴⁸ Prob. Code §§ 630-632.

⁴⁹ Prob. Code § 649.2.

This new limitation will make clear when the provision applies, thereby giving the surviving spouse a marketable title.⁵⁰

Right to probate only portion of 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.⁵¹ The new division also recognizes the existing practice in some cases of probating only a portion of the deceased spouse's estate.

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 requirement⁵² 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.⁵³

(2) The general requirement⁵⁴ 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 requirement⁵⁵ that notice of hearing be given not less than 20 days before the hearing.

⁵⁰ 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.

⁵¹ 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 property administered in the estate of the deceased spouse.

⁵² 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).

⁵³ See Prob. Code § 1200.5.

⁵⁴ Prob. Code § 1200.5(b).

⁵⁵ Prob. Code § 653.

(3) An inventory and appraisalment is not required in order to obtain the order, but the petitioner has the option to file an 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 require⁵⁶ 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.⁵⁷

(4) The provision of existing law⁵⁸ 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.⁵⁹ This replaces the existing law which provides for court approval of a portion only of the legal fees that are likely to be involved in the disposition without administration of the estate of a deceased spouse.⁶⁰

⁵⁶ Prob. Code § 657.

⁵⁷ See Prob. Code § 656. A provision expressly giving the court authority to require the filing of an inventory and appraisalment is added to the provision of the new division that continues the substance of existing Probate Code Section 656.

⁵⁸ See Prob. Code § 910(b).

⁵⁹ Although the attorney's fee is not approved by the court, the new division gives the probate court jurisdiction to determine disputes concerning the fee. If there is no agreement between the lawyer and the client concerning the attorney's fee and there is a dispute concerning the reasonableness of the fee, a petition may be filed requesting the court to determine the reasonableness of the fee. If there is an agreement concerning the attorney's fee and there is a dispute concerning the meaning of the agreement, the probate court is authorized to determine the dispute.

⁶⁰ 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.

OUTLINE OF NEW DIVISION 8 OF PROBATE CODE

DIVISION 8. DISPOSITION OF ESTATE WITHOUT ADMINISTRATION

PART 1. COLLECTION OR TRANSFER OF SMALL ESTATE WITHOUT ADMINISTRATION

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- § 13002. Holder of the decedent's property
- § 13004. Particular item of 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
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- § 13107. Claim against estate in probate
- § 13108. No pending probate proceeding; later probate proceeding not precluded
- § 13109. Liability for decedent's unsecured debts
- § 13110. Liability to person having superior right
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- § 13112. Limitation on liability under Sections 13109 and 13110
- § 13113. Other remedies not affected
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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 appraisal
- § 13153. Notice of hearing
- § 13154. Court order
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- § 13156. Personal liability of petitioners
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CHAPTER 5. AFFIDAVIT PROCEDURE FOR REAL PROPERTY OF SMALL VALUE

- § 13200. Filing affidavit in superior court; inventory and appraisal
- § 13201. Filing fee
- § 13202. Issuance and recording of certified copy of affidavit
- § 13203. Effect of recorded affidavit

- § 13204. Liability for decedent's unsecured debts
- § 13205. Liability to person having superior right
- § 13206. Restitution if estate proceeding commenced
- § 13207. Limitation on liability under Sections 13204 and 13205
- § 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. No liability if all property administered
- § 13554. 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. Contents of affidavit
- § 13602. Payment of earnings by employer
- § 13603. Protection of employer from liability
- § 13604. Enforcement of payment
- § 13605. Rights of heirs or devisees of deceased spouse not affected
- § 13606. 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. Filing 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 appraisal
- § 13660. Attorney's fee

Probate Code §§ 630-632 (repealed). Collection of personal property by affidavit

SEC.____. Article 1 (commencing with Section 630) of Chapter 10 of Division 3 of the Probate Code is repealed.

Comment. Former Article 1 (commencing with Section 630) of Chapter 10 of Division 3 is replaced by Part 1 (commencing with Section 13000) of Division 8 (collection or transfer of small estate without administration). The disposition of each repealed section of the former law is indicated in the Comment to the repealed section set out in the “Comments to Repealed Sections” found at the end of this recommendation.

Probate Code §§ 649.1-649.6 (repealed). Passage of property to surviving spouse without administration

SEC.____. Article 2.5 (commencing with Section 649.1) of Chapter 10 of Division 3 of the Probate Code is repealed.

Comment. Former Article 2.5 (commencing with Section 649.1) of Chapter 10 of Division 3 is replaced by Sections 13500-13553. The disposition of each repealed section of the former law is indicated in the Comment to the repealed section set out in the “Comments to Repealed Sections” found at the end of this recommendation.

Probate Code §§ 650-658 (repealed). Determination or confirmation of property passing or belonging to surviving spouse

SEC.____. Article 3 (commencing with Section 650) of Chapter 10 of Division 3 of the Probate Code is repealed.

Comment. Former Article 3 (commencing with Section 650) of Chapter 10 of Division 3 is replaced by Sections 13650-13660. The disposition of each repealed section of the former law is indicated in the Comment to the repealed section set out in the “Comments to Repealed Sections” found at the end of this recommendation.

Probate Code §§ 13000-13660 (added). Disposition of estate without administration

SEC.____. Division 8 (commencing with Section 13000) is added to the Probate Code, to read:

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

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" or "holder" means, with respect to any particular item of property of the decedent, 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").

§ 13004. Particular item of property

13004. "Particular item of property" means, respectively, particular personal property of the decedent which is sought to be collected, received, or transferred by the successor of the decedent under Chapter 3 (commencing with Section 13100), or particular real property of the decedent for which the successor of the decedent seeks a court order determining succession under Chapter 4 (commencing with Section 13150) or with respect to which the successor of the decedent files an affidavit of succession under Chapter 5 (commencing with Section 13200). Subject to this section, "particular item of property" includes all interests specified in Section 62.

Comment. Section 13004 is new. This definition, together with the definition of “successor of the decedent” in Section 13006, 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 13101 and Section 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 Sections 13151-13152).

§ 13006. Successor of the decedent

13006. “Successor of the decedent” means:

(a) If the decedent died leaving a will, the sole beneficiary or all of the beneficiaries who succeeded to a particular item of 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 particular item of property under the decedent’s will.

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

Comment. Subdivision (a) of Section 13006 is drawn from portions 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.

Subdivision (b) expands the provision of subdivision (b) of former Probate Code Section 630 to include all persons who succeeded to a particular item of property of the decedent under Sections 6401 and 6402 (intestate succession). The former provision 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 subdivision (b), the persons who can use the summary provisions of this part are not so limited.

See also the Comment to Section 13004.

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 a 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 same meaning as 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, truck camper, or floating home registered under Part 2 (commencing with Section 18000) of Division 13 of the Health and Safety Code.

(c) For the purposes 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. 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 the portion of subdivision (a) of former Probate Code Section 630 that excluded certain state registered property in determining the estate or its value with the addition of "floating home" in paragraph (3). This addition reflects the 1985 amendment to Section 18102 of the Health and Safety Code which added "floating homes" to the kinds of property which can be transferred without administration under that section. See 1985 Cal. Stat. ch. 1467, § 27. The state registered property excluded under subdivision (b) can be

transferred without probate under special statutory provisions. See Health & Safety Code § 18102 (manufactured homes, mobilehomes, commercial coaches, truck campers, and floating homes); 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).

§ 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 the trustee 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.

§ 13052. Application of part

13052. (a) Except as provided in subdivision (b), this part applies whether the decedent died before, on, or after January 1, 1987.

(b) This part does not apply and the law in effect at the time of payment, delivery, or transfer shall apply if the payment, delivery, or transfer is made pursuant to former Probate Code Sections 630 to 632, inclusive, prior to January 1, 1987.

Comment. Section 13052 is a new provision that preserves prior law where a payment, delivery, or transfer was made under prior law before the operative date of this part. The section also makes clear that this part applies if the payment, delivery, or transfer is made on or after the operative date, without regard to whether the decedent died before or after that date. Thus, where the decedent died before the operative date, the provisions of this part may be used to require the payment, delivery, or transfer if the property was not paid, delivered, or transferred prior to the operative date pursuant to the provisions of former Probate Code Sections 630-632.

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

**§ 13100. Collection or 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 if 40 days have elapsed since the death of the decedent, the successor of the decedent may, without procuring letters of administration or awaiting probate of the will, do any of the following with respect to one or more particular items of property:

(a) Collect any particular item of property that is money due the decedent.

(b) Receive any particular item of property that is tangible personal property of the decedent.

(c) Have any particular item of property that is evidence 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, truck camper, or floating home 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 Sections 13600-13605.

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). (The provision of former Section 630 that precluded use of the affidavit procedure where the gross value of the decedent's real property in this state exceeded \$10,000 is not continued.)

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

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

(4) 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 13101 must be executed by all the successors who have an interest in the property sought to be collected, received, or transferred. See Sections 13004 (defining "particular item of property") and 13006 (defining "successor of the decedent").

The procedure under this chapter cannot be used for real property. See Section 13115. However, the phrase "whether or not secured by a lien on real property" has been added to subdivision (c) of Section 13100 to make clear that evidence of a debt or obligation may be transferred under this chapter even though the debt or obligation is secured by a lien on real property. 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).

§ 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 this state 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 in Section 13050 of the California Probate Code, does not exceed sixty thousand dollars (\$60,000)."
- (f) A description of the property of the decedent that is to be paid, transferred, or delivered to the affiant or declarant.
- (g) The name of the successor of the decedent (as defined in Section 13006 of the California Probate Code) to the described property.

(h) Either of the following, as appropriate:

(1) "The affiant or declarant is (the affiants or declarants are) the successor of the decedent (as defined in Section 13006 of the California Probate Code) to the decedent's interest in the described property."

(2) "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) with respect to the decedent's interest in the described property."

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

(j) "The affiant or declarant requests that the described property be paid, delivered, or transferred to the affiant or declarant."

(k) "The affiant or declarant affirms or declares under penalty of perjury under the laws of the State of California that the foregoing is true and correct."

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 Sections 13004 (defining "particular item of property") and 13006 (defining "successor of the decedent").

§ 13102. Presenting decedent's evidence of ownership

13102. (a) If the decedent had evidence of ownership of the property described in the affidavit or declaration and the holder of the property would have had the right to require presentation of the evidence of ownership before the duty of the holder to pay, deliver, or transfer the property to the decedent would have arisen, 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 evidence of ownership is not presented to the holder pursuant to subdivision (a), the holder may require, as a condition for the payment, delivery, or transfer of the property, that the person presenting the affidavit or declaration provide the holder with a bond or undertaking 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. Nothing in this subdivision precludes the holder and the person presenting the affidavit or declaration from dispensing with the requirement that a bond or undertaking be provided and instead entering into an agreement satisfactory to the holder concerning the duty of the person presenting the affidavit or declaration to indemnify the holder.

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, floating home, 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 of nonresident decedent 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).

§ 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 form, content, and manner of making the inventory and appraisal of the real property shall be as set forth in Chapter 9 (commencing with Section 600) of Division 3. The inventory and appraisal shall be made by a probate referee selected by the affiant or declarant from those probate referees appointed by the

Controller under Section 1305 to appraise property in the county where the real property is located.

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 (excluding real property held in joint tenancy or other real property described in paragraph (1) of subdivision (a) of 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 value).

§ 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 or 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 Department of Motor Vehicles of this state that is current or was issued during the preceding five years.

(2) A passport issued by the Department of State of the United States that is current or was issued during the preceding five years.

(3) Any of the following documents if the document is current or was issued during the preceding 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.

§ 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 as successor of the decedent 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 as successor of the decedent.

(b) If the holder of the decedent's property refuses to pay, deliver, or transfer any personal property or evidence thereof to the successor of the decedent within a reasonable time, the successor 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 person or 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. 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. The holder does not

act unreasonably in refusing to pay, deliver, or transfer the property if the refusal is based on the holder's good faith belief that there may be estate taxes payable.

§ 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 may rely in good faith on the statements in the affidavit or declaration and has no duty 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 clarifying language. See also Section 13102(b) (bond to protect person paying, delivering, or transferring property).

§ 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 identified by the affidavit or declaration as the successor of the decedent 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.

§ 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 this state.

(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. 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); Broll, *Summary Administration*, in 1 California Decedent Estate Administration § 3.14, at 124 (Cal. Cont. Ed. Bar 1971).

§ 13109. Liability for decedent's unsecured debts

13109. A person to whom payment, delivery, or transfer of the decedent's property is made under this chapter is personally liable, to the extent provided in Section 13112, 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. Section 13109 is a new provision drawn from former Section 645.3, continued as 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 13554 (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.

§ 13110. Liability to person having superior right

13110. (a) Except as provided in subdivision (b), each person to whom payment, delivery, or transfer of the decedent's property is made under this chapter is personally liable to the extent provided in Section 13112 to any person having a superior right by testate or intestate succession from the decedent.

(b) Any person who fraudulently secures the payment, delivery, or transfer of the decedent's property under this chapter is liable to the person having such a superior right for three times the fair market value of the property. For the purposes of this subdivision, the "fair market value of the property" is the fair market value of the property paid, delivered, or transferred to the person liable under this subdivision, valued as of the time the affidavit or declaration is presented under this chapter to the holder of the decedent's property, excluding any liens and encumbrances on that property at that time.

(c) An action to impose liability under this section is forever barred five years after the affidavit or declaration is presented under this chapter to the holder of the decedent's property. This five-year period allowed for commencing the action is tolled during the minority of the person having the superior right, but is not tolled for any other reason.

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.

§ 13111. Restitution if estate proceeding commenced

13111. (a) Subject to subdivisions (b), (c), and (d), 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 is liable for:

(1) The restitution of the property to the estate if the person still has the property, together with the net income the person received from the property.

(2) The restitution to the estate of the fair market value of the property if the person no longer has the property, together with (A) the net income the person received from that property and (B) interest at the rate payable on a money judgment on the fair market value of the property. For the purposes of this subdivision, the "fair market value of the property" is the fair market value, valued as of the time of the disposition of the property, of the property paid, delivered, or transferred to the person under this chapter, excluding any liens and encumbrances on the property at that time.

(b) Subject to subdivision (c), if the person fraudulently secured the payment, delivery, or transfer of the decedent's property under this chapter, the person is liable under this section for restitution to the decedent's estate of three times the fair market value of the property. For the purposes of this subdivision, the "fair market value of the property" is the fair market value, valued as of the time the affidavit or declaration is presented under this chapter, of the property paid, delivered, or transferred to the person under this chapter, excluding the amount of any liens and encumbrances on the property at that time.

(c) The property and amount required to be restored to the estate under this section shall be reduced by any property or amount paid by the person to satisfy a liability under Section 13109 or 13110.

(d) An action to enforce the liability under this section is forever barred three years after presentation of the affidavit or declaration under this chapter to the holder of the decedent's property. The three-year period specified in this subdivision is not tolled for any reason.

Comment. Section 13111 is a new provision that requires restitution to the decedent's estate if probate proceedings are commenced.

§ 13112. Limitation on liability under Sections 13109 and 13110

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 satisfies the requirements of Section 13111.

(b) Except as provided in subdivision (b) of Section 13110, the aggregate of the personal liability of a person under Sections 13109 and 13110 shall not exceed the fair market value, valued as of the time the affidavit or declaration is presented under this chapter, of the property paid, delivered, or transferred to the person under this chapter, less the amount of any liens and encumbrances on that property at that time.

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.

§ 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 decedent's estate, 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.

§ 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 (commencing with Section 13150) (court order determining succession to real property) and Chapter 5 (commencing with Section 13200) (affidavit procedure for real property of small value).

CHAPTER 4. COURT ORDER DETERMINING SUCCESSION TO REAL 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 an interest in a particular item of property that is 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 that real property and that administration of the decedent's estate is unnecessary.

Comment. Sections 13150-13157 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).

(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 Sections 13004 (defining "particular item of property") and 13006 (defining "successor of the decedent").

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

(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.

§ 13152. Contents of petition; inventory and appraisal

13152. (a) The petition shall be verified by each petitioner, shall contain a request that the court make an order under this chapter determining that the particular item of property described in the petition is property passing to the petitioner 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, as shown by the inventory and appraisal attached to the petition, does not exceed sixty thousand dollars (\$60,000).

(3) A description of the particular item of property in this state which the petitioner alleges is property of the decedent passing to the petitioner.

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

(5) A statement that no proceeding is being or has been conducted in this state 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 those 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 appraisal 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 appraisal 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 petitioner bases his or her claim to the described particular item of property upon 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.

§ 13153. Notice of hearing

13153. The clerk shall set the petition for hearing. Not less than 10 days before the hearing on the petition notice of the hearing 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 person at the person's residence or mailing address as set forth in the petition, or if neither of these addresses are known to any petitioner, 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 this state, 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 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 petitioner.

(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 this state, 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."

§ 13155. Finality of order

13155. Upon becoming final, an order under this chapter determining that real property is property passing to the petitioner 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).

§ 13156. Personal liability of petitioners

13156. (a) Subject to subdivisions (b) and (c), the petitioner who receives the decedent's property pursuant to an order under this chapter is 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 petitioner 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. If there is no agreement between the attorney and the client concerning the attorney's fee for services performed in connection with the filing of a petition and obtaining of a court order under this chapter and there is a dispute concerning the reasonableness of the attorney's fee for those services, a petition may be filed with the court requesting that the court determine the reasonableness of the attorney's fee for those services. If there is an

agreement between the attorney and the client concerning the attorney's fees for services performed in connection with the filing of a petition and obtaining a court order under this chapter and there is a dispute concerning the meaning of the agreement, a petition may be filed with the court requesting that the court determine the dispute.

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

§ 13200. Filing affidavit in superior court; inventory and appraisalment

13200. (a) No sooner than six months from the death of a decedent, a person or persons claiming as successor of the decedent to a particular item of property that is 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 appraisalment 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) "The affiant is the successor of the decedent (as defined in Section 13006 of the Probate Code) and 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) "The affiant declares under penalty of perjury under the law of the State of California that the foregoing is true and correct."

(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 appraisal of the decedent's real property in this state, excluding the real property described in Section 13050. The form, content, and manner of making the inventory and appraisal of the real property shall be as set forth in Chapter 9 (commencing with Section 600) of Division 3. The inventory and appraisal shall be made by a probate referee selected by the affiant from those probate referees appointed by the Controller under Section 1305 to appraise property in the county where the real property is located.

(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.

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 property in this state (excluding certain property) does not exceed \$10,000. See Section 13200(a)(4). See also Section 13050 (exclusions).

(2) No proceeding for the administration of the decedent's estate is pending or has been conducted in California. See Section 13200(a)(6).

(3) Not less than six months have elapsed since the death of the decedent. See Section 13200(a) (introductory clause).

(4) The funeral expenses, expenses of last illness, and all unsecured debts of the decedent have been paid. See Section 13200(a) (7).

(5) The person executing the affidavit is the successor of the decedent. See Section 13200(a) (8).

(6) The affidavit contains a notary public's certificate of acknowledgment identifying each person executing the affidavit. See Section 13200(b).

(7) An inventory and appraisal of the real property, made by a probate referee, is attached to the affidavit. See Section 13200(c).

(8) A copy of the decedent's will is attached to the affidavit if the successor of the decedent claims the property under the will of the decedent. See Section 13200(d).

Where the real property has a gross value in excess of \$10,000 or less than six months have elapsed since the death of the decedent, there is another procedure available for obtaining a marketable title to the real property without the need for probate. See Sections 13150-13157 (where gross value of decedent's real and personal property in this state does not exceed \$60,000, successor of decedent may obtain court order determining succession to the real property).

§ 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.

§ 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.

§ 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 designed as a successor of the decedent to a particular item of 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 and its net income, or its value and interest on its proceeds 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). Liability under Sections 13204 and 13205 is limited. See Section 13207. If the person fraudulently executed or filed the affidavit, the person is liable to the decedent's estate or to a person having a superior right to the property for three times the fair market value of the property. See Sections 13205(b), 13206(b).

§ 13204. Liability for decedent's unsecured debts

13204. Each person who is designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 is personally liable to the extent provided in Section 13207 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. Liability to person having superior right

13205. (a) Except as provided in subdivision (b), each person who is designated as a successor of the decedent in a certified copy of any affidavit issued under Section 13202 is personally liable to the extent provided in Section 13207 to any person having a superior right by testate or intestate succession from the decedent.

(b) If the person fraudulently executed or filed the affidavit under this chapter, the person is liable to the person having a superior right for three times the fair market value of the property. For the purposes of this subdivision, the "fair market value of the property" is the fair market value, valued as of the time the certified copy of the affidavit was issued under Section 13202, of the property the person liable took under the certified copy of the affidavit to which the other person has a superior right, excluding any liens and encumbrances on the property at that time.

(c) An action to impose liability under this section is forever barred five years after the certified copy of the affidavit is issued under Section 13202. This five-year period allowed for commencing the action is tolled during the minority of the person having the superior right, but is not tolled for any other reason.

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

§ 13206. Restitution if estate proceeding commenced

13206. (a) Subject to subdivisions (b), (c), and (d) if proceedings for the administration of the decedent's estate are commenced, each person who is designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 is liable for:

(1) The restitution to the decedent's estate of the property the person took under the certified copy of the affidavit if the person still has the property, together with the net income the person received from the property.

(2) The restitution to the decedent's estate of the fair market value of the property if the person no longer has the property, together with (A) the net income the person received from the property prior to disposing of it and (B) interest from the date of disposition at the rate payable on a money judgment on the fair market value of the property. For purposes of this paragraph, the "fair market value of the property" is the fair market value, valued as of the time of the disposition of the property, of the property the person took under the certified copy of the affidavit, excluding the amount of any liens and encumbrances on the property at the time the certified copy of the affidavit was issued.

(b) Subject to subdivision (d), if the person fraudulently executed or filed the affidavit under this chapter, the person is liable under this section for restitution to the decedent's estate of three times the fair market value of the property. For the purposes of this subdivision, the "fair market value of the property" is the fair market value, valued as of the time the certified copy of the affidavit was issued, of the property the person took under the certified copy of the affidavit, excluding the amount of any liens and encumbrances on the property at that time.

(c) Subject to subdivision (d), if proceedings for the administration of the decedent's estate are commenced and a person designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 made a significant improvement to the property taken by the person under the certified copy of the affidavit in the good faith belief that the person was the successor of the

decedent to that property, the person is liable for whichever of the following the decedent's estate elects:

(1) The restitution of the property, as improved, to the estate of the decedent upon the condition that the estate reimburse the person making restitution for (A) the amount by which the improvement increases the fair market value of the property restored, valued as of the time of restitution, and (B) the amount paid by the person for principal and interest on any liens or encumbrances that were on the property at the time the certified copy of the affidavit was issued.

(2) The restoration to the decedent's estate of the fair market value of the property, valued as of the time of the issuance of the certified copy of the affidavit under Section 13202, excluding the amount of any liens and encumbrances on the property at that time, together with interest on the net amount at the rate payable on a money judgment running from the date of the issuance of the certified copy of the affidavit.

(d) The property and amount required to be restored to the estate under this section shall be reduced by any property or amount paid by the person to satisfy a liability under Section 13204 or 13205.

(e) An action to impose liability under this section is forever barred five years after the certified copy of the affidavit is issued under Section 13202. The five-year period specified in this subdivision is not tolled for any reason.

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.

§ 13207. Limitation on liability under Sections 13204 and 13205

13207. (a) A person designated as a successor of the decedent 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 satisfies the requirements of Section 13206.

(b) Except as provided in subdivision (b) of Section 13205, the aggregate of the personal liability of a person

under Sections 13204 and 13205 shall not exceed the fair market value at the time of the issuance of the certified copy of the affidavit under Section 13202 of the decedent's property received by that person under this chapter, less the amount of any liens and encumbrances on the property at that time.

Comment. Section 13207 is comparable to Section 13112.

§ 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 the decedent's estate, 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.

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.

§ 13501. Property subject to administration

13501. Except as provided in Chapter 6 (commencing with Section 6600) of Division 3 and in Part 1 (commencing with Section 13000) of this division, 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 estate 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).

§ 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, all or a portion of 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) 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.

(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 that

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 with the addition of language in the introductory portion of subdivision (a) that makes clear that “all or a portion” of the described property of the deceased spouse or the surviving spouse may be probated. This language 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. The language also recognizes the practice in some cases under former law of probating less than all of the property of the deceased spouse in the estate of the deceased spouse.

§ 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.

§ 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.

§ 13505. Application of this part

13505. This part applies whether the deceased spouse died before, on, or after January 1, 1987.

Comment. Section 13505 makes this part applicable whether the deceased spouse died before, on, or after the operative date of this part. The section eliminates the restrictive effect of former Section 658 which preserved the law in effect prior to January 1, 1985, for cases where the deceased spouse died before that date.

§ 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, of the Probate Code (as repealed by Chapter 527 of the Statutes of 1984) or former Sections 649.1 to 649.5, inclusive, of the Probate Code (as repealed by the act enacting this section) 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.

**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 is a new provision that makes clear that Section 13540 does not affect or limit the liability of a surviving spouse under Sections 13550-13554. Although Section 13540 may preclude a devisee or creditor from enforcing his or her rights against a grantee, purchaser, encumbrancer, or lessee or against the property interest transferred to the grantee, purchaser, encumbrancer, or lessee, the section does not relieve the surviving spouse of any liability under Sections 13550-13554. 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.

§ 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 office of the county recorder of 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 change 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 by the act enacting this section 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 a 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. Except as provided in Sections 951.1, 13552, 13553, and 13554, 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 to the extent provided in Section 13551.

Comment. Section 13550 continues subdivision (a) of former Section 649.4 without substantive change.

§ 13551. Limitation on liability

13551. The liability imposed by Section 13550 shall not exceed the fair market value at the date of the decedent's death, less the amount of any liens and encumbrances, of the total of the following:

(a) The portion of the one-half of the community and quasi-community property belonging to the surviving spouse under Sections 100 and 101 that is not exempt from enforcement of a money judgment and is not administered in the estate of the deceased spouse.

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

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

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 property belonging to the surviving spouse that is 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) (election to administer only a portion of the community and quasi-community property that belongs to the surviving spouse).

§ 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 have or who secure the surviving spouse's 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 but with the addition of the clarifying phrase "who have or who secure" in subdivision (b).

§ 13553. No liability if all property administered

13553. The surviving spouse is not liable under this chapter if all the property described in paragraphs (1) and (2) of subdivision (a) of Section 13502 is administered under Division 3 (commencing with Section 300).

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

§ 13554. Enforcement of liability

13554. (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 13554 continues subdivision (e) of former Section 649.4 without substantive change.

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) At any time after a husband or wife dies, the surviving spouse or the guardian or conservator of the estate of the surviving spouse may, without procuring letters of administration or awaiting probate of the will, collect salary or other compensation owed by an employer for personal services of the deceased spouse, including compensation for unused vacation, not in excess of five thousand dollars (\$5,000) net.

(b) Not more than five thousand dollars (\$5,000) net in the aggregate may be collected by or for the surviving spouse under this chapter from all of the employers of the decedent.

(c) For the purposes of this chapter, a guardian or conservator of the estate of the surviving spouse may act on behalf of the surviving spouse without authorization or approval of the court in which the guardianship or conservatorship proceeding is pending.

Comment. Sections 13600-13606 provide a 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. Use of this new procedure will provide funds for the surviving spouse 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. See Section 13601(c).

Section 13600 permits the guardian or conservator of the estate of the surviving spouse to use the new procedure under this chapter to collect compensation owing to the deceased spouse. See also Section 13601(d) (proof of appointment of person as

guardian or conservator). 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 13100-13115 (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.

§ 13601. Contents of affidavit

13601. (a) To collect salary or other compensation under this chapter, an affidavit or a declaration under penalty of perjury under the laws of this state shall be furnished to the employer of the deceased spouse stating all of the following:

- (1) The name of the decedent.
- (2) The date and place of the decedent's death.
- (3) Either of the following, as appropriate:

(A) "The affiant or declarant is the surviving spouse of the decedent."

(B) "The affiant or declarant is the guardian or conservator of the estate 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) net, be paid promptly 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 declarant 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) net, less the amount of \$_____ which was previously collected.”

(10) “The affiant or declarant affirms or declares under penalty of perjury under the laws of the State of California that the foregoing is true and correct.”

(c) Reasonable proof of the identity of the surviving spouse shall be provided to the employer. If a guardian or conservator is acting for the surviving spouse, reasonable proof of the identity of the guardian or conservator 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 the guardian or conservator of the estate of the surviving spouse, the employer shall be provided with reasonable proof, satisfactory to the employer, of the appointment of the person to act as guardian or conservator of the estate of the surviving spouse.

Comment. See the Comment to Section 13600.

§ 13602. Payment of earnings by employer

13602. If the requirements of Section 13600 are satisfied, the employer to whom the affidavit or declaration is presented shall promptly pay the earnings of the decedent, including compensation for unused

vacation, not in excess of five thousand dollars (\$5,000) net, to the person presenting the affidavit or declaration.

Comment. Section 13602 imposes a duty on the employer to pay promptly the decedent's earnings to the person presenting the affidavit or declaration. The employer who pays the decedent's earnings to the person presenting the affidavit or declaration is protected from liability. See Section 13603. Payment pursuant to Section 13602 does not preclude later administration of the decedent's estate. See Section 13605. As to the liability of the person receiving the payment, see Section 13605.

§ 13603. Protection of employer from liability

13603. If the requirements of Section 13601 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 may rely in good faith on the statements in the affidavit or declaration and has no duty to inquire into the truth of any statement in the affidavit or declaration.

Comment. Section 13603 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 13601 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 Sections 13600 and 13601 and the Comment to Section 13600. Section 13603 is comparable to Section 13106 and is drawn from the first sentence of former Section 631.

§ 13604. Enforcement of payment

13604. (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 13604 is a new provision comparable to subdivision (b) of Section 13105. Section 13604 makes clear that the duty imposed by Section 13602 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).

§ 13605. Rights of heirs or devisees of deceased spouse not affected

13605. 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. A person who fraudulently secures a payment under this chapter is liable to a person having a superior right to the payment for three times the amount of the payment.

Comment. Section 13605 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.

§ 13606. Other methods of collecting compensation not affected

13606. 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 13606 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.*, Sections 160 (payment of money due to

decedent to person designated by decedent), 6600-6614 (small estate set-aside), 13100-13115 (affidavit procedure for collection or transfer of personal property of a small estate), 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.

§ 13651. Contents of petition

13651. (a) A petition filed pursuant to Section 13650 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 all of 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) of Section 13651 has been revised to make clear that it is limited to an unincorporated business.

§ 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. Filing 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 filed 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 filed with a petition for the probate of the will of the deceased spouse or for administration of the estate of the deceased spouse or the petition may be filed (without filing a petition for probate or administration) in the superior court of the county in which the estate of the deceased spouse may be administered. See Section 13650.

§ 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 filed with a petition filed under this chapter.

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

§ 13655. Notice of hearing

13655. (a) If a petition filed under this chapter is filed 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 filed 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 filed 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) 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.

(c) The notice specified in subdivision (b) shall also be mailed, as provided in subdivision (b), to 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 either of the following:

(1) A testamentary trust of property for charitable purposes other than a charitable trust with a designated trustee, resident in this state.

(2) A devise for a charitable purpose without an identified devise or beneficiary.

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.

§ 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. The court may issue any further orders which may be necessary to cause delivery of the property or its proceeds to the surviving spouse.

(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. If the court determines that property passes to the surviving spouse, the court may issue any further orders which may be necessary to cause delivery of that property or its proceeds to the surviving spouse.

(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 and may issue any further orders which may be necessary to cause ownership of the property to be confirmed in the surviving spouse.

Comment. Section 13656 continues subdivisions (a) and (b) of former Section 655 without substantive change.

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 estate without administration) if the requirements of that part are satisfied. See also Sections 6600-6614 (small estate set-aside).

§ 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.

§ 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 amounts 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.

§ 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. The petitioner may consider the independent appraisal useful for the purposes of capital gains taxes or other taxes. See also Section 13658 (authority of court to require the filing of an inventory and appraisal to protect creditors of unincorporated business of deceased spouse).

§ 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. If there is no agreement between the attorney and the client concerning the attorney's fee for services performed in connection with the filing of a petition and obtaining of a court order under this chapter and there is a dispute concerning the reasonableness of the attorney's fee for those services, a petition may be filed with the court requesting that the court determine the reasonableness of the attorney's fee for those services. If there is an agreement between the attorney and the client concerning the attorney's fee for services performed in connection with the filing of a petition and obtaining a court order under this chapter and there is a dispute concerning the meaning of the agreement, a petition may be filed with the court requesting that the court determine the dispute.

Comment. Section 13660 replaces the provision of prior law that provided 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. The last two sentences of Section 13660 make clear that the probate court has jurisdiction (1) to determine the reasonableness of the attorney's fee if there is a dispute and no agreement or (2) to determine the meaning of the agreement if there is a dispute concerning the meaning of an agreement concerning the attorney's fees for filing the petition and obtaining the order. The probate court has no jurisdiction with respect to the attorney's fee for other legal work in connection with the decedent's property.

CONFORMING AMENDMENTS

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

18102. ~~Upon~~ *(a) If 40 days have elapsed since the death of a registered or legal owner of a manufactured home, mobilehome, commercial coach, truck camper, or floating home registered under this part, without the decedent leaving other property necessitating probate, unless the manufactured home, mobilehome, commercial coach, or truck camper is, by will, otherwise bequeathed, and irrespective of the value of the manufactured home, mobilehome, commercial coach, truck camper, or floating home the surviving heir or beneficiary in the order named in Section 630 of the Probate Code following person may secure a transfer of registration of the title or interest of the decedent :*

(1) The 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, truck camper, or floating home is, by will, otherwise bequeathed.

(2) The sole beneficiary or all of the beneficiaries who succeeded to the manufactured home, mobilehome, commercial coach, truck camper, or floating home under the will of the decedent, where the manufactured home,

mobilehome, commercial coach, truck camper, or floating home 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:

~~(a)~~

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

~~(b) A certified statement of the heir or beneficiary setting forth his or her interest in the estate of the decedent.~~

~~(c) The names and addresses of any other heirs or beneficiaries.~~

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

~~(e) A statement that there are no creditors of the decedent or, if so, that the creditors of the decedent have been paid in full or their claims have been otherwise discharged.~~

(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, truck camper, or floating home either (i) as the 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, truck camper, or floating home 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.*

Comment. Section 18102 is amended to add the provision for a 40-day delay after the decedent's death. This makes the section consistent with Probate Code §§ 13100 (affidavit procedure for collection or transfer of personal property), 13151 (court order determining succession to real property), 13540 (right of surviving spouse to dispose of real property); Veh. Code § 9916 (affidavit procedure for transfer of ownership of title or interest of decedent in vessel).

The amendment to Section 18102 also substitutes references to the general provisions of the Probate Code governing intestate succession in place of the references to former Probate Code Section 630. Probate Code Section 630 has been repealed.

The amendment makes clear that a beneficiary who takes a manufactured home, mobilehome, commercial coach, truck camper, or floating home under the decedent's will (whether or not the beneficiary is related to the decedent) may secure a transfer of registration of the title or interest of the decedent without the need to probate the decedent's estate. This is consistent with the practice of the department and with other comparable provisions. See Veh. Code §§ 5910 (vehicle), 9916 (vessel).

Section 18102 is also amended to specify in somewhat more detail the contents of the certificate to be presented to the department and to limit to unsecured creditors the requirement that creditors have been paid. The section as amended is consistent with other comparable provisions. See Veh. Code §§ 5910 (vehicle), 9916 (vessel).

Probate Code § 605 (amended). Inventory and appraisal

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

(1) The executor or administrator shall appraise at fair market value moneys, currency, cash items, bank accounts and amounts on deposit with any financial institution, and the proceeds of life and accident insurance policies and retirement plans payable upon death in lump sum amounts, excepting therefrom such items whose fair market value is, in the opinion of the

executor or administrator, an amount different from the ostensible value or specified amount.

As used in this subdivision, "financial institution" means a bank, trust company, federal savings and loan association, savings institution chartered and supervised as a savings and loan or similar institution under federal or state law, federal credit union or credit union chartered and supervised under state law.

(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.~~

~~(B) Estates subject to summary probate proceedings pursuant to Section 630.~~

~~(C) Such~~ those cases in which the court waives, for good cause, the appointment of a probate referee.

(3) If an executor or administrator seeks a waiver of the appointment of a probate referee pursuant to ~~subparagraph (C)~~ of paragraph (2), the executor or administrator, at the time of filing the inventory and appraisement pursuant to Section 600, shall file an appraisal of the fair market value of all assets of the estate and a statement which sets forth the good cause which justifies the waiver. The clerk shall set a hearing on the waiver not sooner than 15 days after the filing. A copy of the inventory and appraisement, the statement, and notice of the date of the hearing shall be served on and in the same manner as on, all persons who are entitled to notice pursuant to Section 926.

(b) The executor or administrator shall furnish to the referee such information concerning the assets appraised by him or to be appraised by the referee as the referee shall require.

(c) The executor or administrator or his attorney shall not be entitled to receive compensation for extraordinary services by reason of appraising any asset pursuant to this section.

(d) In a small estate set-aside proceeding under Chapter 6 (commencing with Section 6600) of Part 3 of Division 6, an inventory and appraisement of the decedent's estate is required as provided in Section 6608.

(e) *No inventory and appraisal of the decedent's estate is required where it is disposed of without administration under Division 8 (commencing with Section 13000) except to the extent an inventory and appraisal is required under or pursuant to Section 13103, subdivision (b) of Section 13152, subdivision (c) of Section 13200, or Section 13658.*

Comment. Section 605 is amended to delete from paragraph (2) of subdivision (a) the provisions containing the references to former Sections 630 and 650, to make a technical revision in paragraph (3) of subdivision (a), and to add subdivisions (d) and (e) which contain references to special inventory and assessment provisions in the small estate set-aside statute and the disposition without administration provisions.

Probate Code § 854 (amended). Option to purchase given in will

854. (a) When any option to purchase real or personal property is given in a will duly admitted to probate the optionee may petition the court for an order authorizing the executor or the administrator with the will annexed to transfer or convey ~~such~~ *the* property upon compliance with the terms and conditions stated in the will.

(b) The clerk shall set the petition for hearing by the court and give notice thereof for the period and in the manner required by ~~Section~~ *Sections 1200 and 1200.5 of this code.*

~~Such~~ (c) *The order shall not be made unless the court shall find finds that the rights of creditors will not be impaired or shall require requires a bond in an amount and with such a surety as the court shall direct or approve. The order shall not be entered unless the court shall find that all inheritance taxes payable in said proceedings have been paid or the State Controller, an inheritance tax attorney or a subordinate inheritance tax attorney has, in writing, consented to the entry of the order by the court.*

(d) The petition ~~must~~ *shall* be filed within any time limitations stated in the will, or, in any event, within ~~six~~ *nine* months after the issuance of letters testamentary or letters of administration with the will annexed ; ~~provided,~~

~~however, that~~. *However*, if any time limitation in the will is measured from the death of the testator ~~such that~~ time shall be extended by the period between ~~such the~~ *testator's* death and the issuance of ~~such those~~ letters but in no event to more than ~~six~~ *nine* months after ~~such~~ issuance.

Comment. Section 854 is amended to make three changes:

(1) To delete the former provision that required either a court finding that all inheritance taxes had been paid or consent by the State Controller. Inheritance taxes have been eliminated in California. See Rev. & Tax. Code § 13301.

(2) To add to the notice requirements a reference to Section 1200.5 (notice by mail). When Section 854 was enacted in 1963, the section required notice as provided in Section 1200. At that time, Section 1200 required notice by posting and by mail. In 1980, the provisions for notice by mail were split out of Section 1200 and relocated in Section 1200.5, but a conforming revision was not made to Section 854. Thus, this amendment accomplishes the original purpose of Section 854 as enacted.

(3) To substitute "nine months" for "six months" in subdivision (d). The Law Revision Commission has been advised by probate practitioners that the former six-month period did not allow sufficient time to file the petition.

Probate Code § 910 (amended). Attorney's 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 650, subject to approval by the court.~~

Comment. Section 910 is amended to delete the second paragraph. This paragraph is replaced by Section 13660.

Probate Code § 1200.5 (amended). Notice by mail or personal service

1200.5. (a) Notice shall be given in the manner prescribed in subdivision (b) upon the filing of any of the following:

(1) A petition under Section 641 for the setting aside of an estate.

(2) A petition to set apart a homestead or exempt property.

(3) A petition relating to the family allowance filed after the return of the inventory.

(4) A petition for leave to settle or compromise a claim against a debtor of the decedent or a claim against the estate or a suit against the executor or administrator as such.

(5) A petition for the sale of stocks or bonds.

(6) A petition for confirmation of a sale ~~or~~, a petition to grant an option to purchase real property, *or a petition to authorize a transfer or conveyance to a person given an option to purchase property of the decedent by a will duly admitted to probate.*

(7) A petition for leave to enter into an agreement to sell or give an option to purchase a mining claim or real property worked as a mine.

(8) A petition for leave to execute a promissory note or mortgage or deed of trust or give other security.

(9) A petition for leave to lease or to exchange property, or to institute an action for the partition of property.

(10) A petition for an order authorizing or directing the investment of money.

(11) An account of an executor or administrator or trustee.

(12) A petition for partial or ratable or preliminary or final distribution.

(13) A petition for the delivery of the estate of a nonresident.

(14) A petition for determination of heirship or interests in an estate.

(15) A petition of a trustee for instructions.

(16) A petition for the appointment of a trustee.

(17) Any petition for letters of administration or for probate of will, or for letters of administration-with-will annexed, which is filed after letters of administration or letters testamentary have once been issued.

(18) A report of status of administration.

(19) A petition for family allowance.

(20) An objection to the appraisal made by the executor, administrator, or probate referee.

(21) A petition under Section 709 for leave to file a claim against the estate after the expiration of the prescribed period.

(22) Any other proceeding under this code in which notice is required and no other time or method is prescribed by law or by court or judge.

(b) At least 10 days before the time set for the hearing of the petition or account, the petitioner or person filing the account shall cause notice of the time and place of hearing to be mailed to the executor or administrator, when he or she is not the petitioner, to any coexecutor or coadministrator not petitioning, and to all persons (or to their attorneys, if they have appeared by attorney), who have requested notice or who have given notice of appearance in the estate in person or by attorney, as heir, devisee, legatee or creditor, or as otherwise interested, addressed to them at their respective post office addresses given in their request for special notice, if any, otherwise at their respective offices or places of residence, if known, and if not, at the county seat of the county where the proceedings are pending, or to be personally served upon such person.

(c) Proof of the giving of notice shall be made at the hearing; and, if it appears to the satisfaction of the court that the notice has been regularly given, the court shall so find in its order, and the order shall be conclusive upon all persons when it becomes final.

(d) This section does not apply to proceedings under Division 4 (commencing with Section 1400). When a provision of Division 4 applies the provisions of this code applicable to executors or administrators to proceedings under Division 4, a reference to this section in the provisions applicable to executors or administrators shall be deemed to be a reference to Chapter 3 (commencing with Section 1460) of Part 1 of Division 4.

(e) The notice required by this section shall be in addition to the notice, if any, required to be given in the manner specified in Section 1200.

Comment. Section 1200.5 is amended to add a reference in paragraph (6) of subdivision (a) to a petition to authorize a transfer or conveyance to one given an option to purchase the decedent's property given in a will duly admitted to probate. See Section 854.

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 who takes 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.

Comment. Section 5910 is amended to substitute references to the general provisions of the Probate Code governing intestate succession in place of the references to former Probate Code Section 630. Probate Code Section 630 has been repealed.

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 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 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.

Comment. Section 9916 is amended to substitute references to the general provisions of the Probate Code governing intestate succession in place of the references to former Probate Code Section 630. Probate Code Section 630 has been repealed.

COMMENTS TO REPEALED SECTIONS

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

Comment. The portion of subdivision (a) of Section 630 which restricted use of the affidavit procedure to cases where the gross value of the decedent's real and personal property in this state does not exceed \$60,000 is continued in Section 13100 without substantive change. The portion of subdivision (a) which precluded use of the affidavit procedure if the gross value of the decedent's real property in this state exceeded \$10,000 is not continued. The portion of subdivision (a) which excluded certain state registered property is continued in Section 13050(b) with the addition of "floating home." 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 13051(a). The portion of subdivision (b) relating to a trustee is superseded by the last sentence of subdivision (a) 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) 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 Section 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 56 (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 subdivision (c) of Section 13051 without substantive change.

Subdivision (d) of Section 630 is continued in Section 13105(a)(2) and Section 13106 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. The last sentence is continued without substantive change in Section 13108(b). See the Comment to that section. See also Section 13111 (restitution if estate proceeding commenced).

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: Subdivision (a) is continued in Section 13550; subdivision (b) is continued in Section 13551; subdivision (c) is continued in Section 13553; subdivision (d) is continued in Section 13552; subdivision (e) is continued in Section 13554.

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. Subdivision (c) is continued in Section 13657 without substantive change.

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

Comment. Former Section 656 is continued without substantive change in Section 13658 except that it is made clear that the provision is limited to creditors of an “unincorporated” business. See also the Comment to Section 13658.

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

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.

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

Comment. Former Section 658 is replaced by Section 13505.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Small Estate Set-Aside

December 1985

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Small Estate Set-Aside*, 18 Cal. L. Revision Comm'n Reports 1101 (1986).

CALIFORNIA LAW REVISION COMMISSION

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ANN E. STODDEN

December 6, 1985

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

Probate Code Sections 640-647.5, inclusive, provide for a small estate set-aside where the net value of a decedent's estate does not exceed \$20,000. The Commission recommends a new statute to replace the existing provisions.

The new statute gives the court discretion whether to set aside a small estate. Under existing law, the court has no discretion and must set aside the small estate if the statutory requirements are satisfied.

The new statute gives the court flexibility to determine the persons to whom the small estate is to be set aside. Existing law requires that the small estate be set aside to the surviving spouse if not remarried or, if there is no unmarried surviving spouse, to the minor child or children of the decedent. Under the new statute, the court may set aside the small estate to the surviving spouse (whether or not remarried) and to the minor child or minor children or to any one or more of them.

The new statute makes other substantive and technical revisions in existing law.

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

Respectfully submitted,

EDWIN K. MARZEC
Chairperson

RECOMMENDATION

relating to

SMALL ESTATE SET-ASIDE

EXISTING LAW

When the net value of the decedent's estate does not exceed \$20,000,¹ it may be summarily set aside to the surviving spouse if not remarried or, if there is no unmarried surviving spouse, to the minor child or children of the decedent.²

The purpose of this small estate set-aside is to make the entire estate available for the support of the surviving spouse or minor children when the breadwinner is taken by death leaving but a small estate. The surviving spouse or minor children take the estate free from the rights of those who otherwise would take all or part of it under the decedent's will or by intestate succession.³ In addition, there are some circumstances where a small estate set-aside is a useful summary method for collecting the estate or transferring the record title to estate property.⁴

¹ The net value of the decedent's estate is computed by reducing its gross value by the amount of any liens or encumbrances and by the value of any probate homestead set apart out of the property. Prob. Code §§ 640, 645. Property held by the decedent in joint tenancy and other interests that terminate at death (such as life interests in trusts, retirement, and insurance, and life estates) are not included in determining the value of the decedent's estate. Prob. Code § 647; O. McCarroll, 1 California Decedent Estate Administration Supplement § 3.24, at 84 (Cal. Cont. Ed. Bar 1985). Any multiple-party account (as defined in Prob. Code § 5101) to which the decedent was a party at the time of death is also excluded in determining the estate of the decedent or its value to the extent that the sums on deposit belong to a surviving party, pay-on-death payee, or beneficiary. Prob. Code § 647. The decedent's one-half share of the community and quasi-community property as well as the decedent's separate property must be taken into account for the purposes of determining whether the estate is under \$20,000. Estate of Pezzola, 112 Cal. App. 3d 752, 169 Cal. Rptr. 464 (1980). It is unclear whether only California property is included in computing the \$20,000 limitation. See Broll, *Summary Administration*, in 1 California Decedent Estate Administration § 3.24, at 129 (Cal. Cont. Ed. Bar 1971).

² Prob. Code §§ 640, 645.

³ Estate of Pezzola, 112 Cal. App. 3d 752, 169 Cal. Rptr. 464 (1980). See also *In re Estate of Woodburn*, 212 Cal. 683, 300 P. 22 (1931).

⁴ Ordinarily, in order to avoid the need for a court proceeding, the affidavit procedure under Prob. Code § 630 will be used to collect personal property of a decedent or to have the registrar transfer the record title. But the small estate set-aside procedure under Prob. Code §§ 640-647 must be used instead of the Prob. Code § 630 procedure where (1) the small estate includes an interest in California real property

A petition to have a small estate set aside may be filed without filing a petition for probate of the will or for letters of administration, or the petition may be joined with a petition for probate or for letters of administration.⁵ An inventory and appraisal by a probate referee is required.⁶ If the court finds that the statutory requirements concerning the size of the estate are satisfied and that the expenses of the last illness, funeral charges, and expenses of administration have been paid, the court must make an order setting aside the entire estate to the surviving spouse if unremarried or, if there is not an unmarried surviving spouse, to such child or children of the decedent as may then be minors.⁷

The surviving spouse or minor children to whom the small estate is set aside are personally liable for decedent's unsecured debts up to the net amount received, less liens, encumbrances, and probate homestead and other exempt property.⁸ This liability terminates one year after title has vested unless the creditor has filed a court action within that time.⁹

RECOMMENDATIONS

The Commission has studied the small estate set-aside provisions and recommends a new statute to replace the existing provisions.¹⁰ The new statute makes several

having a gross value of more than \$10,000, (2) the widow or minor child does not have the right (under the will or the laws of intestate succession) to inherit the property, or (3) the property set aside has a gross value of more than \$60,000, but the net value (over and above liens, encumbrances, and the value of the probate homestead) does not exceed \$20,000. See O. McCarroll, 1 California Decedent Estate Administration Supplement § 3.24, at 85 (Cal. Cont. Ed. Bar 1985). A surviving spouse will ordinarily use the procedure under Prob. Code §§ 650-658 instead of a small estate set-aside if the surviving spouse takes the property by will or intestate succession because the procedure under Prob. Code §§ 650-658 can be used without regard to the size of the deceased spouse's estate. But the liability of the surviving spouse for the unsecured debts of the deceased spouse may be greater if the procedure under Prob. Code §§ 650-658 is used. Compare Prob. Code § 649.4 with Prob. Code § 645.3.

⁵ Prob. Code § 641.

⁶ Prob. Code § 644. Use of a probate referee is not required if the estate consists entirely of property which the personal representative can appraise under Prob. Code § 605.

⁷ Prob. Code § 645.

⁸ Prob. Code § 645.3. Compare the liability of a surviving spouse under Prob. Code § 645.3 with the liability of the surviving spouse under Prob. Code § 649.4.

⁹ Prob. Code § 645.3.

¹⁰ The new small estate set-aside provisions are compiled in the portion of the Probate Code containing the other family protection provisions, since the primary purpose of the small estate set-aside is to make the entire estate available for the support of the decedent's family. See *supra* text accompanying note 3.

important substantive changes in the existing law. These changes are described below.¹¹

Small estate set-aside discretionary with court. Under existing law, the court has no discretion and is required to set aside the small estate to the unmarried surviving spouse or minor child or children if the court finds that the net value of the decedent's estate is such that it is a small estate within the statute and that the expenses of the last illness, funeral charges, and expenses of administration have been paid.¹²

The new statute gives the court discretion whether to set aside a small estate and requires the court in exercising its discretion to consider the same factors as the court is required to consider in determining whether to set apart a probate homestead.¹³ The small estate set-aside may give to the surviving spouse or minor children property that otherwise would go to another under the decedent's will or by intestate succession. Giving the court discretion to determine whether to set aside the small estate provides the flexibility needed to treat fairly the decedent's dependents and those who otherwise would take the property¹⁴ and is consistent with the discretionary nature of the other family protection provisions.¹⁵

¹¹ Minor changes not discussed in the text are indicated in the Comments to the sections of the recommended legislation.

¹² Prob. Code § 645.

¹³ In determining whether to make a small estate set-aside, the court is required by the new statute to consider the needs of the surviving spouse and minor children, the liens and encumbrances on the property of the decedent's estate, the claims of creditors, the needs of the heirs or devisees of the decedent, the intent of the decedent with respect to the property in the estate and the estate plan of the decedent as expressed in inter vivos and testamentary transfers or by other means, and any other relevant considerations. *Cf.* Prob. Code § 6523 (probate homestead).

¹⁴ For example, the decedent may have made adequate provision for the surviving spouse and minor children by inter vivos transfers, by holding property in joint tenancy with members of the family, or by making members of the family beneficiaries of other interests that terminate at death, such as life interests in trusts, retirement, and insurance, and remainder interests upon termination of the decedent's life estate in property. The family members also may succeed to real property located in another state. Where the decedent has made adequate provision for the family members, it may be unjust and unnecessary under the circumstances to deprive the person who would take part or all of the small estate of that right by requiring the court to set aside the small estate. Giving the court discretion to determine whether or not to make a small estate set-aside permits the court to achieve substantial justice in these cases.

¹⁵ See Prob. Code §§ 6510 (setting aside exempt property other than family dwelling), 6520-6523 (setting apart probate homestead), 6540-6541 (family allowance).

Property included in “decedent’s estate.” Under existing law, the small estate set-aside is available only if the “net value of the whole estate” (over and above all liens and encumbrances and the value of any probate homestead) does not exceed \$20,000.¹⁶ The meaning of the phrase “the whole estate” is unclear.¹⁷ The new statute replaces the phrase “the whole estate” with a definition that the decedent’s estate means all the decedent’s personal property, wherever located, and all of the decedent’s real property in California. This new definition will eliminate uncertainty whether an estate qualifies for a small estate set-aside. It will not, however, preclude the court from taking into account the decedent’s real property located in another state in determining whether to order a small estate set-aside.¹⁸

Persons for whom small estate may be set aside. The new statute gives the court flexibility to determine the persons to whom the small estate is to be set aside.

Existing law does not permit the estate to be assigned to the minor child or children if there is an unmarried surviving spouse.¹⁹ Under the new statute, the court may assign the estate to the minor child or minor children of the decedent even where there is a surviving spouse. This may be desirable, for example, if the minor children live apart from the surviving spouse or where the minor children are not children of the surviving spouse. This change makes the small estate set-aside consistent with other family protection provisions.²⁰

Under existing law,²¹ the court can assign the estate only to a “surviving spouse who has not theretofore remarried.”

¹⁶ Prob. Code § 640. See also Prob. Code § 647.

¹⁷ See Broll, *Summary Administration*, in 1 California Decedent Estate Administration § 3.24, at 129 (Cal. Cont. Ed. Bar 1971).

¹⁸ Under the new statute, the court has discretion whether to order a small estate set-aside and can consider all relevant factors, including the disposition of the decedent’s real property located in another state, in determining whether to order the small estate set-aside. See *supra* text accompanying notes 12-15.

¹⁹ Prob. Code § 645.

²⁰ Prob. Code §§ 6510 (setting aside exempt property other than family dwelling), 6521 (setting apart probate homestead), 6540 (family allowance).

²¹ Prob. Code § 645.

Under the new statute, the assignment may be made to the surviving spouse even if the surviving spouse has remarried.²² Permitting the estate to be set aside to a surviving spouse, whether or not remarried, gives the court flexibility to make an order that is appropriate under the circumstances of the particular case. It also makes the small estate set-aside consistent with other family protection provisions.²³

Under the new statute, the determination whether a child is a minor is made at the time of the death of the decedent. Under existing law, if the other statutory requirements are satisfied, the court can order that the estate be set aside "to such child or children of the decedent as may then be minors."²⁴ The apparent result of this provision is that a child who is a minor at the time of the decedent's death is deprived of the right to a small estate set-aside unless the order is made while the child is still a minor.

Application of new statute. The new statute applies only to cases where the decedent died on or after the date the new statute becomes operative. If the decedent dies before the operative date of the new statute, the case continues to be governed by existing law.

²² The new statute creates a presumption that the needs of a remarried spouse do not justify the setting aside of the small estate. This is a presumption affecting the burden of proof.

²³ Prob. Code §§ 6510 (setting aside exempt property other than family dwelling), 6521 (setting apart probate homestead), 6540 (family allowance).

²⁴ Prob. Code § 645.

RECOMMENDED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following legislation.

Probate Code §§ 640-647.5 (repealed). Small estate set-aside

SEC. _____. Article 2 (commencing with Section 640) of Chapter 10 of Division 3 of the Probate Code is repealed.

Comment. Article 2 (commencing with Section 640) of Chapter 10 of Division 3 is replaced by Chapter 6 (commencing with Section 6600) of Part 3 of Division 6 (small estate set-aside). The disposition of each repealed section of the former law is indicated in the Comment to the repealed section set out in the "Comments to Repealed Sections" found at the end of this recommendation.

Probate Code §§ 6600-6614 (added). Small estate set-aside

SEC. _____. Chapter 6 (commencing with Section 6600) is added to Part 3 of Division 6 of the Probate Code, to read:

PART 3. FAMILY PROTECTION

CHAPTER 6. SMALL ESTATE SET-ASIDE

§ 6600. "Decedent's estate" defined; exclusions in determining estate of the decedent or its value

6600. (a) Subject to subdivision (b), for the purposes of this chapter, "decedent's estate" means all the decedent's personal property, wherever located, and all the decedent's real property located in this state.

(b) For the purposes of this chapter:

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

(2) A multiple-party account to which the decedent was a party at the time of the decedent's death shall be excluded in determining the estate of the decedent or its value, whether or not all or a portion of the sums on

deposit are community property, to the extent that the sums on deposit belong after the death of the decedent to a surviving party, P.O.D. payee, or beneficiary. As used in this paragraph, the terms "multiple-party account," "party," "P.O.D. payee," and "beneficiary" have the same meaning as given those terms by Section 5101.

Comment. Subdivision (a) of Section 6600 is a new provision that defines "decedent's estate." This definition replaces the phrase "the whole estate" used in former Section 640. As defined in subdivision (a), "decedent's estate" is not limited to probate assets. The term includes all personal property, wherever located, and all real property located in this state, excluding the property described in subdivision (b).

Subdivision (a) requires, for example, that the decedent's one-half share of the community and quasi-community property be included in determining the decedent's estate or its value, whether or not the decedent's interest is set apart to the surviving spouse under Sections 13650-13660, unless the interest is excluded in determining the estate of the decedent under subdivision (b) as would be the case, for example, if the property is held in joint tenancy. This is consistent with prior law. *Estate of Pezzola*, 112 Cal. App. 3d 752, 169 Cal. Rptr. 464 (1980).

Subdivision (a) makes clear that real property located outside California is not included in determining the estate of the decedent or its value. The rule under former Probate Code Section 640 was unclear. See Broll, *Summary Administration*, in 1 California Decedent Estate Administration § 3.24, at 129 (Cal. Cont. Ed. Bar 1971). Apparently real property outside California was not included under former law, since former Section 644 required "an inventory and appraisal to be prepared in the manner prescribed by law and filed within such time as the court may allow," and an inventory and appraisal does not include real property located outside California.

Subdivision (b) of Section 6600 continues former Section 647 without substantive change. Subdivision (b) excludes any interest that terminates at death in determining the estate of the decedent or its value. If the interest is one that passes to another on the death of the decedent by virtue of a joint tenancy, a pay-on-death provision, or a contractual provision that provides that the interest is to be transferred or paid to another upon the death of the decedent, subdivision (b) (1) requires that the value of the interest be excluded in determining the estate of the decedent or its value. For example, if there is a policy of insurance on the decedent's life and the proceeds are payable to

a named beneficiary (not to the decedent's estate), the insurance proceeds are excluded in determining the estate of the decedent or its value. Similarly, for example, if the decedent has a retirement plan that provides benefits to a surviving spouse, those benefits are excluded in determining the estate of the decedent or its value. Subdivision (b) also excludes, for example, life interests in trusts and life estates. See O. McCarroll, 1 California Decedent Estate Administration Supplement § 3.24, at 84 (Cal. Cont. Ed. Bar 1985).

Note. The Comment to Section 6600 refers to Sections 13650-13660. Those sections are recommended by the Commission to replace existing Sections 650-658 (determination or confirmation of property passing or belonging to surviving spouse) in *Recommendation Relating to Disposition of Estate Without Administration, supra*.

§ 6601. "Minor child" defined

6601. As used in this chapter, "minor child" means a child of the decedent who was under the age of 18 at the time of the decedent's death and who survived the decedent.

Comment. Section 6601 is a new provision that makes clear that the determination whether a child is a minor is made at the time of the death of the decedent. Under former Section 645, if the other statutory requirements were satisfied, the court could order that the estate be set aside "to such child or children of the decedent as may then be minors." The apparent result of this provision was that a child who was a minor at the time of the decedent's death was deprived of the right to a small estate set aside if the order was not made while the child was still a minor. The definition under Section 6601 avoids this result.

§ 6602. Petition to set aside small estate

6602. A petition may be filed under this chapter requesting an order setting aside the decedent's estate to the decedent's surviving spouse and minor children, or one or more of them, as provided in this chapter, if the net value of the decedent's estate, over and above all liens and encumbrances at the date of death and over and above the value of any probate homestead interest set apart out of the decedent's estate under Section 6520, does not exceed twenty thousand dollars (\$20,000).

Comment. Section 6602 supersedes former Section 640. The purpose of this chapter is to insure the support of the dependent surviving spouse or minor children when the breadwinner is taken by death leaving but a small estate. This right to have a small estate set aside effectively forecloses the rights of a third person to inherit or otherwise receive a part of that estate under the decedent's will. Estate of Pezzola, 112 Cal. App. 3d 752, 169 Cal. Rptr. 464 (1980).

Like former Section 640, Section 6602 limits the use of this chapter to a case where the decedent's estate, less liens and encumbrances and the value of any probate homestead interest, does not exceed \$20,000. See also Section 6600 (defining "decedent's estate") and the Comment to that section. Although this chapter continues the substance of this limitation, it makes other significant changes in existing law. See the Comment to Section 6609.

§ 6603. Venue

6603. The petition shall be filed in the superior court of a county in which the estate of the decedent may be administered.

Comment. Section 6603 is a new provision that specifies the county in which the petition is to be filed. The section is consistent with a provision of Section 13650 (determination or confirmation of property passing or belonging to surviving spouse).

Note. The Comment to Section 6603 refers to Section 13650. That section is recommended by the Commission to replace most of existing Section 650 in *Recommendation Relating to Disposition of Estate Without Administration, supra*.

§ 6604. Contents of petition

6604. (a) The petition shall allege that this chapter applies and request that an order be made setting aside the estate of the decedent as provided in this chapter.

(b) The petition shall include the following:

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

(2) The names, ages, residences, and relation to the decedent of the heirs and devisees of the decedent, so far as known to the petitioner.

(3) A specific description and estimate of the value of the decedent's estate and a list of all liens and encumbrances at the date of death.

(4) A specific description and estimate of the value of any of the decedent's real property located outside this state that passed to the surviving spouse and minor children of the decedent, or any one or more of them, under the will of the decedent or by intestate succession.

(5) A specific description and estimate of the value of any of the decedent's property described in subdivision (b) of Section 6600 that passed to the surviving spouse and minor children of the decedent, or any one or more of them, upon the death of the decedent.

(6) A designation of any property as to which a probate homestead is set apart out of the decedent's estate under Section 6520.

(7) A statement that the expenses of the last illness, funeral charges, and expenses of administration have been paid or that those expenses will be paid before the time of the hearing on the petition.

(8) The requested disposition of the estate of the decedent under this chapter and the considerations that justify the requested disposition.

Comment. Subdivision (a) of Section 6604 continues the first portion of the first sentence of former Section 641 without substantive change. Subdivision (b) supersedes the last sentence of former Section 641 which specified the contents of the petition.

Paragraph (1) of subdivision (b) is new. This paragraph implements Section 6603 (venue).

Paragraph (2) of subdivision (b) is new and is designed to implement the provision for giving notice of the hearing on the petition under this chapter. See Section 6607.

Paragraphs (3), (4), and (5) of subdivision (b) supersede the provision of former Section 641 that required that the petition include "a specific description and an estimate of the value of all of the decedent's property" and "a list of all liens and encumbrances at the date of death."

Paragraph (6) of subdivision (b) continues a requirement of former Section 641 without substantive change.

Paragraph (7) of subdivision (b) is a new provision that is consistent with the requirement of former Section 645 which required, as one of the findings before a small estate could be set

aside, that the court find “that the expenses of the last illness, funeral charges and expenses of administration have been paid.” The requirement that the court make this finding is continued in Section 6609(a) (2).

Paragraph (8) is new. This paragraph requires that the petition contain the information necessary so that the court may make an appropriate order under Section 6609. Section 6609 permits the court in its discretion to set aside the small estate to the surviving spouse and minor children of the decedent, or any one or more of them. See the Comment to Section 6609. The petition, for example, may request that the small estate be set aside to one of the minor children and that the other minor children and the spouse be excluded, or it may request that the small estate be set aside in unequal shares to the minor children. In determining whether to make such an order, the court must take into account the various considerations listed in subdivision (b) of Section 6609.

§ 6605. Filing of petition

6605. (a) If proceedings for the administration of the estate of the decedent are pending, a petition under this chapter shall be filed in those proceedings without the payment of an additional fee.

(b) If proceedings for the administration of the estate of the decedent are not pending, a petition filed under this chapter may, but need not, be filed with a petition for the probate of the decedent’s will or for administration of the estate of the decedent.

(c) A petition may be filed under this chapter at any time prior to the final distribution of the estate.

Comment. Subdivisions (a) and (b) of Section 6605 continue the substance of portions of former Section 641 with language added to subdivision (a) to provide that a petition under this chapter may be filed in a pending probate proceeding “without the payment of an additional fee.” The added language is drawn from Section 13652 (determination or confirmation of property passing or belonging to surviving spouse).

Subdivision (c), which permits a petition to be filed at any time prior to the final distribution of the estate, replaces the provision of former Section 641 which permitted a petition to be “filed at any time before the hearing on the petition for probate of the will or for letters of administration or after the filing of the inventory.”

Note. The Comment to Section 6605 refers to Section 13652. That section is recommended for enactment by the Commission in *Recommendation Relating to Disposition of Estate Without Administration, supra*.

§ 6606. Persons who may file petition

6606. (a) A petition may be filed under this chapter by any of the following:

(1) The person named in the will of the decedent as executor.

(2) The surviving spouse of the decedent.

(3) The guardian of a minor child of the decedent.

(4) A child of the decedent who was a minor at the time the decedent died.

(5) The personal representative of the decedent if a personal representative has been appointed for the decedent's estate.

(b) The guardian of a minor child of the decedent may file the petition without authorization or approval of the court in which the guardianship proceeding is pending.

Comment. Section 6606 continues the provisions of former Section 641 that described the persons authorized to file a petition with two additions:

(1) Paragraph (4) of subdivision (a) is new. This provision recognizes that the court is authorized to set aside a small estate to a child who is a minor at the time of the decedent's death (as distinguished from a requirement that the child be a minor at the time the petition is filed or the time the court order under this chapter is made or some other time). See Section 6609(c). See also Section 6601 (defining "minor child").

(2) Subdivision (b) is a new provision that is consistent with Section 13650(c) (determination or confirmation of property passing or belonging to surviving spouse). See also Section 13051(a) (collection or transfer of small estate without administration).

Note. The Comment to Section 6606 refers to Sections 13650 and 13051. Those sections are recommended for enactment by the Commission in *Recommendation Relating to Disposition of Estate Without Administration, supra*.

§ 6607. Notice of hearing

6607. (a) Where proceedings for the administration of the estate of the decedent are not pending when the petition is filed under this chapter and the petition under

this chapter is not joined with a petition for the probate of the decedent's will or for administration of the estate of the decedent, the petitioner shall give notice of the hearing by mail not less than 10 days before the hearing to each heir and devisee of the decedent, and to each person named as executor who is not petitioning, if known to the petitioner. A copy of the petition shall be sent with this notice of hearing to the surviving spouse, each child, and each devisee who is not petitioning.

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

(c) If proceedings for the administration of the estate of the decedent are pending when the petition is filed under this chapter and the hearing of the petition for probate of the will or administration of the estate of the decedent is set for a day more than 10 days after the filing of the petition filed under this chapter, the petition under this chapter shall be set for hearing at the same time as the petition for probate of the will or for administration of the estate, and notice of hearing on the petition filed under this chapter shall be given by the petitioner as provided in Section 1200.5. If the hearing of the petition for probate of the will or for administration of the estate is not set for hearing for a day more than 10 days after the filing of the petition under this chapter, (1) the petition filed under this chapter shall be set for hearing at least 10 days after the date on which it is filed, (2) notice of the hearing on the petition filed under this chapter shall be given by the petitioner as provided in Section 1200.5, and (3) if the petition for probate of the will or for administration of the estate has not already been heard, that petition shall be continued until that date and heard at the same time unless the court otherwise orders.

Comment. Subdivision (a) of Section 6607 continues the substance of subdivision (a) of former Section 643 but specifies the persons to whom the notice of hearing is to be mailed in place of the reference to former Section 1200.5 contained in former Section 643 and adds the requirement that a copy of the petition be mailed with the notice of hearing given to the surviving spouse, each child, and each devisee, who is not petitioning.

Subdivision (b) supersedes former Section 642. Subdivision (b) of Section 6607 is comparable to subdivision (a) of Section 13655 (determination or confirmation of property passing or belonging to surviving spouse).

Subdivision (c) continues subdivision (b) of former Section 643 without substantive change but with the addition of the phrase “unless the court otherwise orders” at the end of the subdivision.

Note. The Comment to Section 6607 refers to Section 13655. That section is recommended for enactment by the Commission in *Recommendation Relating to Disposition of Estate Without Administration, supra*.

§ 6608. Inventory and appraisalment

6608. If a petition is filed under this chapter, the personal representative, or the petitioner if no personal representative has been appointed, shall file with the clerk of the court, prior to the hearing of the petition, 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 personal representative or the petitioner, as the case may be, may appraise the assets which a personal representative could appraise under paragraph (1) of subdivision (a) of Section 605.

Comment. Section 6608 continues the requirement of former Section 644 that an inventory and appraisalment be filed. The former provision has been revised to conform to the provisions relating to inventory and appraisalment. See Sections 600-611. The requirement that the inventory and appraisalment be filed before the hearing of the petition has been substituted for the requirement of former Section 644 that the inventory and appraisalment be filed within such time as the court may allow.

§ 6609. Court order

6609. (a) The court may make an order under this section only if the court determines both of the following:

(1) The net value of the decedent's estate, over and above all liens and encumbrances at the date of death of the decedent and over and above the value of any probate homestead interest set apart out of the decedent's estate under Section 6520, does not exceed twenty thousand dollars (\$20,000), as of the date of the decedent's death.

(2) The expenses of the last illness, funeral charges, and expenses of administration have been paid.

(b) The court has discretion whether to make an order under this section. In determining whether to make an order under this section, the court shall consider the needs of the surviving spouse and minor children, the liens and encumbrances on the property of the decedent's estate, the claims of creditors, the needs of the heirs or devisees of the decedent, the intent of the decedent with respect to the property in the estate and the estate plan of the decedent as expressed in inter vivos and testamentary transfers or by other means, and any other relevant considerations. If the surviving spouse has remarried at the time the petition is heard, it shall be presumed that the needs of the surviving spouse do not justify the setting aside of the small estate, or any portion thereof, to the surviving spouse. This presumption is a presumption affecting the burden of proof.

(c) If the court in its discretion determines to make an order under this section, the court shall assign the whole of the decedent's estate, subject to all liens and encumbrances on property in the estate at the date of the decedent's death, to the surviving spouse and the minor children of the decedent, or any one or more of them.

(d) Title to property in the decedent's estate vests absolutely in the surviving spouse, minor children, or any or all of them, as provided in the order, subject to all liens and encumbrances on property in the estate at the date of the decedent's death, and there shall be no further proceedings in the administration of the decedent's estate unless additional property in the decedent's estate is discovered.

Comment. Section 6609 supersedes former Section 645. Section 6609 makes significant substantive changes in the former law.

Under Section 6609, the court has discretion whether to set aside a small estate. Under former Section 645, the court had no discretion; the court was required to set aside the small estate if the court made the findings required by the portion of former Section 645 that is continued in subdivision (a) of Section 6609.

Under Section 6609, the court may assign the estate to the minor child or minor children of the decedent even if there is a surviving spouse. This may be desirable, for example, if the minor children live apart from the surviving spouse or where the minor children are not children of the surviving spouse. In this respect, Section 6609 is consistent with Section 6521 (setting apart of probate homestead) and Section 6510 (setting aside of exempt property other than the family dwelling). Former law did not permit the small estate to be assigned to the minor child or children if there was an unmarried surviving spouse.

Under Section 6609, the court may assign the estate to a surviving spouse even if the surviving spouse has remarried. Under former Section 645, the small estate could be set aside only to a "surviving spouse who has not theretofore remarried." Permitting the small estate to be set aside to a surviving spouse, whether or not remarried, makes Section 6609 consistent with Section 6510 (setting aside exempt property other than family dwelling) and Section 6521 (setting apart probate homestead). The last two sentences of subdivision (b) place on the remarried surviving spouse the burden of proof to establish the need for the small estate set aside.

Subdivision (b) of Section 6609, which specifies matters to be considered in determining whether to make an order under the section, is a new provision drawn from subdivision (a) of Section 6523 which specifies matters to be considered in selecting and setting apart a probate homestead. Under some circumstances, the court may order that the small estate be set aside to one of the minor children and that the other minor children and the spouse be excluded, or that the small estate be set aside in unequal shares to the minor children, or that the small estate be set aside to the surviving spouse and that the minor children be excluded. In determining the assignment to make, the court must take into account the various considerations listed in subdivision (b). See also Section 6604(b)(8) (petition must include the requested disposition of the decedent's estate and the considerations justifying the requested disposition).

The word "mortgages," which was found in former Section 645, has been omitted as unnecessary, mortgages being included within the phrase "liens and encumbrances."

Subdivision (d) of Section 6609 continues the last sentence of former Section 645 revised to reflect the new authority of the court to assign the small estate to one or more of the minor children of the decedent where there is a surviving spouse.

§ 6610. Effect of court order

6610. Upon becoming final, an order under Section 6609 shall be conclusive on all persons, whether or not they are then in being.

Comment. Section 6610 supersedes former Section 645.1. Section 6610 gives the order the same effect as an order under Section 13657 (effect of order determining or confirming property passing or belonging to surviving spouse).

The language in former Section 645.1 referring to fraud or the erroneously assumed deceased appearing has been omitted from Section 6610 as unnecessary. The omission of this language make no substantive change in the effect of the section. See *McMillan v. Boese*, 45 Cal. App. 2d 764, 115 P.2d 37 (1941).

Note. The Comment to Section 6610 refers to Section 13657. That section is recommended for enactment by the Commission in *Recommendation Relating to Disposition of Estate Without Administration, supra*.

§ 6611. Liability for unsecured debts of decedent

6611. (a) Subject to the limitations and conditions specified in this section, the person or persons in whom title vested pursuant to Section 6609 are personally liable for the unsecured debts of the decedent.

(b) The personal liability of a person under this section shall not exceed the fair market value at the date of the decedent's death of the property title which vested in that person pursuant to Section 6609, less the total of all of the following:

(1) The amount of any liens and encumbrances on that property.

(2) The value of any probate homestead interest set apart under Section 6520 out of that property.

(3) The value of any other property set aside under Section 6510 out of that property.

(c) The personal liability under this section ceases one year after the date the court makes its order under Section 6609, except with respect to an action or proceeding then pending in court.

(d) In any action or proceeding based upon an unsecured debt of the decedent, the surviving spouse of the decedent, the child or children of the decedent, or the guardian of the minor child or children of the decedent, may assert any defense, cross-complaint, or setoff which would have been available to the decedent if the decedent had not died.

Comment. Section 6611 continues former Section 645.3 without substantive change, except that the language used in subdivision (b) of Section 6611 makes clear that the personal liability of a person who takes only a share or portion of the decedent's estate is limited to the net value of the share or portion (fair market value less liens and encumbrances and any probate homestead or exempt property set apart out of the share), rather than the net value of the entire estate.

§ 6612. Order where estate not set aside

6612. If a petition filed under this chapter is filed with a petition for the probate of the decedent's will or for administration of the estate of the decedent and the court determines not to make an order under Section 6609, the court shall act on the petition for probate of the decedent's will or for administration of the estate of the decedent in the same manner as if no petition had been filed under this chapter, and the estate shall then be administered in the same manner as if no petition had been filed under this chapter.

Comment. Section 6612 is drawn from former Section 646 but the language of the former section has been revised to recognize that the court has discretion to deny a petition filed under this chapter. Under Section 6609, the court is required to deny a petition filed under this chapter if the decedent's estate is not a small estate (see Sections 6600 and 6609), if the expenses of the last illness, funeral charges, and expenses of administration have not been paid, or if there is neither a surviving spouse nor a minor child. The court also has discretion to deny the petition. See Section 6609(b).

§ 6613. Attorney's fee

6613. The attorney's fee for services performed in connection with the filing of a petition and the 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. If there is no agreement between the attorney and the client concerning the attorney's fee for services performed in connection with the filing of a petition and obtaining of a court order under this chapter and there is a dispute concerning the reasonableness of the attorney's fee for those services, a petition may be filed with the court requesting that the court determine the reasonableness of the attorney's fee for those services. If there is an agreement between the attorney and the client concerning the attorney's fees for services performed in connection with the filing of a petition and obtaining a court order under this chapter and there is a dispute concerning the meaning of the agreement, a petition may be filed with the court requesting that the court determine the dispute.

Comment. Section 6613 is the same as Section 13660 (petition for determination or confirmation of property passing or belonging to surviving spouse). Section 6613 continues former law and practice but gives the probate court authority to determine disputes concerning the attorney's fee for services performed in connection with the filing of a petition and the obtaining of a court order under this chapter. The court has no jurisdiction to determine disputes concerning attorney's fees for other services, such as termination of joint tenancies, collection of insurance, and the like.

Note. The Comment to Section 6610 refers to Section 13660. That section is recommended for enactment by the Commission in *Recommendation Relating to Disposition of Estate Without Administration, supra*.

§ 6614. Applicability of chapter

6614. This chapter applies only if the decedent died on or after January 1, 1987. If the decedent dies before January 1, 1987, the case shall continue to be governed by the law applicable to the case prior to January 1, 1987.

Comment. Section 6614 supersedes former Section 647.5 and makes clear that this chapter applies only if the decedent died on or after January 1, 1987, the operative date of this chapter. If the decedent died before that date, the right to a small estate set-aside is determined under the law that was applicable prior to January 1, 1987. The application of this chapter is limited to

cases where the decedent died on or after its operative date because in a case where the decedent died before the operative date there was a right to have a small estate set-aside. Under this chapter, whether there is to be a small estate set-aside is discretionary with the court.

CONFORMING AMENDMENT

Probate Code § 605 (amended). Inventory and appraisal

Comment. Section 605 is amended to delete from paragraph (2) of subdivision (a) the provisions containing the references to former Sections 630 and 650, to make a technical revision in paragraph (3) of subdivision (a), and to add subdivisions (d) and (e) which contain references to special inventory and assessment provisions in the small estate set-aside statute and the disposition without administration provisions.

COMMENTS TO REPEALED SECTIONS

Probate Code § 640 (repealed). Authority to set aside estate

Comment. The portion of former Section 640 that restricted the small estate set-aside procedure to estates having a net value not exceeding \$20,000 is continued in Section 6602 but the phrase “the whole estate” in former Section 640 is superseded by subdivision (a) of Section 6600. See the Comment to Section 6600. The portion of former Section 640 relating to setting aside the estate to the surviving spouse or minor children is superseded by Section 6602 and subdivision (c) of Section 6609. See the Comment to Section 6609.

Probate Code § 641 (repealed). Petition to set aside estate

Comment. The portion of former Section 641 relating to the allegations and contents of the petition is continued in substance in Section 6604. The portions relating to the filing of a petition without filing a petition for probate of the will or for letters or including the petition alternatively in a petition for probate of the will or for letters or filing the petition in a pending probate proceeding is continued in substance in subdivisions (a) and (b) of Section 6605. The portion relating to who may file a petition is replaced by subdivision (a) of Section 6606. The portion providing that a petition may be “filed at any time before the hearing on the petition for probate of the will or for letters of administration or after the filing of the inventory” is replaced by subdivision (c) of Section 6605 which permits the petition to be filed at any time prior to final distribution of the estate.

Probate Code § 642 (repealed). Notice of hearing where petition included in petition for probate or letters

Comment. Former Section 642 is superseded by subdivision (b) of Section 6607.

Probate Code § 643 (repealed). Notice of hearing where separate petition

Comment. Subdivision (a) of former Section 643 is continued in a revised form in subdivision (a) of Section 6607. Subdivision (b) is continued in substance in subdivision (c) of Section 6607.

Probate Code § 644 (repealed). Inventory and appraisal

Comment. Former Section 644 is superseded by Section 6608.

Probate Code § 645 (repealed). Court order

Comment. Former Section 645 is superseded by Section 6609. See the Comment to Section 6609. See also the Comment to Section 6601.

Probate Code § 645.1 (repealed). Effect of order

Comment. Former Section 645.1 is superseded by Section 6610. See the Comment to Section 6610.

Probate Code § 645.3 (repealed). Liability for debts

Comment. Former Section 645.3 is continued in substance in Section 6611 with a clarifying revision. See the Comment to Section 6611.

Probate Code § 646 (repealed). Procedure where order denied

Comment. Former Section 646 is superseded by Section 6612. See the Comment to Section 6612.

Probate Code § 647 (repealed). Exclusions in determining value of estate

Comment. Former Section 647 is continued without substantive change in subdivision (b) of Section 6600.

Probate Code § 647.5 (repealed). Application of article

Comment. Former Section 647.5 is superseded by Section 6614. See the Comment to Section 6614.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Proration of Estate Taxes

December 1985

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Proration of Estate Taxes*, 18 Cal. L. Revision Comm'n Reports 1127 (1986).

CALIFORNIA LAW REVISION COMMISSION

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December 6, 1985

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

The Law Revision Commission submits herewith its recommendation to modernize the existing California statute governing proration of estate taxes. The recommended legislation is necessitated by the substantial changes that have occurred in federal and state estate and gift tax law since the existing proration statute was first enacted. This recommendation is submitted pursuant to authority of 1980 Cal. Stat. res. ch. 37.

The Commission wishes to take this opportunity to express its appreciation to Kenneth M. Klug, of Fresno, for his substantial assistance to the Commission in the development of this recommendation.

Respectfully submitted,

EDWIN K. MARZEC
Chairperson

RECOMMENDATION

relating to

PRORATION OF ESTATE TAXES

The California statute governing proration of estate taxes among the beneficiaries of a decedent's estate was enacted in 1943.¹ Despite major changes in the federal and state estate and gift tax laws since that time, there have been no significant amendments to the California statute, other than in 1984 to recognize enactment of the California estate tax.² As a result, the proration statute is now obsolete in many respects and is in substantial need of modernization.

The California Law Revision Commission recommends revision of the statute in the manner described below. In addition, the revised statute incorporates numerous minor and technical improvements that are noted in the Comments following the text of the revised provisions.

Time of proration. Existing California law requires that the estate tax be actually paid before a proration may be made.³ But federal law allows for deferral of payment of estate taxes for up to 15 years in certain cases. Once the amount of tax is determined, the proration should be made, even though the tax hasn't yet been paid. This will enable settlement and closing of estates expeditiously without later disruption. The revised statute permits proration of an estate tax that has been imposed whether or not actually paid at the time of proration.

Proration by personal representative. Existing law requires the court to order the proration of estate taxes.⁴ There is no reason to involve the court in making the proration if all the persons interested in the estate agree on the proration. This is a matter within the purview of the personal representative. The revised statute eliminates

¹ Prob. Code §§ 970-977, enacted by 1943 Cal. Stat. ch. 894, § 1.

² 1984 Cal. Stat. ch. 1711.

³ Prob. Code § 970.

⁴ Prob. Code § 971.

mandatory court involvement and provides an optional procedure for obtaining a court determination of proration in the event of a dispute.

Modification of proration order. Where there is a court order for proration, the order may be rendered incorrect by a subsequent adjustment of the estate tax after the return is filed. This may be done as a result of audit, or as a result of filing an amended estate tax return upon locating additional property or discovering additional deductions. In this event, the court should modify the proration order, and the revised statute provides for this. Since there is a potential for the modification to occur many years after the estate is closed, the Commission does not recommend a limitation period for modification. Rather, the matter is left to the doctrine of laches and other judicial equitable powers in the circumstances of each case.

Uncollectable proration. A practical problem arises where the estate tax prorated against a person proves to be uncollectable, whether because the person or property is not subject to the jurisdiction of the court or for other reasons. To assist in the collection, the revised statute makes clear that a court order of proration is an enforceable judgment. If the prorated tax is uncollectable nonetheless, the uncollectable amount is apportioned among the remaining beneficiaries. A person required to pay more than his or her properly prorated share as a result is given a reimbursement right and is subrogated to the position of the personal representative in enforcing the right.

Treatment of specially valued qualified real property. Under federal law an election may be made to specially value certain qualified real property.⁵ The special value may be as much as \$750,000 less than the fair market value of the qualified real property, with the result of a substantial estate tax savings. If the election is made, the persons who receive the real property must continue to use the real property as a farm or other trade or business for ten years. If they dispose of the property or cease the qualified use, then the estate tax savings resulting from the special value are lost, and an additional tax is imposed, for which

⁵ I.R.C. § 2032A.

the persons receiving the property are personally liable. In this situation, the reduction of estate taxes resulting from the special valuation should be allocated entirely to the persons receiving the qualified real property, and any additional tax imposed as a result of cessation of a qualified use should be imposed entirely on them.

Treatment of extended estate tax. Federal law allows payment of a portion of the estate tax attributable to specified property (such as a closely held business or a remainder interest) to be extended.⁶ The present California proration statute does not require that the extended tax follow the property. The revised statute makes it clear that where tax attributable to a closely held business is extended, the privilege to pay the tax in installments goes to the person who receives the closely held business.

Conflict of state and federal law. In some cases, the manner of proration required by the California statute may conflict with the proration prescribed by federal law. For example, federal law provides that the tax on a Qualified Terminable Interest Property trust will be at the highest incremental bracket, with the effect that the other property of a decedent's estate is taxed at lower brackets.⁷ This conflicts with the present California statute. In such a situation, federal law should control, and the revised statute so provides.

Enforcement of out-of-state proration. The revised statute includes provisions to assist a nonresident personal representative in collecting amounts prorated against a person residing in or property located in California. This fills a gap in existing law.

Proration of taxes on generation-skipping transfers. Existing federal law imposes personal liability on the distributee for the generation-skipping tax, not exceeding the value of the property received by the distributee.⁸ The present California proration statute does

⁶ See e.g., I.R.C. §§ 6163-6166.

⁷ I.R.C. § 2207A.

⁸ I.R.C. § 2603.

not deal with equitable proration of the generation-skipping tax among trust beneficiaries. The Commission recommends, and the revised statute includes, generation-skipping tax proration provisions, comparable to the estate tax proration provisions. The Commission recognizes the possibility that the generation-skipping tax may be repealed or restructured by Congress in the immediate future. However, a proration statute is important in the interim.

The Commission's recommendations would be effectuated by enactment of the following legislation:

Probate Code §§ 970-977 (repealed). Payment of federal estate tax

SEC. _____. Article 4a (commencing with Section 970) of Chapter 15 of Division 3 of the Probate Code is repealed.

Comment. Sections 970-977 are superseded by Sections 20100-20125 (proration of estate taxes). Comparable provisions of the old and new law are listed below.

OLD LAW	NEW LAW
970	20110
971	20111
972	20112
973	20113
975	20116
976	20123
977	20100

Probate Code §§ 20100-20225 (added). Proration of taxes

SEC. _____. Division 10 (commencing with Section 20100) is added to the Probate Code, to read:

DIVISION 10. PRORATION OF TAXES

CHAPTER 1. PRORATION OF ESTATE TAXES

Article 1. General Provisions

§ 20100. Definitions

20100. Except where the context otherwise requires, as used in this chapter:

(a) “Estate tax” means a tax imposed by any federal or California estate tax law, now existing or hereafter enacted, and includes interest and penalties on any deficiency.

(b) “Person interested in the estate” means any person, including a personal representative, entitled to receive, or who has received, from a decedent while alive or by reason of the death of the decedent any property or interest therein.

(c) “Personal representative” includes guardian, conservator, trustee, or other person charged with the responsibility of paying the estate tax.

(d) “Property” means property included in the gross estate for federal estate tax purposes.

(e) “Value” means fair market value as determined for federal estate tax purposes.

Comment. Section 20100 supersedes former Section 977. The definition of “gross estate” in former Section 977 (b) erroneously had the effect of prorating taxes to adjusted taxable gifts.

The definition of “person interested in the estate” in subdivision (b) includes but is not limited to persons who receive property by nonprobate transfer, such as a joint tenant or the beneficiary of a trust.

Subdivision (c) defines “personal representative” broadly to include more than an executor, administrator, administrator with the will annexed, or special administrator.

The definition of “property” in subdivision (d) makes clear that the term includes property transferred by the decedent during life if included in the gross estate for federal estate tax purposes. See, e.g., I.R.C. § 2035; cf. subdivision (b) (“person interested in estate” includes person who received property from a decedent while alive).

Subdivision (e) defines the term “value” to mean fair market value as determined for federal estate tax purposes. Thus where an alternate valuation is elected pursuant to Section 2032 of the Internal Revenue Code, “value” means the fair market value determined as of the alternate valuation date for federal estate tax purposes. See Treas. Reg. § 20.2031-1 (b).

§ 20101. Transitional provision

20101. (a) This chapter applies to persons interested in the estate of a decedent who dies on or after January 1, 1987.

(b) Notwithstanding the repeal of any provision by this act, the applicable law in effect before January 1, 1987, remains in effect and applicable to persons interested in the estate of a decedent who dies before January 1, 1987. No inference as to the applicable law in effect before January 1, 1987, shall be drawn from the enactment of this chapter.

CROSS-REFERENCES

Definitions

Person interested in the estate § 20100(b)

Article 2. Proration

§ 20110. Proration among persons interested in estate

20110. (a) Except as provided in subdivision (b), any estate tax shall be equitably prorated among the persons interested in the estate in the manner prescribed in this article.

(b) This section does not apply in any of the following cases:

(1) To the extent the decedent in a written inter vivos or testamentary instrument disposing of property specifically directs that the property be applied to the satisfaction of an estate tax or that an estate tax be prorated to the property in the manner provided in the instrument. As used in this paragraph, an instrument disposing of property includes an instrument that creates an interest in property or an amendment to an instrument that disposes of property or creates an interest in property.

(2) Where federal law directs otherwise.

Comment. Section 20110 restates former Section 970 without substantive change, but recognizes that federal law may provide for a different manner of proration. Section 20110 allows proration of an extended estate tax prior to actual payment of the tax. Section 20115 (proration of extended estate tax). *Cf.* I.R.C. § 2207A. Penalties and interest on an estate tax are prorated pursuant to Section 20112 (allowance and charges for credits, deductions, interest, and other adjustments).

CROSS-REFERENCES

Definitions

Estate tax § 20100(a)

Person interested in the estate § 20100(b)

Property § 20100(d)

§ 20111. Manner of proration

20111. The proration required by this article shall be made in the proportion that the value of the property received by each person interested in the estate bears to the total value of all property received by all persons interested in the estate, subject to the provisions of this article.

Comment. Section 20111 continues former Section 971 without substantive change, but does not require a court order to make the proration. *Cf.* Sections 20120-20125 for optional court procedure to determine proration. The proration is made against all property included in the decedent's gross estate for federal estate tax purposes, including gifts includible in the estate pursuant to Section 2035 of the Internal Revenue Code. See Sections 20100 (definitions) and 20110 (proration among persons interested in estate) and Comments thereto. The proration is based on fair market value as determined for federal estate tax purposes, even though the estate tax may be based on a special value. Adjustments for interest and penalties may be made on an equitable basis. See Section 20112 (allowance and charges for credits, deductions, interest, and other adjustments).

CROSS-REFERENCES

Definitions

Person interested in the estate § 20100(b)

Property § 20100(d)

Value § 20100(e)

§ 20112. Allowance and charges for credits, deductions, interest, and other adjustments

20112. (a) In making a proration of the federal estate tax, allowances shall be made for credits allowed for state or foreign death taxes in determining the federal tax payable and for exemptions and deductions allowed for the purpose of determining the taxable estate.

(b) In making a proration of the California estate tax, allowances shall be made for (1) credits (other than the credit for state death taxes paid) allowed by the federal estate tax law and attributable to property located in this state, and (2) exemptions and deductions allowed by the federal estate tax law for the purpose of determining the taxable estate and attributable to property located in this state.

(c) In making a proration of an estate tax, interest on extension of taxes and interest and penalties on any deficiency shall be charged to equitably reflect the benefits and burdens of the extension or deficiency and of any tax deductions associated with the interest and penalties.

Comment. Subdivisions (a) and (b) of Section 20112 continue former Section 972 without substantive change. Although the federal estate tax exemption is replaced by a unified tax credit and other credits are allowed, subdivision (a) also refers to exemptions in anticipation of future enactment of exemptions.

Subdivision (c) is new.

§ 20113. Trusts and temporary interests

20113. If a trust is created, or other provision made whereby a person is given an interest in income, or an estate for years, or for life, or other temporary interest in any property, the estate tax on both the temporary interest and on the remainder thereafter shall be charged against and paid out of the corpus of the property without apportionment between remainders and temporary estates.

Comment. Section 20113 continues former Section 973 without substantive change.

CROSS-REFERENCES

Definitions

Estate tax § 20100(a)

§ 20114. Proration of additional tax on certain qualified real property

20114. (a) As used in this section, “qualified real property” means qualified real property as defined in Section 2032A of the Internal Revenue Code.

(b) If an election is made pursuant to Section 2032A of the Internal Revenue Code, the proration shall be based upon the amount of federal estate tax that would be payable but for the election. The amount of the reduction in federal estate tax resulting from an election pursuant to Section 2032A of the Internal Revenue Code shall reduce the tax that is otherwise attributable to the qualified real property that is the subject of the election. If the tax that is otherwise attributable to the qualified real property is reduced to zero

pursuant to this subdivision, any excess amount of reduction shall reduce the tax otherwise payable with respect to the other property, such amount to be equitably prorated in accordance with Section 20111.

(c) If additional federal estate tax is imposed under Section 2032A(c) of the Internal Revenue Code by reason of early disposition or cessation of qualified use, the additional tax shall be a charge against the portion of the qualified real property to which the additional tax is attributable, and shall be equitably prorated among the persons interested in that portion of the qualified real property in proportion to their interests.

Comment. Section 20114 is new and deals with specially valued real property. Where an election is made to specially value qualified real property under Internal Revenue Code Section 2032A, the qualified heirs who receive the qualified real property receive the entire benefit of the estate tax reduction resulting from the election, and are likewise liable for the entire amount of any additional tax subsequently imposed on the property. For example, assume an estate in which, absent a special valuation election, each beneficiary receives property of equal value and shares equally in the prorated estate taxes. If one beneficiary makes a special valuation election that reduces the total estate tax, the amount of the reduction must be allocated entirely to that beneficiary, and the others must pay the amount they would have been liable for absent the special valuation election.

To illustrate the operation of Section 20114, assume the decedent dies in 1986, leaving an estate consisting of \$500,000 cash and real property having a fair market value of \$500,000 (and a value under Internal Revenue Code Section 2032A of \$250,000). The decedent's will leaves the real property to A and the cash to B.

(1) If no election is made under Section 2032A, the taxable estate is \$1,000,000. The estate tax is \$190,000, which is prorated \$95,000 to A and \$95,000 to B.

(2) If an election is made under Section 2032A, the taxable estate is \$750,000. The estate tax is \$92,500; the reduction in estate tax is \$97,500. A is credited with \$95,000 against the fair market value proration. (This represents the amount of the reduction in tax resulting from the election, to the extent of the tax that would be attributable to the qualified real property but for the election.) A pays no tax

and B pays the full tax of \$92,500, which represents a reduction of B's tax liability by \$2,500.

Subdivision (b) ensures that A receives the benefit of the tax relief under Section 2032A, up to the amount of tax that would have been prorated to the fair market value of the qualified real property. B also benefits from the election, but no further compensating adjustment is required, except that if B shares the devise with other persons, the tax obligation of each of the others is reduced by a proportionate share of the \$2,500 savings.

Subdivision (c) provides that any additional tax under Internal Revenue Code Section 2032A(c) will be imposed only upon those who received the qualified real property and benefited from the election. If A causes the full additional tax to be assessed under Internal Revenue Code Section 2032A(c), the entire additional tax of \$97,500 will be prorated to A. This is true even though B also benefited from the election under Section 2032A.

CROSS-REFERENCES

References to statutes § 7

§ 20115. Proration of extended estate tax

20115. Where the payment of any portion of the federal estate tax is extended under the provisions of the federal estate tax law, the amount of extended tax shall be a charge against the specific property that gives rise to the extension.

Comment. Section 20115 ensures that the persons who receive property that gives rise to the extension of estate tax are the persons who benefit from the extension privilege. With respect to allocation of any interest on the extension, see Section 20112 (allowance and charge for credits, deductions, interest, and other adjustments).

Section 20115 makes it clear that where a decedent's estate consists of a closely held business with respect to which the estate taxes may be extended, the deferred tax and interest thereon follow the business. If the persons who receive the property fail to pay the tax when due and the tax is collected from persons other than the persons to whom the tax is prorated, the persons from whom the tax is collected have a right of reimbursement against the persons to whom the tax is prorated. See Section 20116 (where property not in possession of personal representative).

§ 20116. Where property not in possession of personal representative

20116. (a) If all property does not come into the possession of the personal representative, the personal representative is entitled, and has the duty, to recover from the persons interested in the estate the proportionate amount of the estate tax with which the persons are chargeable under this chapter.

(b) If the personal representative cannot collect from any person interested in the estate the amount of an estate tax apportioned to the person, the amount not recoverable shall be equitably prorated among the other persons interested in the estate who are subject to proration.

(c) If a person is charged with or required to pay an estate tax greater than the amount prorated to that person because another person does not pay the amount of estate tax prorated to the other person, the person charged with or required to pay the greater amount has a right of reimbursement against the other person. The right of reimbursement may be enforced through the personal representative or may be enforced directly by the person charged with or required to pay the greater amount, and for the purpose of direct enforcement the person is subrogated to the position of the personal representative.

Comment. Subdivision (a) of Section 20116 continues former Section 975 without substantive change. Subdivisions (b) and (c) are new. Recovery of estate taxes pursuant to this section includes prorated interest and penalties. See Sections 20112 (allowance and charges for credits, deductions, interest, and other adjustments) and 20100(a) (“estate tax” defined).

The court may by order direct payment of the amount of taxes owed by a person to the personal representative. Section 20123 (court order to effectuate proration). As to costs incurred in enforcing a proration order, see Code Civ. Proc. § 685.040. Failure of the personal representative to make a good faith effort to collect taxes prorated against a person is a breach of the fiduciary obligation of the personal representative, for which the personal representative is liable personally and on the bond, if any.

CROSS-REFERENCES

Definitions

Estate tax § 20100(a)

Person interested in the estate § 20100(b)

Personal representative § 20100(c)
Property § 20100(d)

Article 3. Judicial Proceedings

§ 20120. Who may commence proceeding

20120. (a) The personal representative or any person interested in the estate may commence a proceeding to have a court determine the proration pursuant to this chapter.

(b) A proceeding under this article shall be commenced in the court in which the estate of the decedent was administered or, if no administration proceedings have been commenced, in the superior court of the county in which the estate of the decedent may be administered.

(c) If proceedings for the administration of the decedent's estate are pending, a proceeding under this article shall be combined with the administration proceedings. If a proceeding is commenced at any time before final distribution, there shall be no additional filing fee.

Comment. Sections 20120 to 20125 supersede a portion of former Section 971, requiring court proration, and a portion of former Section 975, providing for a court order for payment.

CROSS-REFERENCES

Definitions

Person interested in the estate § 20100(b)
Personal representative § 20100(c)
Property § 20100(d)

§ 20121. Petition

20121. A proceeding under this article shall be commenced by filing a verified petition that sets forth all of the following information:

(a) The jurisdictional facts.

(b) Other facts necessary for the court to determine the proration of estate taxes.

Comment. See Comment to Section 20120.

CROSS-REFERENCES

Definitions

Estate tax § 20100(a)

§ 20122. Notice of hearing

20122. The petitioner shall:

(a) At least 10 days before the hearing, cause notice of the hearing and a copy of the petition to be mailed to the personal representative and each person interested in the estate against whom prorated amounts may be charged pursuant to paragraph (1) of subdivision (a) of Section 20123.

(b) At least 30 days before the hearing, cause summons and a copy of the petition to be served on each person interested in the estate who may be directed to make payment of prorated amounts pursuant to paragraph (2) of subdivision (a) of Section 20123. Summons shall be in the form and shall be served in the manner prescribed in Title 5 (commencing with Section 410.10) of Part 2 of the Code of Civil Procedure.

Comment. See Comment to Section 20120.

CROSS-REFERENCES**Definitions**

Person interested in the estate § 20100(b)

Personal representative § 20100(c)

§ 20123. Court order to effectuate proration

20123. (a) The court, upon making a determination as provided in this article, shall make an order:

(1) Directing the personal representative to charge the prorated amounts against the persons against whom an estate tax has been prorated insofar as the personal representative is in possession of any property or interests of the persons against whom the charge may be made.

(2) Summarily directing all other persons against whom an estate tax has been prorated to make payment of the prorated amounts to the personal representative.

(b) An appeal may be taken from an order made or from the refusal to make an order under this section.

(c) A court order made under this section is a judgment that may be enforced against the persons against whom an estate tax has been prorated.

Comment. Subdivision (a) of Section 20123 restates former Section 976 without substantive change. Subdivisions (b) and (c) are new. The court order prorating an estate tax includes interest and penalties. See Section 20112 (allowance and charges for

credits, deductions, interest, and other adjustments); see also Section 20100(a) (“estate tax” defined).

CROSS-REFERENCES

Definitions

Estate tax § 20100(a)

Personal representative § 20100(c)

§ 20124. Modification of court order

20124. Upon petition by the personal representative or any person interested in the estate, the court shall modify an order made pursuant to this article whenever it appears that the amount of estate tax as actually determined is different from the amount of estate tax on which the court based the order.

Comment. Section 20124 provides for the possibility that subsequent to the making of an order, the taxes may be adjusted as a result of audit or the filing of an amended return. Section 20124 does not apply to any additional tax under Internal Revenue Code Section 2032A(c) resulting from a disposition or cessation of qualified use of specially valued property. See Section 20114 (proration of additional tax on certain qualified real property). Section 20124 does not provide a limitation period for modification of a proration order; the matter is left to laches and other equitable doctrines within the discretion of the court.

CROSS-REFERENCES

Definitions

Estate tax § 20100(a)

Person interested in the estate § 20100(b)

Personal representative § 20100(c)

§ 20125. Enforcement of out-of-state proration

20125. (a) A personal representative acting or resident in another state may commence an action in this state to recover from a person interested in the estate, who either is resident in this state or owns property in this state, the amount of the federal estate tax, or an estate tax or death duty payable to another state, apportioned to the person.

(b) The action shall be commenced in the superior court of the county in which administration of the estate of the decedent would be proper or, if none, in which any defendant resides.

(c) For purposes of the action an apportionment made by the court having jurisdiction of the administration of the decedent's estate in the other state is *prima facie* correct.

Comment. Section 20125 is new. See also Code Civ. Proc. §§ 1710.10-1710.65 (sister state money-judgments).

CROSS-REFERENCES

Definitions

Person interested in the estate § 20100(b)

Personal representative § 20100(c)

CHAPTER 2. PRORATION OF TAXES ON GENERATION-SKIPPING TRANSFERS

Note. This chapter is temporary, pending the outcome of federal legislation affecting taxes on generation-skipping transfers.

Article 1. General Provisions

§ 20200. Definitions

20200. Except where the context otherwise requires, as used in this chapter:

(a) “Generation-skipping transfer tax” means a tax imposed by any federal or California generation-skipping transfer tax law, now existing or hereafter enacted, and includes interest and penalties on any deficiency.

(b) “Property” means property on which a generation-skipping transfer tax is imposed.

(c) “Transferee” means any person who receives, who is deemed to receive, or who is the beneficiary of, any property.

(d) “Trustee” means any person who is a trustee within the meaning of the federal generation-skipping transfer tax law, or who is otherwise required to pay a generation-skipping transfer tax.

(e) “Value” means value as determined for generation-skipping transfer tax purposes.

Comment. Sections 20200 to 20224 parallel comparable provisions of Chapter 1 (commencing with Section 20100) (proration of estate taxes).

§ 20201. Transitional provision

20201. (a) This chapter applies to transferees of property of a decedent who dies on or after January 1, 1987.

(b) No inference as to the applicable law in effect before January 1, 1987, shall be drawn from the enactment of this chapter.

CROSS-REFERENCES

Definitions

Property § 20200(b)
 Transferee § 20200(c)

Article 2. Proration**§ 20210. Proration among transferees**

20210. (a) Except as provided in subdivision (b), any generation-skipping transfer tax shall be equitably prorated among the transferees in the manner prescribed in this article.

(b) This section does not apply in any of the following cases:

(1) To the extent the transferor in a written instrument transferring property specifically directs that the property be applied to the satisfaction of a generation-skipping transfer tax or that a generation-skipping transfer tax be prorated to the property in the manner provided in the instrument.

(2) Where federal law directs otherwise.

Comment. Proration of a generation-skipping transfer tax includes proration of interest and penalties on any deficiency. See Sections 20200(a) (“generation-skipping transfer tax” defined) and 20212 (allowance and charges for credits, deductions, and interest).

CROSS-REFERENCES

Definitions

Generation-skipping transfer tax § 20200(a)
 Transferee § 20200(c)

§ 20211. Manner of proration

20211. The proration required by this article shall be made in the proportion that the value of the property received by each transferee bears to the total value of all property received by all transferees, subject to the provisions of this article.

Comment. See Comment to Section 20200.

CROSS-REFERENCES

Definitions

Property § 20200(b)
 Transferee § 20200(c)
 Value § 20200(e)

§ 20212. Allowance and charges for credits, deductions, and interest

20212. In making a proration required by this article:

(a) Allowances shall be made for credits, exemptions, and deductions allowed for the purpose of determining the tax payable.

(b) Interest and penalties on any deficiency shall be charged to equitably reflect the benefits and burdens of the deficiency and of any tax deductions associated with the interest and penalties.

Comment. See Comment to Section 20200.

§ 20213. Trusts and temporary interests

20213. If a trust is created or other provision made whereby a transferee is given an interest in income, or an estate for years or for life, or another temporary interest in property, the tax on both the temporary interest and other interests in the property shall be charged against and paid out of the corpus of the property without apportionment between the temporary and other interests.

Comment. See Comment to Section 20200.

CROSS-REFERENCES

Definitions

Property § 20200(b)

Transferee § 20200(c)

§ 20214. Where property not in possession of trustee

20214. (a) If all property does not come into the possession of the trustee, the trustee is entitled, and has the duty, to recover from the transferees, the proportionate amount of the tax with which the transferees are chargeable under this chapter.

(b) If the trustee cannot collect from any transferee the amount of tax apportioned to the transferee, the amount not recoverable shall be equitably prorated among the other transferees who are subject to proration.

(c) If a person is charged with or required to pay a generation-skipping transfer tax greater than the amount prorated to that person because another person does not pay the amount of generation-skipping transfer tax prorated to the other person, the person charged with or required to pay the greater amount has a right of

reimbursement against the other person. The right of reimbursement may be enforced through the trustee or may be enforced directly by the person charged with or required to pay the greater amount, and for the purpose of direct enforcement the person is subrogated to the position of the trustee.

Comment. See Comment to Section 20200.

CROSS-REFERENCES

Definitions

- Property § 20200(b)
- Transferee § 20200(c)
- Trustee § 20200(d)

Article 3. Judicial Proceedings

§ 20220. Who may commence proceeding

20220. (a) The trustee or any transferee may commence a proceeding to have a court determine the proration pursuant to this chapter.

(b) A proceeding under this article shall be commenced in the court in which the estate of the decedent was administered or, if no administration proceedings have been commenced, in the superior court of the county in which the estate of the decedent may be administered.

(c) If proceedings for the administration of the decedent's estate are pending, a proceeding under this article shall be combined with the administration proceedings. If a proceeding is commenced at any time before final distribution, there shall be no additional filing fee.

Comment. See Comment to Section 20200.

CROSS-REFERENCES

Definitions

- Transferee § 20200(c)
- Trustee § 20200(d)

§ 20221. Petition

20221. A proceeding under this article shall be commenced by filing a verified petition that sets forth all of the following information:

- (a) The jurisdictional facts.
- (b) Other facts necessary for the court to determine the proration of the generation-skipping transfer tax.

Comment. See Comment to Section 20200.

CROSS-REFERENCES

Definitions

Generation-skipping transfer tax § 20200(a)

§ 20222. Notice of hearing

20222. At least 30 days before the hearing the petitioner shall:

(a) Cause notice of the hearing and a copy of the petition to be mailed to the trustee and each transferee against whom prorated amounts may be charged pursuant to paragraph (1) of subdivision (a) of Section 20223.

(b) Cause summons and a copy of the petition to be served on each transferee who may be directed to make payment of prorated amounts pursuant to paragraph (2) of subdivision (a) of Section 20223. Summons shall be in the form and shall be served in the manner prescribed in Title 5 (commencing with Section 410.10) of Part 2 of the Code of Civil Procedure.

Comment. See Comment to Section 20200.

CROSS-REFERENCES

Definitions

Transferee § 20200(c)

§ 20223. Court order to effectuate proration

20223. (a) The court, upon making a determination as provided in this article, shall make an order:

(1) Directing the trustee to charge the prorated amounts against the transferees against whom the generation-skipping transfer tax has been prorated insofar as the trustee is in possession of any property or interests of the transferees against whom the charge may be made.

(2) Summarily directing all other transferees against whom the generation-skipping transfer tax has been prorated to make payment of the prorated amounts to the trustee.

(b) An appeal may be taken from an order made or from the refusal to make an order under this section.

(c) A court order made under this section is a judgment that may be enforced against the persons against whom a generation-skipping transfer tax has been prorated.

Comment. See Comment to Section 20200.

CROSS-REFERENCES

Definitions

Generation-skipping transfer tax § 20200(a)
 Transferee § 20200(c)
 Trustee § 20200(d)

§ 20224. Modification of court order

20224. Upon petition by the trustee or any transferee, the court shall modify an order made pursuant to this article whenever it appears that the amount of generation-skipping transfer tax as actually determined is different from the amount of tax on which the court based the order.

Comment. See Comment to Section 20200.

CROSS-REFERENCES

Definitions

Generation-skipping transfer tax § 20200(a)
 Transferee § 20200(c)
 Trustee § 20200(d)

§ 20225. Enforcement of out-of-state proration

20225. (a) A trustee acting or resident in another state may commence an action in this state to recover from a transferee, who either is resident in this state or owns property in this state, the amount of the federal generation-skipping transfer tax, or a generation-skipping transfer tax payable to another state, apportioned to the person.

(b) The action shall be commenced in the superior court of the county in which administration of the estate of the decedent would be proper or, if none, in which any defendant resides.

(c) For purposes of the action an apportionment made by the court having jurisdiction of the administration of the decedent's estate in the other state is prima facie correct.

Comment. Section 20225 is new. See also Code Civ. Proc. §§ 1710.10-1710.65 (sister state money-judgments).

CROSS-REFERENCES

Definitions

Transferee § 20200(c)
 Trustee § 20200(d)