

Memorandum 83-58

Subject: Study L-826 - Distribution of Decedent's Estate Without
Administration

Attached is a draft of a recommendation that effectuates the Commission's decisions concerning the distribution of a decedent's estate without administration. We have sent this draft out for review and comment. At the September meeting, we will review the draft and any comments that we have received.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

STATE OF CALIFORNIA
CALIFORNIA LAW
REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

DISPOSITION OF ESTATES WITHOUT ADMINISTRATION

August 2, 1983

Important Note: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you object to the tentative recommendation or that you believe that it needs to be revised. COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN SEPTEMBER 8, 1983.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
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TENTATIVE RECOMMENDATION

relating to

DISPOSITION OF ESTATES WITHOUT ADMINISTRATION

Introduction

California law includes provisions to expedite transfer of property of a decedent to the persons entitled to the property without the need for probate administration.¹ The Commission has reviewed these provisions and recommends that their scope be expanded. The recommended expansion is expected to reduce significantly the need for probate administration.

Passage of Property to Surviving Spouse Without Administration

When a married person dies the community and quasi-community property which passes to the surviving spouse² is not subject to probate adminis-

1. See Prob. Code §§ 649.1 (formerly Section 202), 630-632, 650-655. 1983 Cal. Stats. ch. ____, operative January 1, 1985, added, amended, or repealed many sections of the Probate Code. References in this recommendation are to the Probate Code as revised by 1983 Cal. Stats. ch. ____. The comparable provisions of the Probate Code that were superseded by that chapter also are indicated.
2. In the usual case, all of the decedent's share of the community and quasi-community property does pass to the surviving spouse. If the decedent dies intestate, all of the decedent's share of the community and quasi-community property passes to the surviving spouse. Prob. Code §§ 100 (formerly Section 201), 101 (formerly Section 201.5). If the decedent dies testate, it is likely that the surviving spouse will take the decedent's share of the community and quasi-community property under the decedent's will, since empirical studies show that most decedents who die testate leave their estate to the surviving spouse. See Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. B. Found. Research J. 321, 356. The decedent may, however, leave up to half of the community and quasi-community property to someone other than the surviving spouse. See Prob. Code § 6101 (formerly Sections 201, 201.5). To that extent, the community and quasi-community property must be administered in the decedent's estate. See Prob. Code § 649.3 (formerly Section 204). Also, if the decedent's will leaves community or quasi-community property in trust or limits the surviving spouse to a qualified ownership in the property, it is to that extent subject to administration in the decedent's estate. Prob. Code § 649.3 (formerly Section 204).

tration unless the surviving spouse elects to have it administered.³ If all of the estate property is community or quasi-community property which passes to the surviving spouse under the decedent's will or by intestate succession, there need be no administration at all. If some of the estate is the decedent's separate property, only that property must be administered.

The surviving spouse may obtain a court order confirming that all or part of the deceased spouse's share of the community or quasi-community property belongs by will or intestate succession to the surviving spouse.⁴ The order may be obtained without the need for probate administration.⁵ 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.⁶

This system has worked well in California to pass sizable amounts of wealth to the surviving spouse without the need for costly and time-consuming estate proceedings. Where all the property passes to the surviving spouse, there are usually no contending claimants requiring the interposition of a court. Creditors are protected by imposing on the surviving spouse personal liability for the debts of the decedent chargeable against the community and quasi-community property.⁷

3. Prob. Code § 649.1 (formerly Section 202). It may be advisable for the surviving spouse to elect to have the community and quasi-community property administered when there are complex investments or a family business that the surviving spouse may not be able to manage properly, complex creditors' situations or liabilities in excess of the value of the estate, strained family relations, when the surviving spouse is incompetent, or for certain tax purposes. See O. McCarroll, 1 California Decedent Estate Administration Supplement § 3.38, at 75 (Cal. Cont. Ed. Bar 1982).
4. Prob. Code §§ 650-657.
5. Prob. Code § 650(a).
6. See A. Watermaker, 2 California Decedent Estate Administration Supplement § 30.30, at 64 (Cal. Cont. Ed. Bar 1983).
7. Prob. Code § 649.4 (former Section 205). The personal liability of the surviving spouse does not exceed the value at the date of death, less the amount of any liens and encumbrances, of (1) the interest of the surviving spouse (i) in the community property immediately prior to the death and (ii) in quasi-community property arising by virtue of the death which is not exempt from enforcement of a money judgment plus (2) the interest of the deceased spouse in such property passing to the surviving spouse without administration.
Id.

The Commission recommends that the procedure for passage of community and quasi-community property to the surviving spouse without administration be extended to cover separate property passing to the surviving spouse by will or intestate succession.⁸ This will avoid the need for administration of the separate property which passes to the surviving spouse and will avoid the need for any administration at all where the surviving spouse takes the entire estate.⁹ In addition, it will avoid unnecessary time and resources being spent to classify as separate or as community or quasi-community the property that passes to the surviving spouse.

Intestate Share of Surviving Spouse

To further avoid the need for administration where the deceased spouse died without a will, the Commission recommends that the intestate succession provisions be revised to pass all of the decedent's separate property to the surviving spouse except where the decedent is survived by issue one or more of whom are not also issue of the surviving spouse.¹⁰

8. The decedent's creditors would be protected by making the surviving spouse personally liable also for debts of the decedent chargeable against the separate property of the decedent. The surviving spouse's liability would not exceed the value of the surviving spouse's interest in community and quasi-community property plus the value of the property of the deceased spouse passing to the surviving spouse.
9. Under Probate Code Sections 640-647, the surviving spouse may have the estate summarily set aside if the net value of the estate does not exceed \$20,000. However, these provisions would not be usable if there are large amounts of community or quasi-community property, since half the value of such property is includable for the purpose of determining whether the estate value is less than \$20,000. Estate of Pezzola, 112 Cal. App.3d 752, 169 Cal. Rptr. 464 (1980).
10. If the decedent is survived by issue one or more of whom are not also issue of the surviving spouse, half of the separate property would go to the surviving spouse and the other half would be divided among all the decedent's children (including those who are issue of both spouses as well as those who are issue of the decedent and someone else). This scheme is designed to protect children of a prior marriage and their offspring who might otherwise not be provided for by the surviving spouse. The scheme is consistent with the findings of empirical studies that most persons want the children to receive a portion of the estate in this situation. Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. B. Found. Research J. 321, 366.

Under existing law, the surviving spouse takes all of the decedent's separate property only if the decedent leaves no surviving issue, parent, brother, sister, or issue of a deceased brother or sister.¹¹ If the decedent is survived by any of these relatives, the surviving spouse takes one-half or one-third of the separate property depending on who the survivors are.¹² As a result, even if separate property could pass to the surviving spouse without administration, administration usually would be necessary under the existing intestate succession provisions solely because a portion of the decedent's separate property will pass to relatives other than the surviving spouse. The recommended change in intestate succession law will avoid the need for administration except where the decedent leaves issue that are not also issue of the surviving spouse. In addition, the recommended change is more likely to be consistent with the decedent's wishes. Empirical studies show that most persons want the entire estate to go to the surviving spouse in preference to children, parents, and brothers and sisters.¹³ Existing law defeats this desire; for example, if the decedent is survived by a spouse and a grandnephew, the grandnephew takes as much of the separate property as the spouse.

11. Prob. Code § 6401 (formerly Section 224).

12. The surviving spouse receives one-half of the intestate decedent's separate property if the decedent is survived by only one child or the issue of a deceased child or if the decedent dies without issue but is survived by one or both parents or the issue of one or both parents. Prob. Code § 6401 (formerly Sections 221 and 223). The surviving spouse receives one-third of the intestate decedent's separate property if the decedent is survived by two or more children, by one child and the issue of one or more deceased children, or by the issue of two or more deceased children. Prob. Code § 6401 (formerly Section 221).

13. See Fellows, Simon & Rau, supra note 10, at 348-64. This preference applies in the case of children of the marriage, not in the case of the decedent's children of a former marriage. It is reasonable to expect that a surviving spouse will deal fairly with his or her own children and grandchildren, both during the surviving spouse's lifetime and upon the surviving spouse's death, particularly where they devote attention to and show concern for the welfare of the surviving spouse after the death of the decedent. Where the decedent has concern that the other spouse may not deal fairly with the children or other relatives, the decedent may provide for them by will.

The recommended change also avoids the following problems created by the existing intestate succession scheme which passes a share of the decedent's separate property to relatives other than the surviving spouse:

(1) A portion of the separate property may go to adult children or other relatives of the decedent who have little or no need for the property. The surviving spouse is deprived of a portion of the decedent's estate that may be required to maintain the surviving spouse during lifetime.

(2) Awarding property directly to children often involves the expense of establishing and administering court supervised guardianships for minors who receive property of the decedent.¹⁴

(3) Division of the separate property engenders litigation over such matters as the value of items of property.

(4) Treating separate property differently from community property causes delay and expense to determine claims as to the community or separate nature of property. Difficult problems of tracing, commingling, and apportionment often arise in litigation concerning the community or separate nature of property.

Collection of Personal Property by Affidavit

California law provides a simple procedure for the collection without administration of the decedent's personal property from the person holding the property.¹⁵ The person entitled to the property presents an affidavit to the third-party holder of the property showing that the person is entitled to the property under the decedent's will or by intestate succession.¹⁶ Payment or delivery of the property in

14. An award to minor children should be unnecessary, since the surviving spouse has a duty to support them. Civil Code §§ 196-196a.

15. Prob. Code §§ 630-632. The affidavit procedure may be used (1) by the decedent's surviving spouse, children, lawful issue of deceased children, parents, brothers, or sisters of the decedent, lawful issue of a deceased brother or sister, if they are otherwise entitled to the property under the decedent's will or by intestate succession, or (2) by the sole beneficiary or all the beneficiaries under the decedent's will (whether or not related to the decedent). Prob. Code § 630. A separate provision permits the surviving spouse (but not other relatives of the decedent) to collect not more than \$500 on deposit in a bank if the surviving spouse is otherwise entitled to the money and the estate value does not exceed \$5,000, without regard to whether the decedent owns real property in California. Prob. Code § 630.5.

16. Prob. Code § 630.

accord with the affidavit discharges the holder from any further liability with respect to the property.¹⁷ The payment or transfer does not preclude the administration of the estate when necessary to enforce payment of the decedent's debts.¹⁸ The person who received the property may then be required to turn it over to the estate's personal representative.¹⁹ The affidavit procedure is merely a collection mechanism and does not give title to the person collecting the property as against other claimants to the property.²⁰ This affidavit procedure can be used only where the decedent leaves no interest in California real property²¹ and the value of the estate (excluding certain property) does not exceed \$30,000.²²

The Commission recommends that the surviving spouse be permitted to collect personal property²³ using the affidavit procedure described

17. Prob. Code § 631.

18. Prob. Code § 631.

19. Broll, Summary Administration, in 1 California Decedent Estate Administration § 3.14, at 124 (Cal. Cont. Ed. Bar 1971); cf. Estate of Kevil, 98 Cal. App.2d 388, 392, 220 P.2d 555 (1950).

20. See Brezzo v. Brangero, 51 Cal. App. 79, 81, 196 P. 87 (1921).

21. The procedure is not available if the decedent leaves real property, or an interest in or lien on real property, in this state. Prob. Code § 630. However, certain property is excluded in determining the property of the decedent: property held by the decedent as a joint tenant, or in which the decedent had a life or other estate terminable upon the decedent's death, or which was held by the decedent as community or quasi-community property and passed to the decedent's surviving spouse pursuant to Probate Code Section 649.1 (formerly Section 202). This exclusion would be expanded by the recommended legislation to include separate property passing to the decedent's surviving spouse to conform the exclusion to the recommended expansion of the scope of Section 649.1.

22. The following are excluded in determining whether the estate exceeds \$30,000 in value: property not in this state, motor vehicles, mobilehomes, commercial coaches, liens and encumbrances on property of the estate, amounts due the decedent for services in the armed forces of the United States, compensation not exceeding \$5,000 owing to decedent for services from any employment, and the property described in note 21, supra. Prob. Code §§ 630, 632. For a special provision permitting a surviving spouse to collect not to exceed \$500 from a bank deposit when the value of the estate does not exceed \$5,000, irrespective of the character of the decedent's property, see Prob. Code § 630.5.

23. The affidavit procedure under Probate Code Section 630 does not apply to real property. The Commission is informed that where both spouses' names appear on the record title to community real property,

above without regard to the value of the deceased spouse's estate and without regard to whether the deceased spouse left an interest in California real property. Even where the surviving spouse is entitled to receive the decedent's property without administration,²⁴ under existing law the surviving spouse may not be able to use the affidavit procedure where the estate is large or contains real property.²⁵ The expansion of the use of the affidavit procedure for collection of the decedent's personal property by a surviving spouse will provide an expeditious and inexpensive alternative to petitioning for a court order confirming that the property is property passing to the surviving spouse.

The Commission also recommends that the maximum estate value for use of the affidavit procedure by heirs or beneficiaries other than the surviving spouse be increased from the present \$30,000 to \$50,000.²⁶ Estates of less than \$50,000 are too small to justify being put through the time-consuming and costly probate process. Where there is no real

affidavits are routinely accepted to transfer title to the surviving spouse on the death of the other. When the estate contains real property and the surviving spouse's name does not appear on the record title, it may be necessary for the surviving spouse to seek administration or a court order under Probate Code Section 655 to obtain insurable title to the real property. See 2 A. Bowman, Ogden's Revised California Real Property Law § 29.27, at 1449 (Cal. Cont. Ed. Bar 1975); A. Watenmaker, 2 California Decedent Estate Administration Supplement § 30.30, at 64 (Cal. Cont. Ed. Bar 1983).

Since the Commission's recommendation is to permit the surviving spouse to collect the decedent's personal property, including funds on deposit in a financial institution, without regard to whether the decedent owns California real property, the separate bank account provision (Prob. Code § 630.5) would become unnecessary and should be repealed.

24. See discussion in text at notes 2-14, supra.

25. See notes 21 and 22, supra.

26. The Commission is informed that the affidavit procedure is presently used in about 20 percent of the estates in California. The maximum dollar amount has been repeatedly increased by the Legislature in recent years, being increased from \$1,000 to \$2,000 in 1961, to \$3,000 in 1967, to \$5,000 in 1972, to \$10,000 in 1974, to \$20,000 in 1976, and to the present \$30,000 in 1979.

The Commission also recommends that existing law be clarified by providing that the maximum estate value for use of the affidavit procedure means net value--that is, the value over and above all liens and encumbrances on the decedent's property in this state at the date of death.

property in the estate, no unpaid debts of the decedent, and no disagreement among family members over distribution of the property, there is no need for probate of the estate. The affidavit procedure will permit those presumptively entitled to the decedent's property to collect it inexpensively and expeditiously.

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend the headings for Article 1 (commencing with Section 630) and Article 2.5 (commencing with Section 649.1) of Chapter 10 of Division 3 of, to amend Sections 630, 632, 649.1, 649.3, 649.4, 650, 653, 655, and 656, and 6401 of, and to repeal Section 630.5 of, the Probate Code, relating to probate law and procedure.

The people of the State of California do enact as follows:

404/678

Heading for Article 1 (commencing with Section 630) of Chapter 10 of Division 3 of the Probate Code (amended)

SECTION 1. The heading for Article 1 (commencing with Section 630) of Chapter 10 of Division 3 of the Probate Code is amended to read:

Article 1. ~~Transfer~~ Collection of Personal Property ~~Not Exceeding One Thousand Dollars (\$1,000) in Value~~ by Affidavit

406/208

Probate Code § 630 (amended). Collection of decedent's personal property by affidavit

SEC. 2. Section 630 of the Probate Code is amended to read:

630. (a) When Subject to Section 632, subdivision (b) applies only where a decedent leaves no real property, nor interest therein nor lien thereon, in this state, and the total value of the decedent's property in this state, (excluding any motor vehicle, or mobilehome or commercial coach registered under the provisions of Part 2 (commencing with Section 18000) of Division 13 of the Health and Safety Code, of which the decedent is the owner or legal owner,) over and above all liens and encumbrances on such property at the date of death, over and above any amounts due to

the decedent for services in the armed forces of the United States, and over and above the amount of salary not exceeding five thousand dollars (\$5,000), including compensation for unused vacation, owing to decedent for services from any employment, does not exceed ~~thirty thousand dollars~~ ~~(\$30,000)~~, fifty thousand dollars (\$50,000), except that subdivision (b) applies to the surviving spouse of the decedent without regard to the value of the estate and without regard to whether the decedent leaves real property or interest therein or lien thereon in this state.

(b) The ~~the~~ surviving spouse, the children, ~~lawful~~ ~~the~~ issue of deceased children, a parent, brothers or sisters of the decedent, the ~~lawful~~ issue of a deceased brother or sister, or the guardian or conservator of the estate of any person bearing such relationship to the decedent, or the trustee named under a trust agreement executed by the decedent during his or her lifetime, the primary beneficiaries of which bear such relationship to the decedent, if such person or persons has or have a right to succeed to the property of the decedent, or the sole beneficiary, or all of the beneficiaries under the last will ~~and~~ ~~testament~~ of the decedent, regardless of whether or not any beneficiary is related to the decedent, may, without procuring letters of administration, or awaiting the probate of the will, collect any money due the decedent (including money of the decedent on deposit in a financial institution as defined in Section 40), receive the tangible personal property of the decedent, and have any evidences of a debt, obligation, interest, indebtedness or right, stock, or chose in action transferred to such person or persons upon furnishing the person, representative, corporation, officer or body owing the money, having custody of such property or acting as registrar or transfer agent of such evidences of debt, obligation, interest, indebtedness or right, stock, or chose in action, with an affidavit or declaration under penalty of perjury showing the right of the person or persons to receive such money or property, or to have such evidences transferred.

(c) A transfer agent of any security shall change the registered ownership on the books of a corporation from the decedent to the successor or successors upon the presentation of an affidavit as provided in subdivision (b) and is discharged from liability in so doing as provided in Section 631.

Comment. Section 630 is amended to increase the maximum estate value for use of the affidavit procedure under the section from \$30,000 to \$50,000. The language in subdivision (a) that the estate value is

"over and above all liens and encumbrances on the decedent's property in this state on the date of death" is new and is drawn from Section 640. Prior law was not clear.

Section 630 also is amended to permit the surviving spouse to use the affidavit procedure provided by Section 630 to collect the decedent's personal property without regard to the value of the estate and without regard to whether the decedent leaves any interest in California real property.

The reference to "tangible" personal property and evidences of an "obligation", "stock", or "choses in action" in subdivision (b) is drawn from Section 3-1201 of the Uniform Probate Code and is clarifying. The word "issue" has been substituted for "lawful issue" in subdivision (b) to conform to the provisions relating to intestate succession. See Sections 6408 and 6408.5.

Subdivision (c) is new and is drawn from Uniform Probate Code Section 3-1201. The provision in subdivision (c) protecting the transfer agent from liability is consistent with Section 631.

405/983

Probate Code § 630.5 (repealed). Collection of \$500 or less from bank account

SEC. 3. Section 630.5 of the Probate Code is repealed.

~~630.5. Whether a person dies testate or intestate, and irrespective of the character of his or her property, if the value of the estate does not exceed five thousand dollars, the spouse of the decedent, if entitled by succession or by the last will and testament of the decedent to any money of the decedent on deposit in bank, may collect such money, not to exceed the total sum of five hundred dollars, without procuring letters testamentary or of administration, upon furnishing the bank with an affidavit showing the right of the affiant to receive such money.~~

Comment. Former Section 630.5 is superseded by Section 630 which has been amended to permit the surviving spouse to collect the decedent's personal property (including funds on deposit in a financial institution) without regard to the value of the estate and without regard to whether the decedent owns an interest in California real property.

405/005

Probate Code § 632 (amended). Exclusion of certain property for purposes of article

SEC. 4. Section 632 of the Probate Code is amended to read:

632. For the purpose of this article, any property or interest therein or lien thereon which, at the time of the decedent's death, was held by the decedent as joint tenant, or in which the decedent had a

life or other estate terminable upon the decedent's death, or which was held by the decedent ~~as community property or quasi-community property~~ and passed to the decedent's surviving spouse pursuant to Section 649.1, shall be excluded in determining the property or estate of the decedent or its value.

Comment. Section 632 is amended to reflect the inclusion of separate property in the property that passes to the decedent's spouse pursuant to Section 649.1. See Section 649.1.

405/990/NZ

Heading for Article 2.5 (commencing with Section 649.1) of Chapter 10 of Division 3 (amended)

SEC. 5. The heading for Article 2.5 (commencing with Section 649.1) of Chapter 10 of Division 3 of the Probate Code is amended to read:

Article 2.5. Administration of Community and Quasi-Community Property Passage of Property to Surviving Spouse Without Administration

Probate Code § 649.1 (amended). Passage of property to surviving spouse

SEC. 6. Section 649.1 of the Probate Code is amended to read:

649.1. (a) Except as provided in Section 649.3, when a husband or wife dies intestate, or dies testate and by his or her will bequeaths or devises all or a part of his or her ~~interest in the community property or quasi-community property~~ to the surviving spouse, it passes to the survivor and no administration is necessary.

(b) Notwithstanding subdivision (a), upon the election of the surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse, the ~~interest of the deceased spouse in the community property or quasi-community property or both the interest of the deceased spouse and the surviving spouse in the community property or quasi-community property, or both,~~ following property may be administered under this division:

(1) The one-half of the community property that belongs to the decedent under Section 100, the one-half of the quasi-community property that belongs to the decedent under Section 101, and the separate property of the decedent.

(2) Both the property described in paragraph (1) and 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.

(c) The election must be made within four months after the issuance of letters testamentary or of administration, or within such further time as the court may allow upon a showing of good cause, by a writing specifically evidencing the election filed in the proceedings for the administration of the estate of the deceased spouse and prior to the entry of an order under Section 655.

(e) (d) Notwithstanding subdivision (a) or (b), 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 in the proceedings for the administration of the estate of the deceased spouse to have all or part of the ~~interest of the surviving spouse in~~ one-half of the community property or 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. The election and agreement must be filed before the entry of the decree of final distribution in the proceedings.

Comment. Section 649.1 is amended to expand the property of the decedent which may pass to the surviving spouse without administration to include the decedent's separate property.

406/253/NZ

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

SEC. 7. Section 649.3 of the Probate Code is amended to read:

649.3. When a deceased spouse disposes by will of all or part of his or her interest in the community property or quasi/community property to someone other than the surviving spouse or when the will of a deceased spouse contains a trust or limits the surviving spouse to a qualified ownership in the property, that part of the interest of the deceased spouse in the community property or quasi/community property disposed of to someone other than the surviving spouse, disposed of in trust, or limiting the surviving spouse to a qualified ownership in the

property shall be subject to administration under this division. A will that provides for The following property of the decedent is subject to administration under this division:

(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 or bequest of community property or quasi-community property to the surviving spouse if such spouse survives the deceased spouse that is conditioned on the spouse surviving the decedent by a specified period of time shall not be considered to create such is not a qualified ownership interest as to fail within the provision of this section, if the specified period of time has expired.

Comment. Section 649.3 is amended to make clear that the decedent's separate property which does not pass to the surviving spouse under Section 649.1 is subject to administration.

968/605/NZ

Probate Code § 649.4 (amended). Surviving spouse's liability for decedent's debts

SEC. 8. Section 649.4 of the Probate Code is amended to read:

649.4. (a) Except as provided by in this section and Section 951.1, upon the death of a married person, the surviving spouse is personally liable for the debts of the deceased spouse chargeable against the ~~community property~~ and the debts of the deceased spouse chargeable against the separate property of the deceased spouse to the extent such separate property is characterized as ~~quasi-community property~~ under Section 66, unless the interests of both spouses in the ~~community property or quasi-community property, or both, are administered under this division~~ property described in subdivision (b).

(b) The ~~personal~~ liability imposed by subdivision (a) shall 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 ~~interest of the surviving spouse (A) in the community property immediately prior to the death and (B) in quasi-community property arising by virtue of the death which one-half of the community and quasi-community property that belongs to the surviving spouse under~~

Sections 100 and 101 that is not exempt from the enforcement of a money judgment.

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

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

(c) The surviving spouse is not liable under subdivision (a) if all of the property described in subdivision (b) is administered under this division.

~~(b)~~ (d) 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 subdivision (a) ~~shall be~~ is barred to the same extent as provided for claims under Article 1 (commencing with Section 700) of Chapter 12, except as to the following:

(1) 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.

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

(3) Creditors who file a timely claim in the proceedings.

~~(e)~~ (e) Except as provided ~~by~~ in subdivision ~~(b)~~, (d), any debt described in subdivision (a) 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. In any action based upon the debt, the surviving spouse may assert any defenses, cross-complaints, or setoffs which would have been available to the deceased spouse if the deceased spouse had not died.

Comment. Section 649.4 is amended to include separate property of the decedent passing to the surviving spouse without administration in the calculation of the maximum limit on the personal liability of the surviving spouse.

Probate Code § 650 (amended). Petition to have property not administered
in the estate

SEC. 9. Section 650 of the Probate Code is amended to read:

650. (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 in the county in which the estate of the deceased spouse may be administered alleging that administration of all or a part of the estate is not necessary for the reason that all or a part of the estate is ~~community property or quasi-community~~ property passing or belonging to the surviving spouse. The petition shall be verified and shall set forth the following information:

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

(2) The names, ages, and addresses of the heirs, devisees, and legatees 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 executors of the will or administrators of the estate of the deceased spouse, which are known to the petitioner.

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

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

(5) 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.

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

(c) To the extent of the election, this section does not apply ~~if~~ to property that the petitioner has elected to have administered under this division as provided in pursuant to subdivision (b) of Section 649.1. either to have:

~~(1) The interest of the deceased spouse in the community property or quasi/community property or both, administered under this division.~~

~~(2) Both the interest of the deceased spouse and the surviving spouse in the community property or quasi/community property, or both, administered under this division.~~

(d) The action authorized by this section may be taken by a guardian or conservator without authorization or approval of the court in which the guardianship or conservatorship proceeding is pending.

Comment. Section 650 is amended to reflect the inclusion of separate property passing to the surviving spouse in the property of the decedent which need not be administered. See Section 649.1.

405/981/NZ

Probate Code § 653 (amended). Clerk to set petition for hearing; notice of hearing

SEC. 10. Section 653 of the Probate Code is amended to read:

653. If proceedings for the administration of the estate of a deceased spouse are pending at the time a petition described in Section 650 is filed or, if the proceedings are not pending and if the petition is not joined with a petition for probate of the will or administration of the estate of the deceased spouse, the clerk shall set the petition for hearing. At least 20 days prior to the date of the hearing on the petition, a notice of the hearing and a copy of the petition 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 are 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 legatees, devisees, and known heirs of the deceased spouse.
- (3) All persons or their attorneys who have requested special notice pursuant to Section 1202.

(4) All persons or their attorneys who have given notice of appearance.

(5) The Attorney General, addressed to the office of the Attorney General at Sacramento, California, if the petitioner bases the allegation that all or part of the estate of the deceased spouse is ~~community property or quasi/community~~ property passing to the surviving spouse upon the will of the deceased spouse and the will involves or may involve (i) a testamentary trust of property for charitable purposes other than a charitable trust with a designated trustee, resident in this state, or (ii) a bequest or devise for a charitable purpose without an identified legatee, devisee, or beneficiary.

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

Comment. Section 653 is amended to reflect the inclusion of separate property passing to the surviving spouse in the property of the decedent which need not be administered. See Section 649.1.

405/984

Probate Code § 655 (amended). Court order

SEC. 11. Section 655 of the Probate Code is amended to read:

655. (a) If the court finds that all of the property is ~~community property or quasi/community~~ property, ~~or both~~, passing to the surviving spouse, it shall issue an order describing the property, determining that the property is ~~community property or quasi/community~~ property, ~~or both~~, passing to the surviving spouse, and determining that no administration is necessary. If the petition filed under Section 650 includes a description of the interest of the surviving spouse in the community property 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, it shall issue an order describing the property and confirming the ownership of the surviving spouse.

(b) If the court finds that all or a part of the property is not ~~community property or quasi/community~~ property passing to the surviving spouse, it shall do all of the following:

(1) Issue an order describing any property which is ~~community property or quasi/community~~ property passing to the surviving spouse,

determining that the property passes to the surviving spouse, and determining that no administration of the property is necessary; and issue any further orders which may be necessary to cause delivery of the property or its proceeds to the surviving spouse.

(2) If the petition filed under Section 650 includes a description of the interest of the surviving spouse in the community property 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, issue an order describing the property and confirming the ownership of the surviving spouse and any further orders which may be necessary to cause ownership of the property to be confirmed in the surviving spouse.

(3) Issue an order ~~that the~~ describing any property which is not ~~community property or quasi-community~~ property passing to the surviving spouse, determining that the property does not pass to the surviving spouse, and determining that the property is subject to administration under this division.

(c) Upon becoming final, an order (1) determining that property is ~~community property or quasi-community~~ 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 655 is amended to reflect the inclusion of separate property passing to the surviving spouse in the property of the decedent which need not be administered. See Section 649.1. Paragraph (3) of subdivision (b) is also amended to make the paragraph consistent with paragraph (1).

405/988

Probate Code § 656 (amended). Order to protect creditors of decedent's business

SEC. 12. Section 656 of the Probate Code is amended to read:

656. In any case in which the court finds that all or a part of the ~~community property or quasi-community~~ property passing to the surviving spouse consists of a business or an interest in a business which the deceased spouse was operating or managing at the time of death, it shall require the surviving spouse to file a list of all of the known creditors of the business and the amount owing to each of

them. The court may issue any order necessary to protect the interests of the creditors of the business, including the filing of an undertaking.

Comment. Section 656 is amended to reflect the inclusion of separate property passing to the surviving spouse in the property of the decedent which need not be administered. See Section 649.1.

34747

Probate Code § 6401 (amended). Intestate share of surviving spouse

SEC. 13. Section 6401 of the Probate Code is amended to read:

6401. (a) As to community property, the intestate share of the surviving spouse is the one-half of the community property that belongs to the decedent under Section 100.

(b) As to quasi-community property, the intestate share of the surviving spouse is the one-half of the quasi-community property that belongs to the decedent under Section 101.

(c) As to separate property, the intestate share of the surviving spouse is as follows:

(1) The entire intestate estate if ~~the decedent did not leave any surviving issue, parent, brother, sister, or issue of a deceased brother or sister~~ (A) there is no surviving issue of the decedent or (B) there are surviving issue of the decedent all of whom are surviving issue of the surviving spouse also.

(2) One-half of the intestate estate ~~in the following cases:~~ if there are surviving issue of the decedent one or more of whom are not issue of the surviving spouse.

~~(A) Where the decedent leaves only one child or the issue of a deceased child.~~

~~(B) Where the decedent leaves no issue but leaves the parent or parents or their issue or the issue of either of them.~~

~~(3) One-third of the intestate estate in the following cases:~~

~~(A) Where the decedent leaves more than one child living.~~

~~(B) Where the decedent leaves one child living and the issue of one or more deceased children.~~

~~(C) Where the decedent leaves issue of two or more deceased children.~~

Comment. Subdivision (c) of Section 6401 is amended to provide that the surviving spouse takes all of the decedent's separate property unless there are surviving issue of the decedent one or more of whom are not issue of the surviving spouse. In the latter case, subdivision (c) gives one-half of the separate property to the issue of the decedent (both those who are also the issue of the surviving spouse and those who are not). Under prior law, the surviving spouse received all of the decedent's separate estate only if the decedent died without leaving surviving issue, parent, brother, sister, or descendant of a deceased brother or sister.

32108

Transitional Provision

SEC. 14. The amendments made by this act to Sections 649.1, 649.3, 649.4, 650, 653, 655, 656, and 6401 of the Probate Code apply only to cases where the decedent died after December 31, 1984. If the decedent died before January 1, 1985, the case shall be governed by the law that would apply if those sections had not been amended by this act.