

Memorandum 83-18

Subject: Study L-625 - Probate Law (Passage of Property Without Administration or With Summary Administration)

Attached to this Memorandum is a comprehensive draft of new provisions relating to passage of property at death either without administration or with summary administration. The staff proposes to codify these provisions in new Division 7 of the Probate Code. Proposed new Chapters 1, 3, and 4 are drawn from existing Probate Code provisions. Proposed new Chapter 2 is drawn from the succession without administration provisions of the Uniform Probate Code.

This draft needs more staff work, but is presented now to give an overview of how the new provisions will look. After the meeting, the staff will work over the drafting and make other technical revisions, and may reorganize these provisions somewhat.

The attached draft is discussed below.

Surviving Spouse's Election Concerning Administration

Under existing law, neither the surviving spouse's half of the community and quasi-community property, nor the decedent's half which passes outright to the surviving spouse by will or intestate succession, is subject to administration unless the surviving spouse elects to have it be administered. Prob. Code § 202. See generally Prob. Code §§ 202-206, 650-657. If the surviving spouse chooses not to have the property be administered, the surviving spouse assumes personal liability for the decedent's debts chargeable against the community and quasi-community property, not to exceed the value of both halves of the community and quasi-community property. Prob. Code § 205.

The attached draft continues these provisions in Chapter 1 and broadens them to provide the same rule for the decedent's separate property which passes outright to the surviving spouse. This will avoid the need to classify the property or the type of debt of the decedent, and should not be unfair to creditors of the decedent since the draft makes the surviving spouse liable for the decedent's separate debts.

Setting Aside Small Estates for Decedent's Family

Existing law provides for the surviving spouse or minor children of the decedent to have the whole estate summarily set aside to them on

petition, if the estate is worth \$20,000 or less. Prob. Code §§ 640-647. These provisions take precedence over the rules for intestate succession, and take precedence over the decedent's will. In re Estate of Woodburn, 212 Cal. 683, 300 P. 22 (1931); McMillan v. Boese, 45 Cal. App.2d 764, 115 P.2d 37 (1941). Thus, these provisions are family protection provisions as well as administration-avoidance provisions.

Chapter 3 of the attached draft continues these provisions without substantive change.

Collection of Small Estates by Affidavit

If the decedent owns no real property in California and the value of the decedent's personal property in California is \$30,000 or less, existing law permits the surviving spouse and certain other relatives of the decedent to collect the estate by presenting an affidavit to those who are holding the decedent's property. Prob. Code §§ 630-632. These provisions are neither intent-defeating nor administration-avoiding: The person collecting the estate in this manner must be entitled to the property by intestate succession or under the decedent's will (Prob. Code § 630), and administration of the estate is not precluded when necessary to enforce payment of the decedent's debts (Prob. Code § 631).

Chapter 4 in the attached draft continues these provisions, and eliminates the present restriction preventing use of the affidavit procedure if the decedent owns real property in California. This change has been suggested by members of the State Bar Estate Planning, Probate and Trust Law Section, and should make these provisions more useful. The staff needs to examine further the question of how marketable title to real property may be obtained in the absence of a decree of distribution.

Passage of Property to heirs or devisees Without Administration

Under the 1982 amendments to the Uniform Probate Code for succession without administration, administration of the estate may be avoided by written agreement and application of all adult, competent heirs of an intestate decedent or residuary devisees under the decedent's will. The applicants must agree to accept proportionate personal liability for specific gifts under the will and for debts of the decedent, not limited to the value of the assets they receive.

These provisions are broadly similar to the California provisions

for passage of community and quasi-community property. Three significant differences are:

(1) The California community and quasi-community property provisions only benefit the surviving spouse. The UPC succession without administration provisions may be used by all adult, competent heirs or devisees.

(2) The California community and quasi-community property provisions do not require bond. Under the UPC, any creditor, heir, or devisee may demand bond.

(3) The California community and quasi-community property provisions permit the surviving spouse to avoid administration as of right. Under the UPC, any creditor, heir, or devisee may require the estate to be administered by filing an objection.

In the staff's view, there is benefit in broadening the list of those who may avoid administration to include heirs or residuary devisees of the decedent as under the UPC. The principal concern should be adequate protection of creditors and specific devisees of the decedent. The UPC provision for bonding upon demand goes a long way toward giving this protection. (A devisee entitled to specific property might elect to proceed against the residuary devisee having possession of it if a cash award is less desirable than the property.)

Chapter 2 in the attached draft is drawn from the UPC provisions for succession without administration. The draft provisions differ from the UPC in several important respects:

(1) Under the UPC, the persons who take the decedent's property without administration are liable for the decedent's debts, even in the case where the debts exceed the value of the property in the decedent's estate. This creates considerable hazard for the takers, and may result in creditors being able to recover more from the takers than the creditors could have recovered from the decedent's estate if it were administered. The draft of Chapter 2 limits the liability of each taker to the value of the decedent's property received by each. Subject to that limit, however, the creditor is not required to collect the debt proportionately from each taker. The creditor may collect from one or a few, who are then entitled to contribution from the other takers. This minimizes the procedural burden on creditors, but does not give them more than they could have collected out of the decedent's estate.

(2) The takers are not required under the draft to waive their right to have a personal representative appointed for the decedent. Under the UPC, this right must be waived. By preserving the right of a taker to seek appointment of a personal representative, the draft affords a remedy to the taker who is pursued by creditors of the decedent--the taker may force the estate into administration where all debts will be discharged.

(3) The UPC permits certain persons to prevent succession without administration by filing an objection. The draft permits the takers to take the decedent's property notwithstanding an objection by posting bond. This should adequately protect creditors and others without giving them a veto.

Respectfully submitted,

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DIVISION 7. PASSAGE OF PROPERTY WITHOUT
ADMINISTRATION OR WITH SUMMARY ADMINISTRATION

- Chapter 1. Surviving Spouse's Election Concerning Administration
(§§ 7100-7127)
- Chapter 2. Passage of Property to Heirs or Devisees Without Adminis-
tration (§§ 7200-7213)
- Chapter 3. Setting Aside Small Estates for Decedent's Family
(§§ 7300-7310)
- Chapter 4. Collection of Small Estates by Affidavit (§§ 7400-7404)

DIVISION 7. PASSAGE OF PROPERTY WITHOUT
ADMINISTRATION OR WITH SUMMARY ADMINISTRATION

CHAPTER 1. SURVIVING SPOUSE'S ELECTION CONCERNING ADMINISTRATION

Article 1. General Provisions

§ 7100. Property subject and not subject to administration

7100. On the death of a married person:

(a) The following property of the decedent is subject to administration under this division:

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

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

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

(b) Except as provided in subdivision (a), the decedent's property which passes to the surviving spouse (whether by intestate succession or under the decedent's will) is not subject to administration unless the surviving spouse elects to have the property administered as provided in Article 2 (commencing with Section 7110).

(c) The one-half of the community and quasi-community property that belongs to the surviving spouse under Sections 100 and 101 is not subject to administration unless the surviving spouse elects to have the property administered as provided in Article 2 (commencing with Section 7110).

Comment. Subdivision (a) of Section 7100 continues the substance of former Section 204. The provision in paragraph (1) of subdivision (a) that property passing by intestate succession to someone other than the surviving spouse is subject to administration makes express the rule that was implied under former Sections 202 and 204.

Subdivision (b) continues the substance of subdivision (a) and a portion of subdivision (b) of former Section 202. Subdivision (c) continues provisions implied in subdivision (b) of former Section 202.

Section 7100 expands the former provisions to apply also to separate property of the decedent, and applies rules comparable to the rules for community and quasi-community property: If an unqualified interest in the decedent's separate property passes to the surviving spouse, the property is not subject to administration unless the surviving spouse so elects. If the separate property passes to someone other than the surviving spouse, the property is subject to administration.

The term "qualified ownership interest" as used in paragraph (3) of subdivision (a) means an interest such as a life estate. Cf. Review of Selected 1975 California Legislation, 7 Pac. L.J. 237, 248 (1976) (discussing former Section 204).

045/194

§ 7101. Surviving spouse's liability for decedent's debts

7101. (a) Except as provided in this section and Section 951.1, on the death of a married person, the surviving spouse is personally liable for the debts of the deceased spouse chargeable against the property in the decedent's estate.

(b) The liability imposed by subdivision (a) shall not exceed the aggregate value of the following, less the amount of any liens and encumbrances:

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

(2) The one-half of the community and quasi-community property that belongs to the decedent under Sections 100 and 101 and 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 for the debts of the deceased spouse if all of the property described in subdivision (b) is administered under this division.

(d) If proceedings are commenced in this state for the administration of the estate of the decedent and the time for filing or presenting claims has commenced, any action upon the liability of the surviving spouse pursuant to subdivision (a) 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) Except as provided in subdivision (d), a 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 7101 continues the substance of former Section 205, with the following revisions:

(1) Subdivision (a) includes 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. This is consistent with Section 7100 which newly permits separate property to pass to the surviving spouse without administration.

(3) The former reference to "counterclaims" has been replaced by the reference to "cross-complaints"--counterclaims have been abolished. See Code Civ. Proc. § 428.80.

101/144

§ 7102. Power of surviving spouse to deal with community and quasi-community real property

7102. (a) Except as provided in subdivision (b), after 40 days from the death of a married person, the surviving spouse, or the personal representative or the guardian 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 and quasi-community real property. The right, title, and interest of any grantee, purchaser, encumbrancer, or lessee shall be free of rights of devisees or creditors of the decedent to the same extent as if the property had been owned as the separate property of the surviving spouse.

(b) One who claims an interest in community or quasi-community real property under the will of the decedent may record a notice in the county in which the property is situated setting forth the following:

(1) The name of the person who claims the interest and the nature of the interest claimed.

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

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

(4) Instructions that the notice 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 7102 continues the substance of former Section 203.

101/145

§ 7103. Community property held in certain revocable trusts

7103. Notwithstanding the provisions of this chapter, 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 7103 continues the substance of former Section 206.

101/164

Article 2. Surviving Spouse's Election to Have Property Administered in Decedent's Estate or in Trust

§ 7110. Surviving spouse's election to have property administered in decedent's estate

7110. (a) Subject to the time limits specified in subdivision (c), the surviving spouse may elect to have the following property administered under this division:

(1) The share of the community and quasi-community property that belongs to the decedent under Sections 100 and 101, and separate property of the decedent, that would otherwise not be subject to administration as provided in Section 7100.

(2) Both the property described in paragraph (1) and the one-half of the community and quasi-community property that belongs to the surviving spouse under Sections 100 and 101.

(b) The election provided by subdivision (a) may be made by a personal representative, guardian of the estate, or conservator of the estate of the surviving spouse.

(c) The election shall be made by a writing specifically evidencing the election and shall be filed in the proceedings for administration of the estate of the deceased spouse.

(d) The election shall be made within four months after the issuance of letters testamentary or letters of administration, or within such further time as the court may allow upon a showing of good cause, but in any event the election shall be made prior to the entry of an order under Section 7125.

Comment. Section 7110 continues the substance of subdivision (b) of former Section 202, and expands the former section to include separate property of the decedent which may pass to the surviving spouse without administration as provided in Section 7100.

101/170

§ 7111. Surviving spouse's election and agreement to have property transferred in trust

7111. (a) Before entry of a decree of final distribution, the surviving spouse may file in the proceedings for administration of the estate of the deceased spouse an election and agreement to transfer into trust all or part of the one-half of the community and quasi-community property that belongs to the surviving spouse under Sections 100 and 101 to be administered and distributed by the trustee. The trust may be created by the will of the deceased spouse, or may be an existing trust identified by the will of the deceased spouse.

(b) The election and agreement and transfer into trust provided by subdivision (a) may be made by the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse.

Comment. Section 7111 continues the substance of subdivision (c) of former Section 202. See also Section 2580 (petition by conservator for court authorization to make election and agreement).

101/175

Article 3. Order That Administration Is Not Necessary

§ 7120. Application of article

7120. (a) Except as provided in subdivision (c), if all or part of the property in the decedent's estate is not required to be administered as provided in Section 7100, the surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse may petition for an order to that effect as provided in this article.

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

(c) The provisions of this article may not be used with respect to any property the petitioner has elected to have administered as provided in Section 7110.

Comment. Section 7120 continues the substance of a portion of the first sentence of subdivision (a) and all of subdivisions (c) and (d) of former Section 650.

101/181

§ 7121. Venue

7121. (a) If proceedings for administration of the estate of the deceased spouse are pending, a petition under this article shall be filed in such proceedings. No additional fee shall be required.

(b) If proceedings for administration of the estate of the deceased spouse are not pending, a petition under this article may be filed in the superior court in the county in which administration of the estate of the deceased spouse would be proper. The petition may be joined with a verified petition for probate of the will or for administration of the estate of the deceased spouse.

Comment. Section 7121 is the same in substance as a portion of the first sentence of subdivision (a) of former Section 650 and all of former Section 651.

101/183

§ 7122. Contents of petition

7122. (a) A petition filed under this article shall be verified and shall set forth all of the following:

(1) That all or part of the property in the decedent's estate is not required to be administered as provided in Section 7100.

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

(3) The names, ages, and addresses of the heirs and devisees of the deceased spouse which are known to the petitioner.

(4) The names and addresses of all persons named as executors of the will of the deceased spouse and of all persons appointed as executors of the will or administrators of the estate of the deceased spouse which are known to the petitioner.

(5) A description of the property of the deceased spouse which the petitioner alleges is not required to be administered as provided in Section 7100, including the trade or business name of any business which the deceased spouse was operating or managing at the time of death.

(6) A description of any community or quasi-community property in which the petitioner requests the court to confirm the half interest that belongs to the surviving spouse as provided in Sections 100 and 101.

(b) If any of the property which the petitioner alleges is not required to be administered passes to the surviving spouse under a will of the deceased spouse, a copy of the will shall be attached to the petition.

Comment. Section 7122 continues the substance of a portion of subdivision (a) and all of subdivision (b) of former Section 650. See also Section 34 ("devisee" defined).

101/184

§ 7123. Petition does not preclude probate or administration

7123. The filing of a petition under this article does not preclude the court from admitting the will of the deceased spouse to probate or issuing letters testamentary or of administration upon petition of any person legally entitled, including any petition for probate of the will or administration of the estate which is joined with a petition filed under this article.

Comment. Section 7123 continues former Section 652.

101/185

§ 7124. Notice and hearing

7124. (a) Upon the filing of a petition under this article, the clerk shall set the petition for hearing.

(b) If the petition is joined with a petition for probate of the will, notice of the hearing shall be given in the manner prescribed by

Sections 327 and 328, except that the notice shall be given at least 20 days prior to the hearing, and shall be included in the notice required by those sections. A copy of the petition shall be personally served upon, or mailed postage prepaid to, all persons entitled to notice under Section 328.

(c) If the petition is joined with a petition for administration of the estate, notice of the hearing shall be given in the manner prescribed by Section 441, except that the notice shall be given at least 20 days prior to the hearing, and shall be included in the notice required by that section. A copy of the petition shall be personally served upon, or mailed postage prepaid to, all persons entitled to notice under Section 441.

(d) If the petition is not joined with a petition for probate of the will or for administration of the estate, at least 20 days prior to the hearing, a notice of the hearing and a copy of the petition shall be personally served upon the following persons (other than the petitioner) by the petitioner, or mailed by the petitioner, postage prepaid, to the following persons (other than the petitioner), 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 these addresses are not known to petitioner, to the county seat of the county in which the proceedings are pending:

- (1) Any personal representative of the deceased spouse.
- (2) All devisees and known heirs of the deceased spouse.
- (3) All persons or their attorneys who have requested special notice pursuant to Section 1202.
- (4) All persons or their attorneys who have given notice of appearance.
- (5) The Attorney General if any of the property which the petitioner alleges is not required to be administered passes to the surviving spouse under a 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 devisee or beneficiary. If notice is mailed to the Attorney General, it shall be addressed to the office of the Attorney General at Sacramento, California.
- (6) All other persons who are named in the will of the deceased spouse if any of the property which the petitioner alleges is not required

to be administered passes to the surviving spouse under a will of the deceased spouse.

Comment. Section 7124 continues the substance of former Sections 653 and 654. See also Section 34 ("devisee" defined).

100/960

§ 7125. Order

7125. (a) After the hearing, the court shall make its order:

(1) Describing all property in the estate described in subdivision (a) of Section 7100 and determining that such property is subject to administration under this division.

(2) Describing all property in the estate described in subdivision (b) of Section 7100, determining that the property passes to the surviving spouse and that no administration of such property is necessary.

(b) If the petition requests an order confirming the ownership of the surviving spouse of the one-half of the community and quasi-community property that belongs to the surviving spouse under Sections 100 and 101, the court shall describe such property, confirm the ownership of the surviving spouse, and determine that no administration of such property is necessary.

(c) The court may make any further orders which may be necessary to cause delivery of property or its proceeds to the surviving spouse or to cause ownership of property to be confirmed in the surviving spouse.

(d) Upon becoming final, an order determining that property passes to the surviving spouse without administration, or confirming the ownership of the surviving spouse under Sections 100 and 101, is conclusive on all persons, whether or not such persons are in being.

Comment. Section 7125 continues the substance of former Section 655, except that Section 7125 is expanded to include an order relating to separate property of the deceased spouse which passes to the surviving spouse without administration as provided in Section 7100.

§ 7126. Order to protect creditors of decedent's business

7126. If any of the property passing to the surviving spouse without administration is a business or an interest in a 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 known creditors of the business and the amount owing to each of them. The court may make any order necessary to protect the interests of the creditors of the business, including the filing of an undertaking.

Comment. Section 7126 continues the substance of former Section 656.

368/237

§ 7127. Inventory and appraisement

7127. (a) Within three months after the filing of a petition under this article, 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 appraisement in the form set forth in Section 600. The petitioner may appraise the assets which an executor or administrator could appraise under Section 605.

(b) Where the interests of justice require, the court may in its discretion require the petitioner to file an inventory and appraisement, and have the appraisement made, before the court makes its order under Section 7125.

Comment. Section 7127 is the same in substance as former Section 657.

368/245

CHAPTER 2. PASSAGE OF PROPERTY TO HEIRS OR DEVISEES
WITHOUT ADMINISTRATION

§ 7200. Persons who may take property without administration and must join in petition

7200. (a) Subject to the provisions of this chapter, the following persons, excluding minors, persons lacking legal capacity, persons subject to guardianship or conservatorship, and unascertained persons, may take the decedent's property without administration:

(1) If the decedent died testate, all residuary devisees under the decedent's will.

(2) If the decedent died intestate, all persons entitled to an intestate share of the decedent's estate.

(3) If the decedent died partially testate and partially intestate, all persons described in paragraphs (1) and (2).

(b) All of the persons who may take the decedent's property without administration as provided in subdivision (a) must join in a petition filed under this chapter.

Comment. Chapter 2 is drawn from the amendments to the Uniform Probate Code approved in 1982 to permit succession without administration (new Sections 3-312 to 3-322 of the Uniform Probate Code). Section 7200 is drawn from Uniform Probate Code Section 3-312 and a portion of UPC Section 3-313(a)(1). See also Section 34 ("devisee" means one who receives real or personal property under a will) [note: this cite assumes (1) the enactment of AB 25 and (2) a conforming revision to make Section 34 applicable to Section 7200].

368/255

§ 7201. Venue

7201. If a proceeding for probate of the decedent's will or for administration of the decedent's estate is pending in this state, a petition filed under this chapter shall be filed in such proceeding. If no such proceeding is pending, the petition shall be filed in the court specified in Section 301.

Comment. Section 7201 is new.

368/256

§ 7202. Contents of petition

7202. (a) A petition filed under this chapter shall be verified by each person required to join in the petition under Section 7200.

(b) The petition shall state all of the following:

(1) The name and address of each petitioner.

(2) That petitioners constitute all of the persons required to join in the petition under Section 7200.

(3) Whether estate proceedings for the decedent have been commenced in any jurisdiction and, if so, where such proceedings are pending.

(4) That if the petition is granted, petitioners consent to the personal jurisdiction of the courts of this state for the purpose of any proceeding relating to the decedent's estate or relating to any liability assumed by petitioners under this chapter.

(5) That if the petition is granted, petitioners jointly accept responsibility for the estate and assume personal liability for taxes due from the estate, debts of the decedent, claims against the decedent or the estate, and distributions due to other heirs and devisees of the decedent, not to exceed the value of the property received by each petitioner.

(c) If estate proceedings for the decedent have not been commenced in this state, a petition filed under this chapter shall, in addition to the matters required by subdivision (a), state all of the following:

(1) That the decedent has died.

(2) The facts necessary to establish proper venue as provided in Section 301.

(3) The street number, street, city, and county of the decedent's residence at the time of his or her death.

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

(5) The character and estimated value of the property of the estate.

(d) If the decedent died leaving a will, a petition filed under this chapter shall, in addition to the matters required by subdivisions (b) and (c), attach a copy of the will, if available, and state all of the following:

(1) That petitioners believe that the instrument which is the subject of the petition is the decedent's last will.

(2) That after the exercise of reasonable diligence, petitioners are unaware of any instrument revoking the will.

(e) If the decedent died without a will, a petition filed under this chapter shall, in addition to the matters required by subdivisions (b) and (c), state either of the following:

(1) That after the exercise of reasonable diligence, petitioners are unaware of any unrevoked will of the decedent.

(2) Why any unrevoked will of the decedent of which petitioners may be aware is not being probated.

Comment. Section 7202 is new. Subdivision (a) and paragraphs (2), (3), and (5) of subdivision (b) are drawn from Uniform Probate Code Section 3-313 (approved 1982). Paragraph (1) of subdivision (b) is drawn from a portion of the first sentence of Uniform Probate Code Section 3-319 (approved 1982). Paragraph (4) of subdivision (b) is drawn from Uniform Probate Code Section 3-318.

Subdivision (c) is drawn from Probate Code Sections 326 (petition for probate of will) and 440 (petition for letters of administration). Subdivision (d) is drawn from Uniform Probate Code Sections 3-313 (approved 1982) and 3-301(a)(2)(iii). Subdivision (e) is drawn from Uniform Probate Code Sections 3-313 (approved 1982) and 3-301(a)(4)(i).

368/266

§ 7203. Petition to be joined with petition for probate

7203. (a) If the decedent died leaving a will and the will has not been admitted to probate in this state, a petition filed under this chapter shall be joined or combined with a petition for probate of the will.

(b) Notwithstanding Section 326, a petition for probate of the will which is joined or combined with a petition filed under this chapter need not state:

(1) Whether the person named as executor in the will consents to act or renounces his or her right to letters testamentary.

(2) The name of the person for whom letters testamentary are prayed.

Comment. Subdivision (a) of Section 7203 is drawn from Uniform Probate Code Section 3-313 (approved 1982); subdivision (b) is new. The reason for a petition for probate when proceedings are commenced under this chapter is to establish the validity of the will. However, since there is no need to appoint an executor, subdivision (b) permits the omission of allegations relating to the prospective executor.

404/085

§ 7204. Defect or error not jurisdictional

7204. If the necessary jurisdictional facts exist but through defect or form or error they or any of them are incorrectly stated in a petition filed under this chapter, the court has jurisdiction to correct the defect or error at any time. No such defect or error makes the proceeding void.

Comment. Section 7204 is new and is drawn from the last portion of Sections 326 and 440.

§ 7205. Notice and hearing

7205. (a) The clerk shall set the petition for hearing by the court. If notice of the decedent's death has not previously been published, the clerk shall cause notice thereof to be published pursuant to Section 333 and the hearing shall be set not less than 30 days following the last publication.

(b) At least 10 days before the hearing, notice of the hearing shall be given to each of the following persons, other than persons joining in the petition:

(1) Each heir of the decedent.

(2) If the decedent died leaving a will, to each devisee named in the will and to each person named as executor.

(c) The notice required by subdivision (b) shall be given by one of the following methods:

(1) By personal service.

(2) By mail, with postage prepaid, from a post office within this state, addressed to the person at his or her residence or mailing address if known to the petitioners, and, if not known, at the county seat of the county where the proceedings are pending.

(d) If the petition is filed in a pending estate proceeding, notice in addition to that required by this section shall be given to the persons and in the manner required by Section 1200.5.

Comment. Section 7205 is new and is drawn from Sections 327, 328, and 441.

404/107

§ 7206. Bond

7206. Any creditor, heir, or devisee of the decedent may demand that petitioners give bond in the amount of one and a half times the amount of the claim as a condition of obtaining the decedent's property under this chapter. Bond shall be given in the manner provided in Chapter 2 (commencing with Section 995.010) of Title 14 of Part 2 of the Code of Civil Procedure.

Comment. Section 7206 is new and is drawn from Uniform Probate Code Section 3-322 (approved 1982). Unlike the Uniform Probate Code, this chapter does not permit a creditor, heir, or devisee of the decedent

to force the estate into administration by objection to the petition. The giving of bond under this section by petitioners sufficiently protects the interests of creditors, heirs, and devisees. [Query: What about a claimant who seeks specific recovery of property?]

404/113

§ 7207. Conditions for granting of petition

7207. The court shall grant a petition filed under this chapter if all of the following conditions are satisfied:

(a) Each person required to join in the petition under Section 7200 has so joined.

(b) The petition contains all of the allegations required by Section 7202.

(c) Venue is proper.

(d) The notice required by Section 7205 has been given [or waived].

(e) If bond has been demanded as provided in Section 7206, bond has been furnished.

(f) If petitioners claim under the decedent's will, either the will has been admitted to probate or the court determines that the instrument which is the subject of the petition is the decedent's last will.

Comment. Section 7207 is new and is drawn from Uniform Probate Code Sections 3-314 and 3-322 (approved 1982).

404/114

§ 7208. Court order

7208. (a) If the conditions set forth in Section 7207 are satisfied, the court shall make its order as follows:

(1) That petitioners are entitled to the estate of the decedent as set forth in the petition.

(2) That each petitioner is responsible for the estate.

(3) That petitioners are jointly and personally liable for taxes due from the estate, debts of the decedent, claims against the decedent or the estate, and distributions due to other heirs and devisees of the decedent, except that each petitioner's liability shall not exceed the value of the property received by each.

(b) If the conditions set forth in Section 7207 are satisfied except that bond has been demanded but not furnished, the court may make its order upon condition that petitioners furnish bond.

Comment. Section 7208 is new and is drawn from Uniform Probate Code Section 3-315 (approved 1982).

404/119

§ 7209. Powers and duties of petitioners after order

7209. After the court makes its order as provided in Section 7208:

(a) The petitioners shall proceed expeditiously to settle and distribute the estate, and may petition the court to resolve questions concerning the estate.

(b) Petitioners have full power of ownership to deal with the assets of the estate, subject to the provisions of this chapter.

(c) For purposes of collecting assets in another state, petitioners have the same standing and power as personal representatives or distributees in this state.

(d) Petitioners are subject to the personal jurisdiction of the courts of this state in any proceeding relating to the estate or to any liability assumed by petitioners.

Comment. Section 7209 is new. Subdivisions (a), (b), and (c) are drawn from Uniform Probate Code Section 3-316 (approved 1982). Subdivision (d) is drawn from Uniform Probate Code Section 3-318 (approved 1982). Section 7209 does not include the provision of Uniform Probate Code Section 3-318 which precludes petitioners from seeking appointment of a personal representative. Thus, for example, if a creditor seeks to impose a disproportionate liability on one of the petitioners, the latter may petition for appointment of a personal representative. Alternatively, the petitioner on whom disproportionate liability is imposed may seek contribution from the other petitioners. See Code Civ. Proc. §§ 875-883.

404/151

§ 7210. Liability of petitioners after order

7210. (a) Subject to subdivisions (b), (c), and (d), after the court makes its order as provided in Section 7208:

(1) Petitioners assume all liabilities of the decedent that were not discharged by reason of death, and liability for all taxes, claims against the decedent or the estate, and charges properly incurred after death for the preservation of the estate, to the extent those items, if duly presented, would be valid claims against the estate.

(2) Petitioners are liable to other heirs and devisees of the decedent for the assets or amounts that would be due them if the estate were administered.

(b) The liability of petitioners is subject to any defenses that would have been available to the decedent.

(c) Except for liability arising from fraud, conversion, or other wrongful conduct of a petitioner, in no case shall the cumulative liability of any petitioner exceed the value of the property received by that petitioner.

(d) No allowance having priority over devisees may be claimed for attorney's fees or charges for preservation of the estate in excess of reasonable amounts properly incurred.

Comment. Section 7210 is new. Subdivisions (a) and (d) are drawn from subdivisions (a) and (b) of Uniform Probate Code Section 3-317 (approved 1982). Subdivisions (b) and (c) are drawn from Uniform Probate Code Section 3-321 (approved 1982).

404/301

§ 7211. Priority for payment of legacies; abatement

7211. Petitioners are entitled to their interests in the estate as heirs or devisees, subject to priority and abatement pursuant to Article 1 (commencing with Section 750) of Chapter 13 of Division 3, and subject to any agreement petitioners may make among themselves.

Comment. Section 7211 is new and is drawn from subdivision (c) of Uniform Probate Code Section 3-317 (approved 1982).

404/302

§ 7212. Information to other heirs and devisees

7212. (a) Not later than 30 days after the court has made an order under Section 7208, petitioners shall deliver or mail a copy of the petition and of the order to each of the following persons who did not join in the petition and whose address is reasonably available to petitioners:

(1) The decedent's grandparents and issue of the decedent's grandparents.

(2) Persons entitled to a share of the estate under the decedent's will.

(3) The parents of a predeceased spouse of the decedent and the issue of such parents.

(b) The failure of petitioners to comply with this section is a breach of duty to the persons specified in subdivision (a), but does not affect the validity of proceedings under this chapter or the powers or liabilities of petitioners as set forth in Sections 7209 and 7210.

Comment. Section 7212 is new and is drawn from Uniform Probate Code Section 3-319 (approved 1982).

404/303

§ 7213. Restitution if personal representative appointed

7213. (a) If, after the court makes an order under Section 7208, a personal representative is appointed for the decedent, each petitioner is personally liable to the estate for restitution of any property of the estate to which he or she is not entitled as heir or devisee of the decedent, in the following manner:

(1) If the petitioner has the property required to be restored to the estate, petitioner shall return the property and its income since distribution.

(2) If petitioner does not have the property, petitioner is liable to return the value of the property as of the date of its disposition by petitioner and the income and gain received by petitioner.

(b) Except for liability arising from fraud, conversion, or other wrongful conduct of a petitioner, the liability established by this section is barred three years after the decedent's death or one year after distribution of the decedent's property to the petitioner, whichever is later.

Comment. Section 7213 is new and is drawn from Uniform Probate Code Section 3-320 (approved 1982).

CHAPTER 3. SETTING ASIDE SMALL ESTATE FOR
DECEDENT'S FAMILY

§ 7300. Conditions for setting aside estate

7300. (a) The court may set aside the decedent's estate to the surviving spouse, or if there is no surviving spouse or if the surviving spouse has remarried, to the minor child or minor children of the decedent, if all of the following conditions are satisfied:

(1) The decedent leaves a surviving spouse who has not remarried, or leaves a minor child or minor children.

(2) The net value of the whole estate as of the date of decedent's death, wherever such estate may be located, does not exceed twenty thousand dollars (\$20,000).

(3) The expenses of decedent's last illness, funeral charges, and expenses of administration have been paid.

(b) As used in this section, "net value of the whole estate" means the half of the community property that belongs to the decedent under Section 100, the half of the quasi-community property that belongs to the decedent under Section 101, and all of the decedent's separate property, less all of the following:

(1) Property held by the decedent and another person as joint tenancy.

(2) Property in which the decedent had a life estate or other estate terminable upon his or her death.

(3) Any liens or encumbrances on the decedent's property.

(4) The value of a probate homestead set apart out of the estate under Section 6520.

Comment. Section 7300 continues the substance of former Sections 640 and 647. The provision in paragraph (2) of subdivision (a) that all decedent's property wherever located is included in computing the value limitation codifies what appears to have been the intent of former Section 640. See Broll, Summary Administration, in 1 California Decedent Estate Administration § 3.24, at 129 (Cal. Cont. Ed. Bar 1971). The requirement of paragraph (3) of subdivision (a) that certain expenses shall have been paid is drawn from former Section 645.

The provision of subdivision (b) that half the value of the decedent's interest in community property is included in the value of the estate for purposes of this chapter codifies Estate of Pezzola, 112 Cal. App.3d 752, 169 Cal. Rptr. 464 (1980).

§ 7301. Who may file petition to set aside estate

7301. (a) The following persons may file a petition to have the decedent's estate set aside as provided in this chapter:

- (1) The surviving spouse of the decedent if the surviving spouse has not remarried.
- (2) The personal representative of the decedent.
- (3) The person named as executor in the decedent's will.
- (4) A guardian of the estate of the minor child or children of the decedent.

(b) If a petition is filed by a guardian of the estate of a minor child or children of the decedent, the guardian may do so without approval of the court in which the guardianship proceeding is pending.

Comment. Subdivision (a) of Section 7301 is the same in substance as a portion of the first sentence of former Section 641. The requirement that the surviving spouse shall not have remarried is drawn from former Section 645. Subdivision (b) is new.

404/342

§ 7302. Venue

7302. If a proceeding for probate of the decedent's will or for administration of the decedent's estate is pending in this state, a petition filed under this chapter shall be filed in such proceeding. If no such proceeding is pending, the petition shall be filed in the court specified in Section 301.

Comment. Section 7302 is new.

404/347

§ 7303. Contents of petition

7303. A petition filed under this chapter shall be verified and shall set forth all of the following:

- (a) Facts to show that petitioner is a person authorized to file a petition under this chapter as provided in Section 7301.
- (b) A specific description and an estimate of the value of all of the decedent's property as of the date of the decedent's death.
- (c) A list of all liens and encumbrances on the decedent's property as of the date of decedent's death.

(d) A designation of any property from which a probate homestead is set apart out of the decedent's estate.

(e) A prayer that the estate be set aside as provided in this chapter.

Comment. Section 7303 continues the substance of a portion of the first sentence, and all of the third and fourth sentences, of former Section 641.

404/404

§ 7304. Filing petition separately or in combination with petition for probate or for letters of administration

7304. (a) A petition under this chapter may be filed with or without a petition for probate of the decedent's will or for letters of administration, or may be combined with such a petition as an alternative form of relief.

(b) If a petition is filed under this chapter after or at the same time as a petition for probate of the will or for letters of administration, the petition filed under this chapter shall be filed at any time before the hearing on the petition for probate of the will or for letters of administration, or shall be filed after the filing of the inventory.

Comment. Section 7304 continues the substance of a portion of the first sentence and a portion of the second sentence of former Section 641.

404/931

§ 7305. Clerk to set petition for hearing

7305. The clerk shall set the petition for hearing by the court at least 10 days after the date on which the petition is filed. If a petition for probate of the decedent's will or for letters of administration has been filed and hearing is set for a day less than 10 days after the filing of a petition under this chapter, the hearing shall be continued so that the petition for probate or for letters of administration may be heard at the same time as the petition under this chapter. If hearing on the petition for probate or for letters of administration is set for a day more than 10 days after the filing of a petition under this chapter, the clerk shall set the petition under this chapter at the same time as the hearing on the petition for probate or for letters of administration.

Comment. Section 7305 continues the substance of portions of former Section 643.

404/932

§ 7306. Notice of hearing

7306. (a) The petitioner shall give notice of the hearing for the period and in the manner provided in Section 1200.5.

(b) If a petition is filed under this chapter without there having been any other petition filed, the petitioner shall, in addition to the notice required by subdivision (b), give notice of the hearing to each heir by mail not less than 10 days prior to the hearing, and there shall be no notice of any type other than as prescribed in this subdivision and in subdivision (a).

(c) If a petition filed under this chapter is combined with a petition for probate of the decedent's will or for letters of administration, the notice of hearing shall include a statement that a prayer for setting aside the estate to the surviving spouse or minor child or minor children, as the case may be, is included in the petition for probate or for letters of administration.

Comment. Subdivisions (a) and (b) of Section 7306 continue the substance of portions of Section 643. Subdivision (c) continues the substance of former Section 642.

404/934

§ 7307. Inventory and appraisement

7307. Upon the filing of a petition under this chapter, the executor or administrator, or the petitioner if no executor or administrator has been appointed, shall cause an inventory and appraisement to be prepared in the manner prescribed by law and filed within such time as the court may allow.

(b) If a probate referee has not been previously appointed, the court shall appoint a probate referee, or for good cause may waive the appointment, as provided in Section 605.

Comment. Section 7307 continues the substance of former Section 644. Section 7307 uses the new term "probate referee" which has replaced the former references to "inheritance tax referee." Section 7307 makes clear that the court may waive the appointment of a probate referee for good cause as provided in Section 605.

§ 7308. Court order

7308. (a) If upon hearing the petition the court finds that the conditions specified in Section 7300 are satisfied, the court shall make its order assigning the whole estate, subject to whatever mortgages, liens, or encumbrances there may be on the estate at the time of decedent's death, as follows:

(1) To the surviving spouse of the decedent, if any, provided that the surviving spouse shall not theretofore have remarried.

(2) If there is no surviving spouse or the surviving spouse has remarried, to such child or children of the decedent as may then be minors.

(b) Title to the estate assigned as provided in subdivision (a) vests absolutely in the person to whom it is assigned, subject to whatever mortgages, liens, or encumbrances there may be on the estate at the time of decedent's death.

(c) Upon the making of an order as provided in subdivision (a), there shall be no further proceedings for administration of the decedent's estate unless further estate is discovered. If the court finds that the conditions specified in Section 7300 are not satisfied, the court shall act upon the petition for probate of the decedent's will or for letters of administration in the same manner as though no petition to set aside the estate had been included or filed, and the estate shall then be administered in the usual manner.

Comment. Section 7308 continues the substance of former Sections 645 and 646.

404/950

§ 7309. Conclusive effect of order

7309. A court order assigning the decedent's estate as provided in Section 7308 is a conclusive determination of the jurisdiction of the court and cannot be collaterally attacked except in the following cases:

(a) If there is fraud in the procurement of the order.

(b) If the order is based on an erroneous assumption of death.

Comment. Section 7309 continues the substance of former Section 645.1, except that the provision for jurisdiction in the superior court is continued in Section 7302, which incorporates Section 301.

§ 7310. Personal liability for unsecured debts of decedent

7310. (a) Subject to subdivisions (b), (c), and (d), a surviving spouse or a minor child or children in whom title has vested as provided in Section 7308 is personally liable for the unsecured debts of the decedent.

(b) The personal liability imposed by subdivision (a) shall not exceed the value of the estate at the date of death less the sum of the following:

(1) The amount of any liens and encumbrances on the estate at the date of death.

(2) The value of a probate homestead set apart out of the decedent's estate under Section 6520.

(3) The value of any exempt property set apart out of the decedent's estate under Section 6510.

(c) The personal liability imposed by subdivision (a) shall cease one year after title to the estate vests, except with respect to any actions or proceedings then pending in court.

(d) In any action based upon the liability imposed by subdivision (a), the surviving spouse or the minor child or children, or the guardian or conservator of such persons, may assert any defenses, cross-complaints, or setoffs which would have been available to the decedent if the decedent had not died.

Comment. Section 7310 continues the substance of former Section 645.3.

404/951

CHAPTER 4. COLLECTION OF SMALL ESTATE BY AFFIDAVIT

§ 7400. Application of chapter

7400. The decedent's property may be collected by affidavit as provided in this chapter without procuring letters testamentary or of administration or awaiting probate of the will, whether the decedent dies testate or intestate and whether the decedent's estate consists of real property, personal property, or both.

Comment. Section 7400 is new. The provision that the decedent's property may be collected as provided in this chapter without procuring letters testamentary or of administration or awaiting probate of the

will continue the substance of portions of former Sections 630 (collection of personal property generally) and 630.5 (collection of bank account). The provision that this chapter may be used whether the decedent dies testate or intestate continues provisions found in former Section 630.5 and implied in former Section 630. The provision that this chapter may be used even when the decedent owns real property continues a portion of former Section 630.5, and supersedes the provision of former Section 630 limiting use of that section to the case where decedent owns no real property in this state.

If the decedent dies testate, one who claims the decedent's real property as devisee should have the will probated, since an unprobated will is not admissible as evidence of title in the devisee. *Reed v. Hayward*, 23 Cal.2d 336, 144 P.2d 561 (1943).

If the decedent dies intestate, a bona fide purchaser from an heir of the decedent is protected against a later-discovered will when four years have elapsed from the date of decedent's death. Prob. Code § 322. See also Prob. Code §§ 1190-1192 (determination of heirship in heirs, heirs of the body, issue, or children of decedent).

A declaration under penalty of perjury may be used in lieu of affidavit. See Code Civ. Proc. § 2015.5.

404/956

§ 7401. Collection of decedent's whole estate by affidavit

7401. (a) The persons authorized in subdivision (b) may collect all or any part of the decedent's estate by affidavit if the total value of the decedent's property as of the date of death does not exceed thirty thousand dollars (\$30,000), exclusive of the following property of the decedent:

(1) 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.

(2) Any property in which the decedent had a life or other estate terminable upon the decedent's death.

(3) Any property which was held by the decedent as community or quasi-community property and which passes to the decedent's surviving spouse by intestate succession or under the decedent's will.

(4) The lesser of five thousand dollars (\$5,000) or the amount of salary (including compensation for unused vacation) owing to the decedent for services from any employment other than for services in the armed forces of the United States.

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

(6) Any motor vehicle, or mobilehome or commercial coach registered under 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.

(b) The following persons may collect the decedent's property by affidavit as provided in this chapter:

- (1) The decedent's surviving spouse.
- (2) The decedent's children and the lawful issue of deceased children.
- (3) A parent, brothers or sisters of the decedent, and the lawful issue of a deceased brother or sister of the decedent.
- (4) The guardian or conservator of the estate of any person described in paragraphs (1), (2), or (3).
- (5) The trustee named under a trust agreement executed by the decedent during his or her lifetime, the primary beneficiaries of which are persons described in paragraphs (1), (2), or (3) if such persons have a right to succeed to the property of the decedent.

(6) The sole beneficiary or all of the beneficiaries under the decedent's will, whether or not any beneficiary is related to the decedent.

(c) The persons described in subdivision (b) may collect any money due to the decedent, receive the property of the decedent, and have any evidences of interest, indebtedness, or right transferred to such person or persons upon furnishing the person, representative, corporation, officer, or body owing the money, having custody of the property, or acting as registrar or transfer agent of such evidences of interest, indebtedness, or right, with an affidavit showing the right of the person or persons to receive the money or property or to have the evidences transferred.

Comment. Section 7401 continues the substance of a portion of former Section 630. A declaration under penalty of perjury may be used in lieu of the affidavit required by this section. See Code Civ. Proc. § 2015.5.

404/976

§ 7402. Collection of deposit of \$500 or less

7402. The surviving spouse of the decedent may collect money of the decedent on deposit in a financial institution, not to exceed the total sum of five hundred dollars (\$500), upon furnishing the financial

institution with an affidavit showing the right of the affiant to receive the money, if both of the following conditions are satisfied:

(a) The surviving spouse is entitled to the money on deposit in the financial institution under the law of intestate succession or under the decedent's will.

(b) The total value of the decedent's estate does not exceed five thousand dollars (\$5,000).

Comment. Section 7402 continues the substance of former Section 630.5 which was limited to bank deposits, and expands the former provisions to apply to deposits in any financial institution. See Section 40 ("financial institution" defined).

404/987

§ 7403. Effect of receipt

7403. (a) A receipt given by the affiant for the property received is a sufficient acquittance for any payment of money or delivery of property pursuant to this chapter, and fully discharges the person, representative, corporation, officer, or body from any further liability without the necessity of inquiring into the truth of any of the facts stated in the affidavit.

(b) A payment or transfer under this chapter does not preclude administration of the decedent's estate.

Comment. Section 7403 continues the substance of former Section 631.

404/991

§ 7404. Claim against estate in probate

7404. When the money or property claimed under this chapter is that of a deceased heir or devisee of a person whose estate is in probate, the personal representative of the person whose estate is in probate shall first present the affidavit to the judge of the court in which the estate is being probated. The court or judge shall direct the personal representative to pay the money or deliver the property to the affiant or affiants to the extent that the decree of distribution shall determine that such heir or devisee was entitled thereto under the decedent's will or under the laws of intestate succession.

Comment. Section 7404 continues the substance of former Section 631.1.