

Memorandum 85-47

Subject: Study L-1031 - Probate Code (Passage of Property to Surviving Spouse Without Administration)

Attached to this memorandum is a draft statute relating to the passage of property to the surviving spouse without administration. This draft supersedes existing Probate Code Sections 649.1-649.6 and 650-658.

The draft continues existing law with several significant changes. The policy issues raised by the draft are noted in the "Draftsman's Note" which follows the text and Comment to various sections in the draft. At the meeting, we will consider the draft section by section.

One policy issue raised by the draft is whether court approval should be required for the fee charged by the lawyer for services in connection with the petition and court order determining or confirming title to property passing to the surviving spouse. The draft statute would dispense with the need to obtain court approval of the lawyer's fee. Attached as Exhibit 1 is an alternative attorney's fee provision. We will consider that provision when we consider the provision of the draft statute relating to the lawyer's fee.

Also attached as Exhibit 2 are Comments showing the disposition of the existing sections that would be superseded by the attached draft.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Outline of Draft Statute

DIVISION 8. DISPOSITION OF ESTATES WITHOUT ADMINISTRATION

PART 1. PASSAGE OF PROPERTY TO SURVIVING SPOUSE
WITHOUT ADMINISTRATION

CHAPTER 1. GENERAL PROVISIONS

- § 9500. Necessity of administration
- § 9501. Property subject to administration
- § 9502. Election of administration
- § 9503. Election to transfer property to trustee
- § 9504. Property held in a revocable trust
- § 9505. Application of this part
- § 9506. Reference in written instrument to repealed statutory provisions

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

- § 9520. Right of surviving spouse to dispose of real property
- § 9521. Recording notice of interest in property

CHAPTER 3. LIABILITY FOR DEBTS OF DECEASED SPOUSE

- § 9540. Personal liability of surviving spouse
- § 9541. Limitation on liability
- § 9542. Effect of commencement of proceedings for administration of estate of deceased spouse
- § 9543. Enforcement of liability

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

- § 9550. Collection of salary or other compensation, not exceeding \$5,000, by affidavit
- § 9551. Protection of employer from liability
- § 9552. Enforcement of payment
- § 9553. Rights of heirs or devisees of deceased spouse not affected
- § 9554. Other methods of collecting compensation not affected

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

- § 9560. Filing of petition
- § 9561. Contents of petition
- § 9562. Filing petition in pending proceeding
- § 9563. Joining petition with petition for probate proceeding
- § 9564. Probate of will or administration not precluded by petition
- § 9565. Setting petition for hearing
- § 9566. Notice of hearing

- § 9567. Court order
- § 9568. Effect of court order
- § 9569. Protection of interests of creditors of business of deceased spouse
- § 9570. Inventory and appraisement
- § 9571. Attorney's fees

DIVISION 8. DISPOSITION OF ESTATES WITHOUT ADMINISTRATION

PART 1. PASSAGE OF PROPERTY TO SURVIVING SPOUSE
WITHOUT ADMINISTRATION

CHAPTER 1. GENERAL PROVISIONS

§ 9500. Necessity of administration

9500. Except as provided in this chapter, when a husband or wife dies intestate leaving property that passes to the surviving spouse under Section 6401, or dies testate and by his or her will devises all or a part of his or her property to the surviving spouse, the property passes to the survivor subject to the provisions of Chapter 2 (commencing with Section 9520) and Chapter 3 (commencing with Section 9540), and no administration is necessary.

Comment. Section 9500 continues the substance of subdivision (a) of former Section 649.1.

CROSS-REFERENCES

Definitions

Property § 62
Surviving spouse § 78
Will § 88

§ 9501. Property subject to administration

9501. The following property of the decedent is subject to administration under Division 7 (commencing with Section 7000):

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

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

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

Comment. Section 9501 continues the substance of former Section 649.3. Administration of property described in Section 9501 may be avoided under Part 2 (commencing with Section 9600) (collection or transfer of small estates without administration) if the requirements of that part are satisfied. See also Chapter 4 (commencing with Section 6600) of Part 3 of Division 6 (small estate set-aside).

CROSS-REFERENCES

Definitions

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

§ 9502. Election of administration

9502. (a) Upon the election of the surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse, the following property may be administered under Division 7 (commencing with Section 7000):

(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.

(b) The election shall be made by a writing specifically evidencing the election filed in the proceedings for the administration of the estate of the deceased spouse within four months after the issuance of letters testamentary or of administration, or within such further time as the court may allow upon a showing of good cause, and before entry of an order under Section 9567.

Comment. Section 9502 continues the substance of subdivisions (b) and (c) of former Section 649.1.

CROSS-REFERENCES

Definitions

Community property § 28
Personal representative § _____
Quasi-community property § 66
Surviving spouse § 78

§ 9503. Election to transfer property to trustee

9503. (a) The surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse may file an election and agreement to have all or part of the one-half of the community property that belongs to the surviving

spouse under Section 100 and the one-half of the quasi-community property that belongs to the surviving spouse under Section 101 transferred by the surviving spouse or the surviving spouse's personal representative, guardian, or conservator to the trustee under the will of the deceased spouse or the trustee of an existing trust identified by the will of the deceased spouse, to be administered and distributed by the trustee.

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

Comment. Section 9503 continues the substance of subdivision (d) of former Section 649.1.

CROSS-REFERENCES

Definitions

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

§ 9504. Property held in a revocable trust

9504. Notwithstanding the provisions of this part, community property held in a revocable trust described in Section 5113.5 of the Civil Code is governed by the provisions, if any, in the trust for disposition in the event of death.

Comment. Section 9504 continues the substance of former Section 649.5.

CROSS-REFERENCES

Definitions

Community property § 28

§ 9505. Application of this part

9505. (a) This chapter and Chapters 2 (commencing with Section 9520) and 3 (commencing with Section 9540) apply whether the deceased spouse died before, on, or after [the operative date of this code].

(b) Chapter 4 (commencing with Section 9550) applies only to cases where the deceased spouse died on or after [the operative date of this code].

(c) Chapter 5 (commencing with Section 9560) applies only to cases where the deceased spouse died on or after January 1, 1985, and if the deceased spouse died before that date, the case shall be governed by the law made applicable to the case under former Section 658.

Comment. Section 9505 supersedes former Section 658. Subdivision (a) of Section 9505 makes Chapters 1, 2, and 3 applicable whether the deceased spouse died before, on, or after the operative date of this code. See Section ____ (operative date). These chapters are given this application because they continue the substance of prior law. Subdivision (b) makes the new procedure for collecting salary and other compensation, not exceeding \$5,000, by affidavit available only where the deceased spouse died on or after the operative date of this code. Subdivision (c) preserves the effect of former Section 658 for cases where the deceased spouse died before January 1, 1985.

§ 9506. Reference in written instrument to repealed statutory provisions

9506. On and after [the operative date of this code], a reference in a written instrument, including a will or trust, to a provision of former Sections 202 to 206, inclusive, repealed by Chapter 527 of the 1984 Statutes, or former Sections 649.1 to 649.5, inclusive, shall be deemed to be a reference to the comparable provision of this part.

Comment. Section 9506 is drawn from and supersedes former Section 649.6.

CROSS-REFERENCES

Definitions

Trust § 82

Will § 88

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

§ 9520. Right of surviving spouse to dispose of real property

9520. Except as provided in Section 9521, after 40 days from the death of a spouse, the surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse has full power to sell, lease, mortgage, or otherwise deal with and dispose of the community or quasi-community real property, and the right, title, and interest of any grantee,

purchaser, encumbrancer, or lessee shall be as free of rights of devisees or creditors of the deceased spouse to the same extent as if the property had been owned as the separate property of the surviving spouse.

Comment. Section 9520 continues the substance of the first portion and the last sentence of former Section 649.2.

CROSS-REFERENCES

Definitions

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

§ 9521. Recording notice of interest in property

9521. (a) Section 9520 does not apply if, within 40 days from the death of the spouse, a notice that satisfies the requirements of this section is recorded in the county in which the property is situated.

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

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

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

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

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

Comment. Section 9521 continues the substance of a portion of former Section 649.2. Section 9521 makes clear that the notice must be recorded within 40 days from the death of the spouse. This clarification is consistent with language in *Wilson v. Superior Court*, 101 Cal. App.2d 592, 595, 225 P.2d 1002 (1951).

CHAPTER 3. LIABILITY FOR DEBTS OF DECEASED SPOUSE

§ 9540. Personal liability of surviving spouse

9540. (a) Except as provided in this chapter and in Section [951.1], upon the death of a married person, the surviving spouse is

personally liable for the debts of the deceased spouse chargeable against the property described in Section 9541.

(b) The surviving spouse is not liable under this section if all the property described in Section 9541 is administered under Division 7 (commencing with Section 7000).

Comment. Section 9540 continues the substance of subdivisions (a) and (c) of former Section 649.4.

CROSS-REFERENCES

Definitions

Surviving spouse § 78

§ 9541. Limitation on liability

9541. The liability imposed by Section 9540 shall not exceed the fair market value at the date of death, less the amount of any liens and encumbrances, of the total of the following:

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

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

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

Comment. Section 9541 continues the substance of subdivision (b) of former Section 649.4.

CROSS-REFERENCES

Definitions

Community property § 28

Property § 62

Quasi-community property § 66

Surviving spouse § 78

§ 9542. Effect of commencement of proceedings for administration of estate of deceased spouse

9542. If proceedings are commenced in this state for the administration of the estate of the deceased spouse and the time for filing or presenting claims has commenced, any action upon the liability of the surviving spouse pursuant to Section 9540 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:

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

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

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

Comment. Section 9542 continues the substance of subdivision (d) of former Section 649.4.

CROSS-REFERENCES

Definitions

Surviving spouse § 78

§ 9543. Enforcement of liability

9543. (a) Except as otherwise provided in this chapter, any debt described in Section 9540 may be enforced against the surviving spouse in the same manner as it could have been enforced against the deceased spouse if the deceased spouse had not died.

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

Comment. Section 9543 continues the substance of subdivision (e) of former Section 649.4.

CROSS-REFERENCES

Definitions

Surviving spouse § 78

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

§ 9550. Collection of salary or other compensation, not exceeding \$5,000, by affidavit

9550. At any time after the death of a decedent, any employer owing salary or other compensation for personal services of the decedent, including compensation for unused vacation, shall pay to the surviving spouse of the decedent the amount owing, not in excess of five thousand dollars (\$5,000), upon being presented an affidavit made by or on behalf of the surviving spouse stating that the affiant is

the surviving spouse of the decedent, or is authorized to act on behalf of the surviving spouse, and that no proceeding is pending or has been conducted in this state for administration of the decedent's estate. Reasonable proof of the identity of the surviving spouse also shall be provided to the employer, and proof of identity that is sufficient under Section 9633 is sufficient proof of identity for the purposes of this section. If a person is acting for the surviving spouse under this chapter, the employer shall also be provided with proof, satisfactory to the employer, of the authority of the person to act for the surviving spouse. A declaration under penalty of perjury under the laws of the State of California may be used in place of the affidavit required by this section.

Comment. Section 9550 is a new provision designed to provide a clear and simple procedure that permits a surviving spouse immediately to collect not more than \$5,000 of the earnings owed by an employer to the deceased spouse. If the employer does not personally know the surviving spouse, reasonable proof of identity must be provided to the employer. Section 9950 permits the affidavit to be executed by a person acting on behalf of the surviving spouse. This permits the conservator of the estate of the surviving spouse to use this chapter to collect compensation owing to the deceased spouse.

This chapter is drawn from Section 9630-9644 (affidavit procedure for collection or transfer of property of small estate). However, use of the procedure under this chapter applies without regard to the amount of the decedent's estate; use of the procedure is not limited to cases where the estate is a small estate.

CROSS-REFERENCES

Definitions

Surviving spouse § 78

§ 9551. Protection of employer from liability

9551. Receipt by the employer of the affidavit constitutes sufficient acquittance for the compensation paid pursuant to this chapter and discharges the employer from any further liability with respect to the compensation paid. The employer has no duty to see to the application of the money paid or to inquire into the truth of any statement in the affidavit.

Comment. Section 9551 is a new provision that protects the employer who pays to the surviving spouse compensation owing to the deceased spouse. The section is comparable to Section 9635 and is drawn from the first sentence of former Section 631.

§ 9552. Enforcement of payment

9552. If the employer refuses to pay as required by this chapter, the surviving spouse may recover the amount the surviving spouse is entitled to receive under this chapter in an action brought for that purpose against the employer

Comment. Section 9552 is a new provision comparable to subdivision (b) of Section 9634. The section makes clear that the duty imposed by Section 9550 may be enforced by an action against the employer. This remedy is in addition to the remedies against the employer if the estate of the deceased spouse is probated. See also Section 9567 (court order for delivery of property or its proceeds to surviving spouse made in proceeding to determine or confirm property passing or belonging to surviving spouse).

CROSS-REFERENCES

Definitions

Surviving spouse § 78

§ 9553. Rights of heirs or devisees of deceased spouse not affected

9553. Nothing in this chapter limits the rights of the heirs or devisees of the deceased spouse. Any person to whom payment is made under this chapter is answerable and accountable therefor to the personal representative of the decedent's estate and is liable for the amount of the payment to any other person having a superior right to the payment received.

Comment. Section 9553 is a new provision that makes clear that the surviving spouse takes under this chapter subject to the rights of any person having a superior right and has the duty to restore the payment received to the decedent's estate if the estate is probated.

CROSS-REFERENCES

Definitions

Devisees § 34

Heirs § 44

Personal representative § ___

§ 9554. Other methods of collecting compensation not affected.

9554. The procedure provided in this chapter is in addition and not in lieu of any other method of collecting compensation owed to a decedent.

Comment. Section 9554 makes clear that the procedure provided by this chapter is in addition and not in lieu of any other method of collecting unpaid compensation owed to a decedent. See, e.g., Section 160 (payment of money due to decedent to person designated by decedent), 6600-6613 (small estate set-aside), 9560-9571 (court order

determining that property passed to surviving spouse), 9630-9644 (affidavit procedure for collection or transfer of personal property of small estate). See also Gov't Code §§ 12479 (designation by state employee of person to receive warrants upon employee's death), 53245 (designation by public employee of person to receive warrants upon employee's death).

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

§9560. Filing of petition

9560. (a) A surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse may file a petition in the superior court of the county in which the estate of the deceased spouse may be administered requesting an order that administration of all or part of the estate is not necessary for the reason that all or part of the estate is property passing to the surviving spouse. The petition may also request an order confirming the ownership of the surviving spouse of property belonging to the surviving spouse under Section 100 or 101.

(b) To the extent of the election, this section does not apply to property that the petitioner has elected as provided in Section 9502 to have administered under Division 7 (commencing with Section 7000).

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

Comment. Subdivision (a) of Section 9560 continues the substance of the first sentence of subdivision (a) of former Section 650 but subdivision (a) of Section 9560 uses language drawn from subdivision (c) of former Section 655 in place of the language of the first sentence of subdivision (a) of former Section 650 which referred to the allegation in the petition. Subdivision (b) of Section 9560 continues the substance of subdivision (c) of former Section 650. Subdivision (c) of Section 9560 continues the substance of subdivision (d) of former Section 650.

CROSS-REFERENCES

Definitions

Personal representative § ___
Property § 62
Surviving spouse § 78

§ 9561. Contents of petition

9561. (a) The petition shall allege that administration of all or a part of the estate of the deceased spouse is not necessary for the reason that all or a part of the estate is property passing to the surviving spouse and shall set forth the following information:

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

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

(3) A description of the property of the deceased spouse which the petitioner alleges is property passing to the surviving spouse, including the trade or business name of any property passing to the surviving spouse that consists of a business or an interest in a 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 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 property passing to the surviving spouse upon the will of the deceased spouse, a copy of the will shall be attached to the petition.

Comment. Section 9561 continues the substance of subdivisions (a) and (b) of former Section 650, except for the first portion of subdivision (a) of former Section 650 which is continued in substance in Section 9560.

CROSS-REFERENCES

Definitions

Community property § 28

Devisee § 34

Heirs § 44
Personal representative § __
Property § 62
Quasi-community property § 66
Surviving spouse § 78
Will § 88
Verification of petition § ____

§ 9562. Filing petition in pending proceeding

9562. If proceedings for the administration of the estate of the deceased spouse are pending, a petition under this chapter shall be filed in those proceedings without the payment of an additional fee.

Comment. Section 9562 continues the first sentence of former Section 651.

§ 9563. Joining petition with petition for probate proceeding

9563. If proceedings for the administration of the estate of the deceased spouse are not pending, a petition under this chapter may, but need not, be joined with a petition for probate of the will of the deceased spouse or the appointment of a personal representative of the estate of the deceased spouse.

Comment. Section 9563 continues the substance of the second sentence of former Section 651.

CROSS-REFERENCES

Definitions

Personal representative § __
Will § 88

§ 9564. Probate of will or administration not precluded by petition

9564. The filing of a petition under this chapter does not preclude the court from admitting the will of the deceased spouse to probate or appointing a personal representative of the estate of the deceased spouse upon the petition of any person legally entitled, including any petition for probate of the will or for appointment of a personal representative which is joined with a petition filed under this chapter.

Comment. Section 9564 continues the substance of former Section 652.

CROSS-REFERENCES

Definitions

Personal representative § __
Will § 88

§ 9565. Setting petition for hearing

9565. If a petition filed under this chapter is not joined with a petition for the probate of the deceased spouse's will or appointment of a personal representative of the estate of the deceased spouse, the clerk of the court shall set the petition for hearing by the court upon a day not less than 10 nor more than 30 days after the petition is filed.

Comment. Section 9565 continues the substance of the first sentence of former Section 653 with the addition of the requirement that the petition be set for hearing upon a day not less than 10 nor more than 30 days after the petition is filed. This new requirement is drawn from Section 7213 (petition for probate of decedent's will or appointment of a personal representative, or both). See also the Comment to Section 9566.

CROSS-REFERENCES

Definitions

Personal representative § __
Will § 88

§ 9566. Notice of hearing

9566. (a) If a petition filed under this chapter is joined with a petition for probate of the deceased spouse's will or appointment of a personal representative of the estate of the deceased spouse, notice of the hearing on the petition shall be given to the persons and in the manner prescribed in Chapter 2 (commencing with Section 7230) of Part 2 of Division 7 and shall be included in the notice of hearing required by that chapter.

(b) Where proceedings for the administration of the estate of the deceased spouse are not pending when the petition is filed under this chapter and the petition is not joined with a petition for the probate of the deceased spouse's will or appointment of a personal representative of the estate of the deceased spouse, notice of the hearing on the petition shall be given to the persons and in the manner prescribed in Article 2 (commencing with Section 7240) of Chapter 2 of Part 2 of Division 7.

(c) Where proceedings for the administration of the estate of the deceased spouse are pending at the time a petition is filed under this chapter, notice of the hearing on the petition shall be given in the manner prescribed in Section [1200.5].

Comment. Section 9566 supersedes all but the first sentence of former Section 653 and all of Section 654.

Subdivision (a) of Section 9566 continues the substance of former Section 654 with two omissions:

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

(2) The requirement of former Section 654 that notice of the hearing be given at least 20 days prior to the date of the hearing is not continued. By adopting the provisions of Chapter 2 (commencing with Section 7230) of Part 2 of Division 7, subdivision (a) of Section 9566 incorporates the requirement of Section 7240 that notice of hearing be given at least 10 days before the hearing on the petition. See Sections 7240-7243 (service of notice of hearing).

Subdivision (b) of Section 9566 continues the substance of the portion of subdivision (a) of former Section 653 that governed the case where there was no pending proceeding and the petition was not joined with a petition for probate or appointment of a personal representative with the following changes:

(1) Except where the notice of hearing is given to the Attorney General, the requirement of former Section 653 that a copy of the petition be served is not continued. This is the result of adopting the provisions of Article 2 (commencing with Section 7240) of Chapter 2 of Part 2 of Division 7.

(2) The requirement of former Section 653 that notice of hearing be given at least 20 days prior to the hearing is not continued. By adopting the provisions of Article 2 (commencing with Section 7240) of Chapter 2 of Part 2 of Division 7, subdivision (b) of Section 9566 incorporates the requirement of Section 7240 that notice be given at least 10 days before the hearing on the petition. See Sections 7240-7243 (service of notice of hearing).

Subdivision (c) of Section 9566 supersedes the provisions of former Section 653 that prescribed the persons to whom and the manner in which notice of hearing was to be given where a petition under this chapter is filed when proceedings for the administration of the estate of the deceased spouse are pending. Subdivision (c) requires that notice of hearing be given in the manner generally required for petitions filed in a pending proceeding. The requirement of former Section 653 that a copy of the petition also be served is not continued. And by adopting the general provision of Section [1200.5], subdivision (c) limits the persons to whom notice is required to be given to the executor or administrator, when he or she is not the petitioner, to any co-executor or co-administrator not petitioning, and to all persons (or to their attorneys, if they have appeared by attorney), who have requested notice or who have given notice of appearance in the estate proceeding in person or by attorney, as heir, devisee, or creditor, or as otherwise interested. Unlike former Section 653, subdivision (c) does not require that notice be given to heirs or devisees or the Attorney General if those persons have not requested notice or given notice of appearance in the estate proceeding.

DRAFTSMAN'S NOTE. Section 9566 makes several changes in prior law. First, the requirement that a copy of the petition be served with the notice of hearing is not continued. This omission is consistent with

the general scheme of the Probate Code that the person interested is not served a copy of each petition but is advised to check the court file for further information. Second, the notice of hearing is required to be served at least 10 days (rather than at least 20 days) prior to the hearing. This change is the result of adopting the general provisions relating to petitions for probate and other petitions, and these provisions generally require 10 days rather than 20 days. Third, where the petition is filed in a pending proceeding, the same notice of hearing is required as is generally required for petitions filed in the pending proceeding. The assumption of the general provision governing notice of hearing when a petition is filed in a pending proceeding is that interested heirs or devisees will have requested special notice or will have given notice of appearance in the estate proceedings.

CROSS-REFERENCES

Definitions

Devisee § 34

Heirs § 44

Personal representative § ___

Surviving spouse § 78

Will § 88

Verification of petition § ___

§ 9567. Court order

9567. (a) If the court finds that all of the property is property passing to the surviving spouse, the court shall issue an order describing the property, determining that the property is property passing to the surviving spouse, and determining that no administration is necessary. If the court finds that a part of the property is not property passing to the surviving spouse, the court shall issue an order describing any property which is 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. The court may issue any further orders which may be necessary to cause delivery of the property or its proceeds to the surviving spouse.

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

order describing the property and confirming the ownership of the surviving spouse and any further orders which may be necessary to cause ownership of the property to be confirmed in the surviving spouse.

(c) If the court finds that all or a part of the property is not property passing to the surviving spouse, the court shall issue an order describing any property which is not 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 Division 7 (commencing with Section 7000).

(d) No inventory and appraisement of the estate of the deceased spouse shall be required in a proceeding under this chapter, and the court shall not make a determination of the value of the property in the estate of the deceased spouse.

Comment. Subdivisions (a), (b), and (c) of Section 9567 continue the substance of subdivisions (a) and (b) of former Section 655. The order under subdivision (c) of Section 9567 determines that property which is not property passing to the surviving spouse is subject to administration under Division 7. But administration of this property may be avoided under Part 2 (commencing with Section 9600) (collection or transfer of small estates without administration) if the requirements of that part are satisfied. See also Sections 6600-6613 (small estate set-aside).

Subdivision (d) makes clear that the court does not make a finding under Section 9567 as to the value of specific items or parcels of property. The court makes only the determinations required by the section. However, Section 9570 permits the surviving spouse to file an inventory and appraisement, made as set forth in [Chapter 9 (commencing with Section 600)], in a proceeding under this chapter. This will permit the surviving spouse to obtain an independent appraisal made by a probate referee if such an appraisal would be useful to the surviving spouse for the purposes of the adjusted basis for federal capital gains taxes. See also the Comment to Section 9570.

DRAFTSMAN'S NOTE. See the Draftsman's Note to Section 9570.

CROSS-REFERENCES

Definitions

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

§ 9568. Effect of court order

9568. Upon becoming final, an order under Section 9567 (1) determining that property is property passing to the surviving spouse or (2) confirming the ownership of the surviving spouse of property belonging to the surviving spouse under Section 100 or 101 shall be conclusive on all persons, whether or not they are in being.

Comment. Section 9568 continues the substance of subdivision (c) of former Section 655.

DRAFTSMAN'S NOTE. Section 9568 should be compared with Section 6610 (small estate set-aside) set out in the draft statute attached to Memorandum 85-49. Both sections should be reviewed and a consistent provision included in place of the two different sections as now drafted. Section 9655 (found in the draft statute attached to Memorandum 85-48) should also be conformed to the language ultimately adopted for use in Section 9568.

CROSS-REFERENCES

Definitions

- Person § 56
- Property § 62
- Surviving spouse § 78

§ 9569. Protection of interests of creditors of business of deceased spouse

9569. If the court determines that all or a part of the 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, the court shall require the surviving spouse to file a list of all of the known creditors of the business and the amount owing to each of them. The court may issue any order necessary to protect the interests of the creditors of the business, including but not limited to the filing of an undertaking or the filing of an inventory and appraisal in the form set forth in Section [600] and made as set forth in [Chapter 9 (commencing with Section 6000)].

Comment. Section 9569 continues the substance of former Section 656, and adds language (drawn from former Section 657) giving the court specific authority to require the filing of an inventory and appraisal where necessary to protect the creditors of the business.

DRAFTSMAN'S NOTE. Language is added to Section 9569 stating that the court may require the filing of an inventory and appraisal where necessary to protect the interests of creditors of the business.

Broader authority to require an inventory and appraisal was found in former Section 657 but is not continued. See Draftsman's Note to Section 9570.

CROSS-REFERENCES

Definitions

Property § 62

Surviving Spouse § 78

§ 9570. Inventory and appraisal

9570. Within three months after the filing of a petition under this chapter, or within such further time as the court [or judge] for reasonable cause may allow, the petitioner may file with the clerk of the court an inventory and appraisal in the form set forth in Section [600]. The appraisal shall be made as set forth in [Chapter 9 (commencing with Section 600)]. The petitioner may appraise the assets which a personal representative could appraise under Section [605].

Comment. Section 9570 is drawn from the first three sentences of former Section 657. An inventory and appraisal is not required for the purposes of making an order under this chapter. See Section 9567(d). However, Section 9570 permits the petitioner to file an inventory and appraisal in a proceeding under this chapter. This will permit the petitioner to obtain an independent appraisal made by a probate referee if such an appraisal determining fair market value would be useful for the purposes of the adjusted basis for federal capital gains taxes. It should be noted, however, that an appraisal by a probate referee is not required in order to obtain an adjusted basis. See also Section [605(a)(2)(A)] (inventory and appraisal by probate referee not required for interspousal transfer under this chapter).

DRAFTSMAN'S NOTE. Section 9570 continues the substance of the first three sentences of Section 657. The last sentence of Section 657, gives the court, in its discretion where the interests of justice require, the authority to require the filing of an inventory and appraisal. This authority is continued only to the extent provided in Section 9569--where necessary to protect the interests of creditors. There is no need to have an inventory and appraisal merely for the purpose of fixing an attorney's fee computed on the value of the estate. See Section 9571 in this draft.

§ 9571. Attorney's fee

9571. The attorney's fee for services performed in connection with the filing of a petition and obtaining of a court order under this chapter is determined by private agreement between the attorney and the client and is not subject to approval by the court.

Comment. Section 9571 eliminates the court-approval requirement of prior law for the attorney's fee for services performed in connection with the filing of a petition and obtaining a court order under former Sections 950-958. See former Section 910(b). Court approval was not required under former law for other legal work in connection with the estate of the deceased spouse, such as, for example, tax work, joint tenancy termination, collection of insurance proceeds, etc., and those matters were left to private agreement between the attorney and the client. Section 9571 leaves the entire matter of the legal fees to private agreement between the attorney and the client in the case of a petition and order under this chapter, thereby avoiding the need to obtain court approval of a portion only of the legal fees that are likely to be involved in the disposition of the estate of a deceased spouse.

DRAFTSMAN'S NOTE. Section 9571 eliminates the requirement that court approval be obtained for the fee in filing a petition and obtaining a court order under this chapter.

ALTERNATIVE ATTORNEY'S FEE PROVISION§ 9571. Compensation of attorney

9571. (a) For representing the person filing a petition under this chapter, the attorney may charge a reasonable fee subject to approval by the court. The attorney's fee for services other than work directly related to the filing of the petition and obtaining the order under this chapter is not subject to the approval by the court and may be fixed by private agreement between the attorney and the client.

(b) If the request for the fee is not included in the original petition, a joinder in the request for the fee shall be filed by the petitioner.

(c) Subject to subdivisions (d) and (e), to obtain approval of the fee, the attorney shall file a declaration with the court setting forth the type of services performed, the time spent in performing them, the suggested hourly rate, the type of assets involved, and any other relevant factors.

(d) No declaration is required if the requested fee does not exceed four hundred dollars (\$400). If the requested fee does not exceed four hundred dollars (\$400), the requested fee shall be approved by the court without any further showing other than that the requirement of subdivision (b) is satisfied.

(e) Unless the court otherwise requires, the declaration need not describe the services in detail if both of the following requirements are satisfied:

(1) The declaration filed by the attorney sets forth (A) the fair market value of the deceased spouse's property (the separate property of the deceased spouse and the deceased spouse's one-half of the community and quasi-community property) described in the petition and (B) the basis upon which the value was established.

(2) The attorney's fee requested is not more than one-third of the statutory probate fee computed using the value of the deceased spouse's property set forth in the declaration.

(f) For the purposes of subdivision (e), any reasonable means of establishing the value of the property described is sufficient, and an inventory and appraisal by a probate referee is not required to establish the value.

Comment. Section 9571 requires court approval of the fee of the attorney for the services in filing a petition and obtaining an order under this chapter. The section does not authorize the court to fix the fee for other legal services, such as tax work, termination of a joint tenancy, and collection of insurance. The fee for other services of the attorney is a matter for negotiation and agreement between the attorney and client. This continues prior law under subdivision (b) of former Section 910. See also Contra Costa County Probate Policy Manual Section 1002 (effective January 1, 1985); Marin County Rules of Probate Practice Section 1207(c) (effective January 1, 1984); San Francisco Probate Manual Section 303 (revised October 1982); Santa Clara County Probate Rules Section 9.9 (effective June 1, 1984)

The client must agree to the requested fee by setting out the agreed fee in the petition or, if the fee is later requested, by joining in the request for the fee. This requirement is consistent with former practice in some courts. E.g., Los Angeles County Probate Policy Memorandum Section 8.04 (effective November 1982); San Diego County Probate Rules Section 8.3(b) (effective September 8, 1982 with 1983 Revisions).

If the requested fee does not exceed \$400, the court is required to approve the requested fee. This will avoid the need for a declaration in cases where the requested fee does not exceed \$400. Under former practice, some courts did not require detail of the services provided by the attorney if the requested fee did not exceed a specified amount. See, e.g., Alameda County Probate Policy Manual Section 1010 (effective January 1, 1985) (no declaration need be filed

where the fee request does not exceed \$350); San Francisco Probate Manual Section 3.03 (Revised October 1982) (all requests for fees in excess of \$500 must be accompanied by declaration of attorney).

If the requested fee does not exceed one-third of the probate fee computed using the fair market value of the deceased spouse's property described in the petition, the declaration need not describe in detail the services provided by the attorney. This is consistent with the prior practice in some courts. See, e.g., Alameda County Probate Policy Manual Section 1010 (effective January 1, 1985)(need not describe services in detail where requested fee is not more than one-third of the probate fee on the decedent's one-half of the property described in the petition); Marin County Rules of Probate Practice Section 1207(b) (effective January 1, 1984) (fee equal to one-half of the statutory fee for probate of the decedent's one-half share allowed without specification of services of attorney). The value of the property of the deceased spouse may be established by any reasonable method. For example, the value of stock usually can be established by reference to the Wall Street Journal for the day of death. The value of stock not reported in the Wall Street Journal sometimes can be established by a quotation of the value on the date of death provided by a stock broker. Real property can be valued by an independent realtor or other appraisal. An inventory and appraisal by a probate referee is not required, but in some cases the petitioner may determine to provide an inventory and appraisal by a probate referee. If the requested fee is in excess of one-third of the statutory probate fee on the value of the property of the deceased spouse described in the petition, the declaration of the attorney must contain the information required by subdivision (c) to establish to the court the reasonableness of the requested fee.

DRAFTSMAN'S NOTE. Subdivisions (e) and (f) could be omitted in view of the provision that requires the court to approve a fee not exceeding \$400 without any showing other than that approval of the fee was contained in the original petition or that the client joined in the separate petition requesting approval of the fee. If the fee request

is for more than \$400, it may not be an unreasonable requirement to require that the higher fee be justified by a detailed showing of the services rendered. Omission of subdivisions (e) and (f) avoids the need to deal with valuation of the estate merely for the purpose of fixing the attorney's fee where the estate is not going to be probated.

DISPOSITION OF REPEALED PROBATE CODE SECTIONS

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

Comment. Former Section 649.1 is continued in substance by the following provisions of the new Probate Code: Subdivision (a) is continued in Section 9500; subdivisions (b) and (c) are continued in Section 9502; subdivision (d) is continued in Section 9503.

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

Comment. Former Section 649.2 is continued in substance by the following provisions of the new Probate Code: The first sentence is continued in Sections 9520 and 9521, the second and third sentences are continued in Section 9521, and the fourth sentence is continued in Section 9520.

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

Comment. Former Section 649.3 is continued in substance in Section 9501.

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

Comment. Former Section 649.4 is continued in substance by the following provisions of the new Probate Code: Subdivisions (a) and (c) are continued in Section 9540; subdivision (b) is continued in Section 9541; subdivision (d) is continued in Section 9542; subdivision (e) is continued in Section 9543.

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

Comment. Former Section 649.5 is continued in substance in Section 9504.

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

Comment. Former Section 649.6 is continued in substance in Section 9506.

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

Comment. Former Section 650 is continued in substance by the following provisions of the new Probate Code: The first sentence of subdivision (a) is continued in subdivision (a) of Section 6560; the

remainder of subdivision (a) and all of subdivision (b) are continued in Section 9561 except that the requirement of former Section 650 that the petition be verified has been omitted as unnecessary in view of the general requirement of Section ____ that all petitions be verified; subdivision (c) is continued in subdivision (b) of Section 9560; subdivision (d) is continued in subdivision (c) of Section 9560.

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

Comment. The first sentence of former Section 651 is continued in substance in Section 9562. The second sentence is continued in substance in Section 9563, but the word "verified" in former Section 651 has been omitted as unnecessary in view of the general requirement of Section ____ that all petitions be verified.

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

Comment. Former Section 652 is continued in substance in Section 9564.

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

Comment. The first sentence of former Section 653 is continued in substance in Section 9565. The remainder of former Section 653 is superseded by subdivisions (b) and (c) of Section 9566.

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

Comment. Former Section 654 is superseded by subdivision (a) of Section 9566.

Probate Code § 655 (repealed). Court order

Comment. Subdivisions (a) and (b) of former Section 655 are continued in substance in Section 9567. Subdivision (c) is superseded by Section 9568.

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

Comment. Former Section 656 is continued in substance in Section 9569.

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

Comment. The first three sentences of former Section 657 are continued in substance in Section 9570. The last sentence is superseded by subdivision (d) of Section 9567 and the last portion of Section 9569. See also [Section 605(a)(2)(A)] (appraisal not required for interspousal transfers under former Section 650, superseded by Sections 9560-9571).

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

Comment. Former Section 658 is superseded by subdivision (c) of Section 9505.