

0233a
8/27/85

Memorandum 85-74

Subject: Study L-1032 - Probate Code (Small Estate Set-Aside)

Attached is a staff draft of Tentative Recommendation Relating to the Small Estate Set-Aside. This staff draft is presented for Commission approval before it is sent out to interested persons and organizations for review and comment.

The staff draft is a revised draft of material briefly considered at the May 1985 meeting, and incorporates the Commission decision made at that meeting that the small estate set-aside should be discretionary with the court rather than absolute as under existing law. The draft makes other substantive changes in existing law. A "Draftsman's Note" under some of the sections notes matters for your special attention.

We urge you to read the entire Tentative Recommendation with care prior to the meeting even though the preliminary portion of the Tentative Recommendation outlines the more significant changes it would make in existing law.

The staff suggests that the attached material be revised after the meeting to incorporate any revisions made by the Commission at the meeting and then be distributed to local bar associations and other interested persons and organizations for review and comment.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

STATE OF CALIFORNIA
CALIFORNIA LAW
REVISION COMMISSION

STAFF DRAFT
(not approved by Commission)

TENTATIVE RECOMMENDATION

relating to

PROBATE LAW

(SMALL ESTATE SET-ASIDE)

August 1985

Important Note: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines the recommendation it will make to the California Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation. COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN NOVEMBER 15, 1985.

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

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September 10, 1985

LETTER OF TRANSMITTAL

The California Law Revision Commission is now devoting its time and resources almost exclusively to the study of probate law and procedure. The goal is to submit an entire new code to the Legislature for enactment in 1987. The Commission is now sending drafts of portions of the new code to interested persons and organizations for review and comment.

This tentative recommendation sets forth the Commission's tentative conclusions concerning the portion of the new code relating to the small estate set-aside (existing Prob. Code §§ 640-647.5).

The preliminary portion of the tentative recommendation indicates the principal substantive revisions the proposed legislation would make in existing law.

The proposed legislation is drafted as a part of the new code. In some cases, you may find a reference to other portions of the new code that are in rough draft form and not yet available for distribution for review and comment.

A Comment follows each section of the proposed legislation. The Comment gives the source of the section and indicates any changes the section would make in existing law.

Comments showing the disposition of each existing section that would be superseded by the proposed legislation can be found at the end of the tentative recommendation.

0232a

SMALL ESTATE SET-ASIDE

EXISTING LAW

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

The purpose of this small estate set-aside is to make the entire estate available for the support of the surviving spouse or minor children when the breadwinner is taken by death leaving but a small estate. The surviving wife or minor children take the estate free

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

2. Prob. Code §§ 640, 645.

from the rights of those who otherwise would take all or part of it under the decedent's will or by intestate succession.³ In addition, there are some circumstances where a small estate set-aside is a useful summary method for collecting the estate or transferring the record title to estate property.⁴

A petition to have a small estate set aside may be filed without filing a petition for probate of the will or for letters of administration or the petition may be combined with a petition for probate or for letters of administration.⁵ An inventory and appraisal by a probate referee is required.⁶ If the court finds

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

4. Ordinarily, in order to avoid the need for a court proceeding, the affidavit procedure under Prob. Code § 630 will be used to collect personal property of a decedent or to have the registrar transfer the record title. But the small estate set aside procedure under Prob. Code §§ 640-647 must be used instead of the Prob. Code § 630 procedure where (1) the small estate includes an interest in California real property having a gross value of more than \$10,000, (2) the widow or minor child does not have the right (under the will or the laws of intestate succession) to inherit the property, or (3) the property set aside has a gross value of more than \$60,000, but the net value (over and above liens, encumbrances, and the value of the probate homestead) does not exceed \$20,000. See O. McCarroll, 1 California Decedent Estate Administration Supplement § 3.24, at 85 (Cal. Cont. Ed. Bar 1985). A surviving spouse will ordinarily use the procedure under Prob. Code §§ 650-658 instead of a small estate set-aside if the surviving spouse takes the property by will or intestate succession because the procedure under Prob. Code §§ 650-658 can be used without regard to the size of the deceased spouse's estate. But the liability of the surviving spouse for the unsecured debts of the deceased spouse may be greater if the procedure under Prob. Code §§ 650-658 is used. Compare Prob. Code § 649.4 with Prob. Code § 645.3.

5. Prob. Code § 641.

6. Prob. Code § 644. Use of a probate referee is not required if
(Footnote continued to page 3)

that the statutory requirements concerning the size of the estate are satisfied and that the expenses of the last illness, funeral charges, and expenses of administration have been paid, the court must make an order setting aside the entire estate to the surviving spouse if unremarried or, if there is not an unremarried surviving spouse, to such child or children of the decedent as may then be minors.⁷

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

NEW CODE

The new code makes important substantive changes in the existing law summarized above. The more significant changes are described below.¹⁰

(Footnote continued from page 2)

the estate consists entirely of property which the personal representative can appraise under Prob. Code § 605.

7. Prob. Code § 645.

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

9. Prob. Code § 645.3.

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

(Footnote continued to page 4)

Small estate set-aside discretionary with court. Under existing law, the court has no discretion and is required to set aside the small estate to the unmarried surviving spouse or minor child or children if the court finds that the net value of the decedent's estate is such that it is a small estate within the statute and that the expenses of the last illness, funeral charges, and expenses of administration have been paid.¹¹

The new code gives the court discretion whether to set aside a small estate and requires the court in exercising its discretion to consider the same factors as the court is required to consider in determining whether to set apart a probate homestead.¹² The small estate set-aside may give to the surviving spouse or minor children property that otherwise would go to another under the decedent's will or by intestate succession. Giving the court discretion to determine whether to set aside the small estate provides the flexibility needed to treat fairly the decedent's dependents and those who otherwise

(Footnote continued from page 3)

Minor changes not discussed in the text are indicated in the Comments to the sections of the new code.

11. Prob. Code § 645.

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

would take the property¹³ and is consistent with the discretionary nature of the other family protection provisions.¹⁴

Property included in "decendent's estate." Under existing law, the small estate set-aside is available only if the "net value of the whole estate" (over and above all liens and encumbrances and the value of any probate homestead) does not exceed \$20,000.¹⁵ The meaning of the phrase "the whole estate" is unclear.¹⁶ The new code replaces the phrase "the whole estate" with a definition that the decedent's estate means all the decedent's personal property, wherever located, and all of the decedent's real property in California. This new definition will eliminate uncertainty whether an estate qualifies for a small estate set aside. It will not, however, preclude the court from taking into account the decedent's real property located in another state in determining whether to order a small estate

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13. For example, the decedent may have made adequate provision for the surviving spouse and minor children by inter vivos transfers, by holding property in joint tenancy with members of the family, or by making members of the family beneficiaries of other interests that terminate at death, such as life interests in trusts, retirement, and insurance, and remainder interests upon termination of the decedent's life estate in property. The family members also may succeed to real property located in another state. Where the decedent has made adequate provision for the family members, it may be unjust and unnecessary under the circumstances to deprive the person who would take part or all of the small estate of that right by requiring the court to set aside the small estate. Giving the court discretion to determine whether or not to make a small estate set-aside permits the court to achieve substantial justice in these cases.
 14. See Prob. Code §§ 6510 (setting aside exempt property other than family dwelling), 6523 (setting apart probate homestead), 6540 (family allowance).
 15. Prob. Code § 640. See also Prob. Code § 647.
 16. See Broll, Summary Administration, in 1 California Decedent Estate Administration § 3.24, at 129 (Cal. Cont. Ed. Bar 1971).

set-aside.¹⁷

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

Existing law does not permit the estate to be assigned to the minor child or children if there is an unmarried surviving spouse.¹⁸ Under the new code, the court may assign the estate to the minor child or minor children of the decedent even where there is a surviving spouse. This may be desirable, for example, if the minor children live apart from the surviving spouse or where the minor children are not children of the surviving spouse. This change makes the small estate set-aside consistent with other family protection provisions.¹⁹

Under existing law,²⁰ the court can assign the estate only to a "surviving spouse who has not theretofore remarried." Under the new code, the assignment may be made to the surviving spouse even if the surviving spouse has remarried. Permitting the estate to be set aside to a surviving spouse, whether or not remarried, gives the court flexibility to make an order that is appropriate under the circumstances of the particular case. It also makes the small estate

17. Under the new code, the court has discretion whether to order a small estate set-aside and can consider all relevant factors, including the disposition of the decedent's real property located in another state, in determining whether to order the small estate set-aside. See supra text accompanying notes 11-14.

18. Prob. Code § 645.

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

20. Prob. Code § 645.

set-aside consistent with other family protection provisions.²¹

Under the new code, the determination whether a child is a minor is made at the time of the death of the decedent. Under existing law, if the other statutory requirements are satisfied, the court can order that the estate be set aside "to such child or children of the decedent as may then be minors."²² The apparent result of this provision is that a child who is a minor at the time of the decedent's death is deprived of the right to a small estate set-aside unless the order is made while the child is still a minor.

Application of new code to pending petitions. The new code converts the existing absolute right to a small estate set-aside into a discretionary power of the court and permits the court to order a small estate set-aside for one or more of the minor children even where there is a surviving spouse. Because of these important substantive changes, the new code will not apply to a case where a petition was filed before the operative date of the new code requesting an order for a small estate set-aside. That petition will continue to be governed by the existing law. However, if a petition is not filed before the operative date of the new code, whether or not a small estate set-aside will be ordered will be determined under the new code, whether the decedent died before or after the operative date of the new code.

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

22. Prob. Code § 645.

PART 3. FAMILY PROTECTION

CHAPTER 4. SMALL ESTATE SET-ASIDE

- § 6600. "Decedent's estate" defined; exclusions in determining estate of the decedent or its value
- § 6601. "Minor child" defined
- § 6602. Petition to set aside small estate
- § 6603. Venue
- § 6604. Contents of petition
- § 6605. Filing petition with no probate proceeding
- § 6606. Filing petition in connection with probate proceeding
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- § 6608. Inventory and appraisement
- § 6609. Court order
- § 6610. Effect of court order
- § 6611. Liability for unsecured debts of decedent
- § 6612. Order where estate not set aside
- § 6613. Attorney's fee
- § 6614. Applicability of chapter

PART 3. FAMILY PROTECTION

CHAPTER 6. SMALL ESTATE SET-ASIDE

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

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

(b) For the purposes of this chapter:

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

(2) A multiple-party account to which the decedent was a party at the time of the decedent's death shall be excluded in determining the estate of the decedent or its value, whether or not all or a portion of the sums on deposit are community property, to the extent that the sums on deposit belong after the death of the decedent to a surviving party, P.O.D. payee, or beneficiary. As used in this paragraph, the terms "multiple-party account," "party," "P.O.D. payee," and "beneficiary" have the meaning given those terms by Section 5101.

Comment. Subdivision (a) of Section 6600 is a new provision that replaces the phrase "the whole estate" used in former Section 640. The meaning of "the whole estate" used in former Section 640 was unclear. See Broll, Summary Administration, in 1 California Decedent Estate Administration § 3.24, at 129 (Cal. Cont. Ed. Bar 1971). Apparently real property outside California was not included under former law, since former Section 644 required "an inventory and appraisal to be prepared in the manner prescribed by law and filed within such time as the court may allow" and an inventory and appraisal does not include real property located outside California. It should be noted that the decedent's one-half share of the community and quasi-community property is included in determining the value of the decedent's estate unless that interest is excluded in determining the estate of the decedent under subdivision (b). Estate of Pezzola, 112 Cal.App.3d 752, 169 Cal.Rptr. 464 (1980).

Subdivision (b) of Section 6600 continues former Section 647 without substantive change. Subdivision (b) excludes property the decedent held as a joint tenant in determining the value of the decedent's estate. It also excludes other interests that terminate at death, such as life interests in trusts, retirement, and insurance and life estates. See Estate of Pezzola, 112 Cal. App.3d 752, 169 Cal.Rptr. 464 (1980); O. McCarroll, 1 California Decedent Estate Administration Supplement § 3.24, at 84 (Cal. Cont. Ed. Bar 1985).

CROSS-REFERENCES

Definitions

Community property § 28
Personal property § 58
Property § 62
Real property § 68

§ 6601. "Minor child" defined

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

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

CROSS-REFERENCES

Definitions

Child § 26

§ 6602. Petition to set aside small estate

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

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

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

CROSS-REFERENCES

Definitions

Decedent's estate § 6600
Minor child § 6601
Probate homestead § 61
Surviving spouse § 78

§ 6603. Venue

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

Comment. Section 6603 is a new provision that specifies the county in which the petition is to be filed. The section is consistent with a provision of Section 9650 (determination or confirmation of property passing or belonging to surviving spouse).

§ 6604. Contents of petition

6604. (a) The petition shall allege that this chapter applies and request that an order be made setting aside the estate of the decedent to the surviving spouse and minor children of the decedent, or one or more of them, as provided in this chapter.

(b) The petition shall include the following:

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

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

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

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

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

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

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

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

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

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

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

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

Paragraph (7) of subdivision (b) is a new provision that is consistent with the requirement of former Section 645 which required, as one of the findings before a small estate could be set aside, that the court find "that the expenses of the last illness, funeral charges and expenses of administration have been paid." The requirement that the court make this finding is continued in Section 6609(a)(2).

CROSS-REFERENCES

Definitions

Decedent's estate § 6600
Devisee § 34
Heirs § 44

Minor child § 6601
Probate homestead § 61
Property § 62
Real property § 68
Surviving spouse § 78
Will § 88
Verification of petition § _____

DRAFTSMAN'S NOTE. Does the Commission wish to require the information listed in paragraphs (4) and (5) of subdivision (b) of Section 6604 to be included in the petition? Or are those matters to be raised by a person objecting to the granting of the petition? The court has discretion to set apart a probate homestead and is required to consider the same factors in setting aside a probate homestead as are considered under this chapter. However, there is no requirement in the case of a petition requesting that a probate homestead be set aside that the petition contain the information listed in paragraphs (4) and (5) of subdivision (b) of Section 6604. Yet the information required by those paragraphs is the information that is required by Section 6609(b) to be taken into consideration by the court in determining whether to set aside the small estate under this chapter.

§ 6605. Filing petition with no probate proceeding

6605. (a) A petition may be filed under this chapter without filing a petition for probate of the will or for appointment of a personal representative.

(b) A petition filed under this section may be filed by any of the following:

- (1) The person named in the will of the decedent as executor.
- (2) The surviving spouse of the decedent.
- (3) The guardian of a minor child of the decedent.
- (4) A child of the decedent who was a minor at the time the decedent died.

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

Comment. Section 6605 continues the substance of a portion of former Section 641 with two additions:

(1) Paragraph (4) of subdivision (b) is added. This added paragraph recognizes that a petition may be filed by a child of the

decedent who was a minor at the time the decedent died. See Section 6601 (defining "minor child").

(2) Subdivision (c) is added. This new provision is consistent with Section 9550 (collection of small estate without administration).

CROSS-REFERENCES

Definitions

Child § 26

Minor child § 6601

Personal representative § 60

Surviving spouse § 78

Will § 88

§ 6606. Filing petition in connection with probate proceeding

6606. (a) A petition filed under this chapter may be joined with a petition for the probate of the decedent's will or for appointment of a personal representative of the decedent's estate.

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

(c) A petition may be filed under this section at any time before the hearing on the petition for probate of the will or for appointment of a personal representative or after the filing of the inventory and appraisal.

(d) The petition filed under this section may be filed by any of the following:

- (1) The person named in the will of the decedent as executor.
- (2) The personal representative of the decedent.
- (3) The surviving spouse of the decedent.
- (4) The guardian of a minor child of the decedent.

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

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

Comment. Section 6606 continues the substance of a portion of former Section 641 with the addition of new provisions.

Language is added to subdivision (b) to provide that a petition under this chapter may be filed in a pending probate proceeding "without the payment of an additional fee." The added language is

drawn from Section 9652 (determination or confirmation of property passing or belonging to surviving spouse).

Paragraph (5) of subdivision (d) and subdivision (e) are new. These provisions recognize that the court is authorized to set aside a small estate to a child who is a minor at the time of the decedent's death (as distinguished from a requirement that the child be a minor at the time the petition is filed or the time the court order under this chapter is made or some other time). See Section 6609(c). See also Section 6601 (defining "minor child").

CROSS REFERENCES

Definitions

Child § 26

Decedent's estate § 6600

Minor child § 6601

Personal representative § 60

Surviving spouse § 78

Will § 88

DRAFTSMAN'S NOTE. Should the requirement as to the time of filing the petition (set out in subdivision (c) of Section 6606) be retained? See Section 6608 (filing of inventory and appraisement),

§ 6607. Notice of hearing

6607. (a) Where proceedings for the administration of the estate of the decedent are not pending when the petition is filed under this chapter and the petition is not joined with a petition for the probate of the decedent's will or appointment of a personal representative of the estate of the decedent, there shall be no notice of any type other than as prescribed in this subdivision. In cases covered by this subdivision, the petitioner shall give notice of the hearing by mail not less than 10 days before the hearing to each heir and devisee of the decedent, and to each person named as executor who is not petitioning, if known to the petitioner.

(b) If the petition under this chapter is joined with a petition for the probate of the decedent's will or for appointment of a personal representative of the estate of the decedent, notice of the hearing on the petition under this chapter 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.

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

Comment. Subdivision (a) of Section 6607 continues the substance of subdivision (a) of former Section 643 but specifies the persons to whom the notice of hearing is to be mailed in place of the reference to former Section 1200.5 contained in former Section 643.

Subdivision (b) supersedes former Section 642. Subdivision (b) of Section 6607 is comparable to subdivision (a) of Section 9655 (determination or confirmation of property passing or belonging to surviving spouse).

Subdivision (c) continues subdivision (b) of former Section 643 without substantive change.

CROSS-REFERENCES

Clerk to set petition for hearing § ____

Definitions

Devisee § 34

Heirs § 44

Personal representative § 60

Will § 88

DRAFTSMAN'S NOTE. The notice provision under subdivision (a) will need to be reviewed when the general provisions relating to giving of notice are drafted.

§ 6608. Inventory and appraisalment

6608. If a petition is filed under this chapter, the personal representative, or the petitioner if no personal representative has been appointed, shall file with the clerk of the court, prior to the hearing of the petition, an inventory and appraisalment in the form set forth in Section [600]. The appraisalment shall be made as set forth in [Chapter 9 (commencing with Section 600)]. The personal representative or the petitioner, as the case may be, may appraise the assets which a personal representative could appraise under Section [605].

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

CROSS-REFERENCES

Definitions

Personal representative § 60

DRAFTSMAN'S NOTE. The Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association in a letter dated May 7, 1985, comments concerning this provision: "We believe that the court should have the discretion to dispense with the filing of an inventory and appraisalment where the petitioner's declaration clearly establishes that the estate is under \$20,000.

§ 6609. Court order

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

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

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

(b) The court has discretion whether to make an order under this section. In determining whether to make an order under this section, the court shall consider the needs of the surviving spouse and minor children, the liens and encumbrances on the property of the decedent's estate, the claims of creditors, the needs of the heirs or devisees of the decedent, the intent of the decedent with respect to the property in the estate and the estate plan of the decedent as expressed in inter vivos and testamentary transfers or by other means, and any other relevant considerations.

(c) If the court in its discretion determines to make an order under this section, the court shall assign the whole of the decedent's estate, subject to all liens and encumbrances on the estate at the date of the decedent's death, to one or more of the following persons:

(1) The surviving spouse of the decedent.

(2) The minor children of the decedent.

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

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

Under Section 6609, the court has discretion whether to set aside a small estate. Under former Section 645, the court had no discretion; the court was required to set aside the small estate if the court made the findings required by the portion of former Section 645 that is continued in subdivision (a) of Section 6609. Subdivision (b) of Section 6609, which specifies matters to be considered in determining whether to make an order under the section, is a new provision drawn from subdivision (a) of Section 6523 which specifies matters to be considered in selecting and setting apart a probate homestead.

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

Under Section 6609, the court may assign the estate to a surviving spouse even if the surviving spouse has remarried. Under former Section 645, the small estate could be set aside only to a "surviving spouse who has not theretofore remarried." Permitting the small estate to be set aside to a surviving spouse, whether or not remarried, makes Section 6609 consistent with Section 6510 (setting aside exempt property other than family dwelling) and Section 6521 (setting apart probate homestead).

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

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

CROSS-REFERENCES

Definitions

Decedent's estate § 6600
Devisee § 34
Heirs § 44
Minor child § 6601
Probate homestead § 61
Property § 62
Surviving spouse § 78

DRAFTSMAN'S NOTE. Section 6609 makes significant changes in existing law. The changes are noted in the Comment to the section.

§ 6610. Effect of court order

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

Comment. Section 6610 supersedes former Section 645.1. Section 6610 gives the order the same effect as an order under Section 9657 (effect of order determining or confirming property passing or belonging to surviving spouse).

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

DRAFTSMAN'S NOTE. At its May 1985 meeting, the Commission determined that Section 6610 should be revised to conform to proposed new Section 9657 (effect of order determining or confirming property passing or belonging to surviving spouse). The Commission also determined that the Comment to Section 6610 should note that the omission of the

reference to fraud or the assumed deceased appearing is omitted as unnecessary and is not a substantive change.

If the order is to be given a conclusive effect should the notice of hearing provision (Section 6607) be made the same in substance as Section 9655 (notice of hearing on petition by surviving spouse)? Making this change in the manner of giving notice would increase the cost of the proceeding in the case of a petition for a small estate set-aside. This is because if there is no pending proceeding and the petition is not joined with a petition for the probate of the decedent's will or for appointment of a personal representative, notice of the hearing on the petition for an order setting aside a small estate may be given by mail under Section 6607 (personal service is not required).

§ 6611. Liability for unsecured debts of decedent

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

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

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

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

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

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

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

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

CROSS-REFERENCES

Definitions

Child § 26

Minor child § 6601

Probate homestead § 61

Property § 62

Surviving spouse § 78

DRAFTSMAN'S NOTE. The language of existing Section 645.3 is modified to make clear the answer to the following question: If the estate is awarded, for example, in equal shares to three children, is each child personally liable to the extent of the value of the estate, or only to the extent of one-third of the value of the estate (the share he or she received)?

§ 6612. Order where estate not set aside

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

Comment. Section 6612 is drawn from former Section 646 but the language of the former section has been revised to recognize that the court has discretion to deny a petition filed under this chapter. Under Section 6609, the court is required to deny a petition filed under this chapter if the decedent's estate is not a small estate (see Sections 6600 and 6609), if the expenses of the last illness, funeral charges, and expenses of administration have not been paid, or if there is neither a surviving spouse or minor child. The court also has discretion to deny the petition.

CROSS-REFERENCES

Definitions

Personal representative § 60
Will § 88

§ 6613. Attorney's fee

6613. The attorney's fee for services performed in connection with the filing of a petition and the obtaining of a court order under this chapter shall be determined by private agreement between the attorney and the client and is not subject to approval by the court.

Comment. Section 6613 is the same as Section 9660 (petition for determination or confirmation of property passing or belonging to surviving spouse). Section 6613 continues former law and practice.

§ 6614. Applicability of chapter

6614. (a) This chapter applies only if both of the following requirements are satisfied:

(1) A petition is filed under this chapter on or after [the operative date of this code].

(2) No petition was filed with respect to the estate of the decedent under former Sections 640 to 647.5, inclusive, before [the operative date of this code].

(b) In case a petition was filed under former Sections 640 to 647.5, inclusive, before [the operative date of this code], the case shall be governed by the law applicable to the petition prior to [the operative date of this code].

Comment. Section 6614 supersedes former Section 647.5 and preserves the effect of that section for cases where a petition was filed under former Sections 640 to 647.5, inclusive, prior to the operative date of this code. See Section ____ (operative date).

DRAFTSMAN'S NOTE. The significant change this chapter makes in existing law is that it converts the absolute right under existing law to have a small estate set aside into a discretionary power of the court to set aside the small estate. This chapter also (1) permits the estate to be set aside to the minor children even where there is a surviving spouse and (2) permits the estate to be set aside to a surviving spouse even if the surviving spouse has remarried. Under existing law, the estate must be set aside to the surviving spouse,

even where there are minor children, but may not be set aside to the surviving spouse if the surviving spouse has remarried.

Do we want to make this chapter apply to cases where the decedent died before the operative date of the chapter? Do we want to make this chapter apply where a petition for a small estate set-aside was filed before the operative date of this chapter but not determined before the operative date of this chapter? Do we want this chapter to apply where the decedent died before the operative date of this chapter but no petition or probate proceeding has been filed or commenced prior to the operative date of this chapter? To the extent that we continue to apply prior law after the operative date of the new code we impose a significant burden on the courts and lawyers because they will have to search out the old law for a number of years after the operative date of the new code. However, in view of the conversion of the absolute right into a discretionary one, the staff recommends that the new chapter not apply to pending petitions.

DISPOSITION OF REPEALED PROBATE CODE SECTIONS

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

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

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

Comment. The portion of former Section 641 relating to the allegations and contents of the petition is continued in substance in Section 6604. The portion relating to the filing of a petition without filing a petition for probate of the will or for letters is continued in substance in Section 6605 with two additions. See the Comment to Section 6605. The portion relating to including the petition alternatively in a petition for probate of the will or for letters or filing the petition in a pending probate proceeding is continued in substance in Section 6606 with additions. See the Comment to Section 6606. The provision requiring verification of the petition is omitted as unnecessary in view of the general requirement of Section _____ that all petitions be verified.

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

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

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

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

Probate Code § 644 (repealed). Inventory and appraisalment

Comment. Former Section 644 is superseded by Section 6608.

Probate Code § 645 (repealed). Court order

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

Probate Code § 645.1 (repealed). Effect of order

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

Probate Code § 645.3 (repealed). Liability for debts

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

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

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

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

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

Probate Code § 647.5 (repealed). Application of article

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