

## Memorandum 82-41

Subject: Study L-604 - Probate Law (Family Maintenance)

At the last meeting, the Commission decided to include family maintenance provisions in the recommended probate legislation, pursuant to which the probate court could make an order for long-term support out of the estate in favor of the decedent's surviving spouse and minor or dependent children. The Commission directed the staff to draft a proposed statute for Commission consideration. The draft statute is attached to this Memorandum as Exhibit 1, together with a narrative explanation of the proposal to be included in the printed recommendation.

The Commission directed the staff to consider the following problems in drafting the proposed statute:

(1) Whether persons other than the surviving spouse and children should be authorized to apply for a support award--for example, the decedent's dependent parents.

(2) Whether lump-sum awards should be encouraged to avoid the need to hold the estate open for many years.

(3) Whether the statute should have a recapture provision to prevent the decedent from defeating the family allowance by making sizable inter vivos gifts to others.

(4) Whether the right to family maintenance should be subject to waiver by agreement between the spouses.

(5) Whether the pretermission statute is unnecessary in view of the proposed support provisions for children of the testator.

Each of these issues is discussed below.

#### Who Should Be Entitled to Support?

Since the support provisions of the family maintenance statute will often make a shambles of the testator's estate plan, the staff is of the view that support should be limited to those whom the decedent had a legal obligation to support immediately before death. Such persons may include the decedent's parent if the parent is "in need" and is "unable to maintain himself by work." Civil Code § 206; 6 B. Witkin, Summary of California Law Parent and Child § 143, at 4658 (8th ed. 1974).

By limiting the draft statute to persons whom the decedent was legally obligated to support immediately before death, the statute will

put a spouse or child where the marriage is intact and who is therefore not protected by an existing support order on the same footing with the spouse or child in whose favor a support order has been made during the decedent's lifetime. It seems to the staff that a very strong case can be made for family maintenance legislation if it is so limited.

#### Lump-Sum Awards

A long-term support order out of the estate has the disadvantage of requiring that the estate be held open for many years with the attendant expense of administration and delay of ultimate distribution. See Laufer, Flexible Restraints on Testamentary Freedom--A Report on Decedents' Family Maintenance Legislation, 69 Harv. L. Rev. 277, 292 (1955); cf. Kress v. Kress, 219 Cal. App.2d 173, 175, 33 Cal. Rptr. 77 (1963). On the other hand, courts are reluctant to make a lump-sum award payable directly to the supported person because the court retains no control over the award and the money may be carelessly dissipated. Laufer, supra at 293.

The draft statute provides that the court's support order "may not be made on any terms which may unduly delay the closing of the estate." The court is otherwise given broad flexibility to fashion an appropriate order, including using the provisions of existing California law for setting aside a fund to be paid into court or to a trustee appointed by the court from which periodic payments may be made for the supported person. See Prob. Code §§ 953, 953.1. The court retains broad equitable power over the fund. See Code Civ. Proc. § 572; Jones v. Roberts, 163 Cal. App.2d 89, 94, 329 P.2d 50 (1958). If funds remain when all payments have been made, the funds are paid out in accordance with the decree of distribution. Prob. Code § 953.1; Jones v. Roberts, supra at 93. Alternatively, the draft statute gives the court authority to direct the decedent's personal representative to purchase an annuity for the supported person. These provisions should give the court sufficient flexibility without delaying the closing of the estate.

#### Recapture

The staff has concluded that there ought not to be a recapture provision in the family maintenance statute. The surviving spouse is already protected by the recapture provisions for community and quasi-community property. To do more would interfere with the decedent's right to deal with separate property and the decedent's half of community

and quasi-community property during lifetime, would introduce complexity into the family maintenance scheme, and would be highly controversial.

Waiver of Family Maintenance by Inter-Spousal Agreement

Both under California decisional law and under UPC Section 2-204 (previously approved by the Commission), the spouses may by written agreement (whether made before or during marriage or in connection with dissolution of marriage) waive all post-death rights in the estate of the other, including the right to take by will or intestate succession, the right to claim community property rights or elective share, the right to claim temporary support under the family allowance provisions, and the right to have a probate homestead and exempt property set aside. Also, in California the right to have a small estate summarily set aside to the surviving spouse may be waived.

In view of the fact that both under California law and the UPC the parties' freedom of contract takes priority over the right to support, the staff recommends that family maintenance be waivable by agreement also. If the Commission approves this recommendation, the staff will add a reference to family maintenance in the approved section (UPC § 2-204).

Pretermission

Pretermission is discussed in Memorandum 82-64 which is on the agenda for this meeting. The staff concludes in that Memorandum that, although the need for a pretermission statute is greatly reduced by family maintenance legislation, on balance the pretermission statute should be retained.

Respectfully submitted,

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## EXHIBIT 1

Family Maintenance

During lifetime, a parent has a duty to support his or her minor children,<sup>1</sup> and a married person has a duty to support his or her spouse.<sup>2</sup> The duty of support survives the death of the parent or married person only in the case of a failed marriage where there has been an agreement or court order for support. A child support obligation survives the parent's death only if support has been fixed by a divorce decree or property settlement agreement.<sup>3</sup> Spousal support survives only if it is expressly made survivable in a property settlement agreement.<sup>4</sup> A support order which survives the death of the obligor may be enforced by a court order that the obligor's personal representative pay into court<sup>5</sup> or to a trustee<sup>6</sup> a lump sum sufficient to pay future installments as they become due.

However, in the usual case where there is no agreement or court order for support, both the child and spousal support obligations terminate at the death of the obligor.<sup>7</sup> There is no sound policy reason why a child or spouse of the decedent should be able to enforce a post-death obligation of support where the marriage has failed, but not be able to obtain such support where the marriage is intact. Although there are

1. See Civil Code §§ 196, 196a; 6 B. Witkin, Summary of California Law Parent and Child § 120, at 230 (Supp. 1982).
2. See Civil Code §§ 242, 5100, 5132; 6 B. Witkin, Summary of California Law Husband and Wife §§ 9, 11, at 4879-82 (8th ed. 1974).
3. 6 B. Witkin, Summary of California Law Parent and Child § 129, at 4646-47 (8th ed. 1974).
4. 6 B. Witkin, Summary of California Law Husband and Wife § 204, at 5075 (8th ed. 1974).
5. Prob. Code § 953 (payment into court of money to cover contingent claims against the estate or claims not yet due); Code Civ. Proc. §§ 572-574 (procedure for payment into court); *Newman v. Burwell*, 216 Cal. 608, 615, 15 P.2d 511 (1932); *Newhall v. Newhall*, 227 Cal. App.2d 800, 810 n.7, 39 Cal. Rptr. 144 (1964).
6. Prob. Code § 953.1; *Newhall v. Newhall*, 227 Cal. App.2d 800, 810 n.7, 817, 819, 39 Cal. Rptr. 144 (1964).
7. 6 B. Witkin, Summary of California Law Parent and Child § 129, at 4647 (8th ed. 1974) (child support); *id.* Husband and Wife §§ 181, 204, at 5050, 5075 (spousal support).

other provisions in the Probate Code to protect the child or spouse of the decedent (probate homestead, family allowance, exempt property, and small estate set-aside),<sup>8</sup> these provisions are limited either in duration or amount.<sup>9</sup> In the case of the intact marriage, the existing provisions may not meet the need for long-term family support after the death of the spouse or parent.

The recommended legislation gives the decedent's spouse and minor children a right to petition the court for a long-term award of support out of the probate estate where there is no existing order or agreement for support, comparable to the right the spouse and children now have where there is an enforceable order or agreement for support after the death of the support obligor. Where there is an order or agreement for support, this order is enforceable after the death of the obligor-spouse except where the order or agreement provides that support is to terminate on death.<sup>10</sup> The post-death right of support extends to any other person whom the decedent was legally obligated to support immediately before his or her death (regardless of whether the obligation was established by order or agreement). This might include, for example, an adult child or parent of the decedent who was physically incapacitated or mentally incompetent.<sup>11</sup>

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8. Prob. Code §§ 640-647, 660-684.

9. The probate homestead provides a dwelling but not support. The decedent's family may obtain cash out of the estate to use for support under the provisions for exempt property, small estate set-aside, and family allowance. However, the small estate set-aside provisions are limited to estates of \$20,000 or less. Prob. Code § 640. The exempt property provisions may protect some life insurance proceeds and funds on deposit in a savings and loan association or credit union (Code Civ. Proc. §§ 690.7, 690.9; Fin. Code § 14864), but are not adequate for long-term support needs. The family allowance provisions are for support of the family, but a family allowance must terminate upon the closing of the estate. See Prob. Code § 680; Pigott, Family Allowance, in 1 California Decedent Estate Administration § 11.28, at 410 (Cal. Cont. Ed. Bar 1971).

10. This would change existing law pursuant to which a court order in spousal support terminates at the death of the obligor-spouse, and support based on an agreement terminates at death unless the agreement expressly provides that the support obligation survives death. See 6 B. Witkin, Summary of California Law Husband and Wife § 204, at 5075 (8th ed. 1974).

11. See Civil Code § 206; 6 B. Witkin, Summary of California Law Parent and Child §§ 141-143, at 4657-59 (8th ed. 1974).

The recommended legislation provides that in determining whether to make an order for support and what amount should be awarded, the court shall consider all of the following:

(1) The decedent's reasons for making the dispositions in the will or for not providing for the person seeking the support order.

(2) The needs of the persons who would otherwise take the decedent's estate (whether by will or intestate succession) whose interests would be adversely affected by the support order.

(3) The needs of the person seeking the support order, taking into account the property passing to the person from the decedent's estate, insurance, death benefits, joint tenancy, nonprobate transfer, or inter vivos gift, and other property and income that the person has or is likely to receive in the future.

(4) Whether the character or conduct of the person is or has been such as in the opinion of the court disentitles the person to support.

(5) In the case of a surviving spouse or former spouse of the decedent, all the factors the court must consider in connection with an order for spousal support under the Family Law Act, including the spouse's earning capacity, the duration of the marriage, the time required for the spouse to obtain education, training, and employment, and the age, health, and standard of living of the spouse.<sup>12</sup>

The recommended legislation provides that no order may be made in favor of a child of the decedent if the other parent of the child is entitled under the decedent's will or the law of intestate succession to substantially all of the estate. According to empirical evidence, the surviving parent in such a case will make adequate provision for the support of the child,<sup>13</sup> and the obligation of the surviving parent to support the child could be enforced by judicial proceedings if necessary.

The recommended legislation provides that the order may not be made on any terms which may unduly delay the closing of the estate. Ordinarily, the order will require that a lump-sum amount be paid into court or to a trustee or be used to purchase an annuity for the supported person. In the case of a minor or incompetent person, the order may provide that the award be paid to a guardian or conservator to be used for the person's benefit.

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12. See Civil Code § 4801.

13. See, e.g., Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. B. Foundation Research J. 319, 355.

CHAPTER 5. FAMILY MAINTENANCE

§ 253.010. "Person the decedent is legally obligated to support" defined

253.010. As used in this chapter, "person the decedent is legally obligated to support" means:

(a) The surviving spouse of the decedent.

(b) A former spouse of the decedent whom the decedent was obligated to support immediately before his or her death under a marital settlement agreement or court order made before the decedent's death unless the agreement or order specifically provides that support was to terminate on the death of the decedent.

(c) A minor child of the decedent who is not emancipated.

(d) Any other person the decedent was legally obligated to support immediately before his or her death.

Comment. Chapter 5 is new and permits a support order to be made out of the decedent's estate in favor of those whom the decedent was legally obligated to support immediately before his or her death. Concerning the obligation of a parent to support children, see 6 B. Witkin, Summary of California Law Parent and Child §§ 120-132, at 4638-50 (8th ed. 1974). Whether a court will order support under this chapter for a person the decedent is legally obligated to support depends upon the circumstances of the particular case. See Section 253.040.

405/926

§ 253.020. Petition

253.020. (a) A petition for an order under this chapter may be filed with the court by or on behalf of any person the decedent is legally obligated to support.

(b) If a petition is filed under this chapter, the court may treat it as a petition on behalf of all persons the decedent is legally obligated to support, and shall treat it as a petition on behalf of all such persons who have been given notice of the hearing or whom the court has directed shall be represented by persons who have been given notice of the hearing.

Comment. Section 253.020 is new. Under subdivision (b), the court may determine the right of all potential claimants to an order under this chapter even though such claimants have not petitioned for an order. See also Section 253.010 ("person the decedent is legally obligated to support" defined).

405/982

§ 253.030. No maintenance for child where whole estate goes to child's other parent

253.030. No order may be made under this chapter in favor of a child of the decedent if the other parent of the child is entitled to substantially all of the decedent's estate or to substantially of the income from the estate under the decedent's will or the law of intestate succession.

Comment. Section 253.030 is new. The section recognizes that when the whole estate goes to the other parent of the decedent's child, the surviving parent will ordinarily make adequate provision for the child, and that the surviving parent's obligation to support the child may be enforced by judicial proceedings if necessary.

405/927

§ 253.040. Circumstances to be considered by court

253.040. In determining whether to make an order under this chapter, and, if the court determines to make such an order, what amount should be awarded, the court shall consider all of the following:

(a) The decedent's reasons for making the dispositions in his or her will or for not making any provision or any further provision for persons whom the decedent is legally obligated to support.

(b) The needs of the decedent's heirs or devisees whose interests would be adversely affected if an order under this chapter were made.

(c) The needs of the person the decedent is legally obligated to support in whose favor the order is to be made, taking into account all of the following:

(1) Property otherwise passing to the person from the decedent's estate, whether under the decedent's will or by intestate succession.

(2) Property or benefits provided for the person by the decedent, including insurance, death benefits, joint tenancy, nonprobate transfer, or inter vivos gift.

(3) Other property and income that the person has or is likely to receive in the future.

(d) Whether the character or conduct of the person the decedent is legally obligated to support is or has been such as in the opinion of the court disentitles the person to the benefit of the order.

(e) If the person the decedent is legally obligated to support is a surviving spouse or former spouse of the decedent, the circumstances set forth in Section 4801 of the Civil Code.

Comment. Section 253.040 is new and sets forth the matters the court shall consider in determining whether to make an order under this chapter and if so, what the amount of the award should be. See also Section 253.010 ("person the decedent is legally obligated to support" defined).

405/929

§ 253.050. Terms of order

253.050. (a) If the court determines to make an order under this chapter, the court may order that such provision be made out of the decedent's estate for one or more persons the decedent is legally obligated to support as the court, in its discretion, determines to be appropriate under the circumstances of the particular case. The order may not be made on any terms which may unduly delay the closing of the estate.

(b) The court may specify such terms and conditions in the order as it determines to be appropriate under the circumstances of the particular case, including any of the following:

(1) The court may order that any amount specified in the order shall be set aside out of the estate and paid into court as provided in Section 953.

(2) The court may order that any amount specified in the order shall be set aside out of the estate and paid to a trustee as provided in Section 953.1.

(3) The court may order that any amount specified in the order shall be paid directly to an adult person for whose benefit the order is

made or, in the case of a minor, incompetent person, or person for whom a conservator of the estate may be appointed, in the manner provided in Division 4 (commencing with Section 1400).

(4) The court may direct the decedent's personal representative to purchase an annuity for one or more persons the decedent is legally obligated to support.

Comment. Section 253.050 is new. The section gives the court broad discretion to fashion an appropriate order so long as the terms of the order does not require an undue delay in closing the decedent's estate. A payment ordered under this chapter is to be paid after all other expenses, debts, and charges against the estate. See Section 950. See also Section 253.010 ("person the decedent is legally obligated to support" defined). The listing in Section 253.050 is not exclusive. For example, the decedent's estate may include an asset that produces a regular income that would be sufficient to support a child during minority. If appropriate under the circumstances of the particular case, the court might have this asset set aside during the child's minority with the income to be paid to the child's guardian. When the child reaches 18, the asset would go to the decedent's heirs or devisees who are otherwise entitled to the asset.

405/940

§ 253.060. Modification of order

253.060. (a) If the court orders an amount to be set aside out of the estate and paid into court as provided in Section 953, the court may modify its order as provided in Section 572 of the Code of Civil Procedure.

(b) If the court orders an amount to be set aside out of the estate and paid to a trustee as provided in Section 953.1, the court may modify its order so long as the trust shall continue.

(c) Except as provided in subdivisions (a) and (b), the court may modify an order made under this chapter until the final settlement of the estate.

(d) A petition for modification may be filed by any person who may file an initial petition or by any of the decedent's heirs or devisees and shall be made on the grounds that there has been a significant change in circumstances since the court's prior order. In considering a petition for modification, the court shall consider the matters which the court would consider in the case of an initial petition, but the court shall not modify the prior order unless the court determines that

there has been a significant change in circumstances since the court's prior order.

Comment. Section 253.060 is new and permits the court to modify an order made under this chapter until the final settlement of the estate.

405/947

§ 253.070. Stay on appeal

253.070. (a) Notwithstanding Chapter 2 (commencing with Section 916) of Title 13 of Part 2 of the Code of Civil Procedure, the perfecting of an appeal from an order made under this chapter does not stay proceedings under this chapter or the enforcement of the order appealed from if the person in whose favor the order is made executes and files a good and sufficient written undertaking, with two or more sureties, to the effect that:

(1) They are bound in double the amount of the payment or payments to the person.

(2) If the order appealed from is modified or reversed so that all or any part of the payment to the person proves to have been unwarranted, the payment will either be deducted from any preliminary or final distribution ordered in favor of the person or will be refunded into the estate.

(b) If the order appealed from is modified or reversed so that all or any part of the payment to the person proves to have been unwarranted and the payment is not deducted from a preliminary or final distribution to the person, the court shall order the person to refund the payment to the estate within 30 days after the date of the order. If the person fails or refuses to do so, the court may, on motion of the decedent's personal representative, enter judgment in favor of the personal representative and against the principal and sureties on the undertaking for the amount of the payment, together with interest and costs, not exceeding the amount of the undertaking.

Comment. Section 253.070 is new and is drawn from the comparable section in the family allowance provisions. See Section 684.

§ 253.080. Law applicable where decedent dies before operative date

253.080. This chapter does not apply in any case where the decedent against whose estate a support obligation is sought to be enforced died prior to the operative date of this chapter. Such cases continue to be governed by the law in effect immediately before the operative date of this chapter.

Comment. Section 253.080 makes clear that this chapter does not affect rights to property in a decedent's estate where the decedent died before the operative date of this chapter.

405/950

CONFORMING REVISIONS

Probate Code § 750 (amended). Order of resort to estate assets

750. If the testator makes provision by his will, or designates the estate to be appropriated, for the payment of his debts, the expenses of administration, ~~or~~ family allowance, or family maintenance, they must be paid according to such provision or out of the estate thus appropriated, so far as the same is sufficient. If insufficient, that portion of the estate not disposed of by the will, if any, must be appropriated for that purpose; and if that is not sufficient, the property given to residuary legatees and devisees, and thereafter all other property devised and bequeathed is liable for the same, in proportion to the value or amount of the several devises and legacies, but specific devises and legacies are exempt from such liability if it appears to the court necessary to carry into effect the intention of the testator, and there is other sufficient estate.

Comment. Section 750 is amended to add the reference to the payment of family maintenance. See generally Sections 253.010-253.080.

Probate Code § 950 (amended). Order of payment of expenses, debts, and charges

950. The debts of the decedent, the expenses of administration and the charges against the estate shall be paid in the following order:

- (1) Expenses of administration;
- (2) Funeral expenses;
- (3) Expenses of last illness;
- (4) Family allowance;
- (5) Debts having preference by the laws of the United States;
- (6) Wages, to the extent of nine hundred dollars (\$900), of each employee of the decedent, for work done or personal services rendered within 90 days prior to the death of the employer. If there is not sufficient money with which to pay all such labor claims in full the money available shall be distributed among the claimants in accordance with the amount of their respective claims;

(7) Mortgages, judgments that are liens, and other liens, in the order of their priority, so far as they may be paid out of the proceeds of the encumbered property. If such proceeds are insufficient for that purpose, the part of the debt remaining unsatisfied shall be classed with the general demands against the estate;

(8) An order for family maintenance under Chapter 4.5 (commencing with Section 253.010) of Division 2.

~~(8)~~ (9) Judgments that are not liens rendered against the decedent in his lifetime and all other demands against the estate, without preference or priority one over another.

Comment. Section 950 is amended to add paragraph (8) and to renumber former paragraph (8) as paragraph (9).

406/161

Probate Code § 1200.5 (amended). Notice

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

- (1) A petition under Section 641 of this code for the setting aside of an estate.
- (2) A petition to set apart a homestead or exempt property.

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

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

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

(6) A petition for confirmation of a sale or a petition to grant an option to purchase real property.

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

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

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

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

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

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

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

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

(15) A petition of a trustee for instructions.

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

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

(18) A petition for family maintenance.

(b) At least 10 days before the time set for the hearing of the petition or account, the petitioner or person filing the account shall cause notice of the time and place of hearing to be mailed to the executor or administrator, when he or she is not the petitioner, to any coexecutor or coadministrator not petitioning, and to all persons (or to their attorneys, if they have appeared by attorney), who have requested notice or who have given notice of appearance in the estate in person or by

attorney, as heir, devisee, legatee or creditor, or as otherwise interested, addressed to them at their respective post office addresses given in their request for special notice, if any, otherwise at their respective offices or places of residence, if known, and if not, at the county seat of the county where the proceedings are pending, or to be personally served upon such person.

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

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

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

Comment. Section 1200.5 is amended to add paragraph (18) to subdivision (a). For the provisions relating to family maintenance, see Sections 253.010-253.080.

406/237

Probate Code § 1240 (amended). Appeal of orders or refusal to make orders

1240. An appeal may be taken from an order or the refusal to make an order:

- (a) Granting or revoking letters testamentary or of administration.
- (b) Removing a trustee of a testamentary trust.
- (c) Admitting a will to probate or revoking the probate thereof.
- (d) Setting aside an estate claimed not to exceed twenty thousand dollars (\$20,000) in value.
- (e) Setting apart property as a homestead or claimed to be exempt from execution.
- (f) Granting or modifying a family allowance or family maintenance.

(g) Directing or authorizing the sale or conveyance or confirming the sale of property.

(h) Directing or authorizing the granting of an option to purchase real property.

(i) Adjudicating the merits of any claim under Section 851.5, 852 or 853.

(j) Allocating debts under Section 980.

(k) Settling an account of an executor or administrator or trustee, or instructing or appointing a trustee.

(l) Instructing or directing an executor or administrator.

(m) Directing or allowing the payment of a debt, claim, legacy, or attorney's fee.

(n) Fixing, directing, or allowing payment of a trustee's compensation.

(o) Determining heirship or the persons to whom distribution should be made or trust property should pass.

(p) Distributing property.

(q) Determining that property is community property passing or belonging to the surviving spouse pursuant to Section 655.

(r) Fixing an inheritance tax or determining that none is due.

(s) Authorizing a personal representative to invest or reinvest any surplus moneys pursuant to Section 584.5.

Comment. Section 1240 is amended to add the reference to family maintenance in subdivision (f). For the provisions relating to family maintenance, see Sections 253.010-253.080.