

#L-1032

First Supplement to Memorandum 85-74

Subject: Study L-1032 - Estates and Trusts Code (Small Estate
Set-Aside)

Attached as Exhibit 1 is a letter from Charles A. Collier, Jr., containing his personal comments on the staff draft of the tentative recommendation attached to Memorandum 85-74 (small estate set-aside). These comments are discussed below in this supplement. (We do not discuss comments that merely approve a particular provision of the staff draft.)

Section 6600(a)

Collier asks:

Does the "decendent's estate" refer only to probate assets or does it refer to all assets of whatever kind or nature except as exempted in (b)? For example, if certain property is subject to transfer under Section 649.1 and the remaining property subject to probate is less than \$20,000, is the small estate set-aside available?

The intent of Section 6600 is that all personal property, wherever located, and all real property located in this state be included in determining the estate of the decedent and its value except as provided in subdivision (b) of Section 6600. See Section 6600(a). For example, the intent of Section 6600 is that the one-half of the decedent's interest in community or quasi-community property be included in determining the value of the decedent's estate, whether or not the decedent's interest is set apart to the surviving spouse under Section 650 (unless the interest is excluded in determining the estate of the decedent under subdivision (b) as would be the case where, for example, the property is held in joint tenancy). We think that we have made this clear by the definition of "decendent's estate" in subdivision (a) of Section 6600. See also the last sentence of the first paragraph of the Comment to Section 6600. If the Commission desires, we could add the substance of the above to the Comment to Section 6600.

Section 6600(b)(1)

Subdivision (b)(1) excludes any interest that terminates at death. If the interest is one that passes to another on the death of the decedent by virtue of a joint tenancy, a pay-on-death provision, or a contractual provision that provides that the interest goes to another upon the death of the decedent, the value of the interest is excluded in determining the estate of the decedent or its value. For example, if there is a policy of insurance on the decedent's life and the proceeds are payable to a named beneficiary (not to the decedent's estate), the insurance proceeds are excluded in determining the value of the decedent's estate. Similarly, for example, if the decedent has a retirement plan that provides benefits to a surviving spouse, those benefits are excluded in determining the value of the decedent's estate. We do not believe that the language of the existing statute (retained in Section 6600) is inadequate, but perhaps the substance of this analysis should be added to the Comment to Section 6600.

Section 6601

Collier comments:

Obviously, this changes existing law and refers to a minor child at the date of decedent's death even though the funds may not be set aside until the child has become an adult. Since this is a policy issue, I make no comment on it other than the fact that, I believe, the purpose of the set-aside was to provide support for the spouse and minor children and, by modifying the definition of minor child, the scope of the set-aside procedures have been expanded.

Under the staff draft, the determination whether a person is one to whom a small estate set-aside may be made is made at the time of the decedent's death, not the time when the court acts on the petition. Existing law makes the determination at the time the court acts on the petition. However, although the staff draft permits a person who was a minor at the time of the decedent's death to receive a small estate set-aside even where the person is an adult at the time of the court order, the staff draft gives the court discretion whether to make a small estate set-aside and discretion as to whom the set-aside will be made. The court has no discretion under existing law.

We should recognize that a small estate set-aside under the staff draft is in substance a lump sum family allowance. If a probate proceeding were commenced, it is likely that the entire small estate could be paid out in the family allowance to the surviving spouse and minor children. The small estate set-aside avoids the need for probate in order to accomplish this result.

In light of this analysis, the Commission might wish to provide that a small estate set-aside may be made for the benefit of the same persons as a family allowance. (This would make the two statutes consistent and would not make the rule as to whom the family allowance (periodic or lump sum) is paid depend on whether or not there is a probate proceeding or whether the petition is filed for a "family allowance" or for a "small estate set-aside.")

Section 6540 provides that the following are entitled to such reasonable family allowance out of the estate as is necessary for their maintenance according to their circumstances during the administration of the estate:

- (1) The surviving spouse of the decedent.
- (2) Minor children of the decedent.
- (3) Adult children of the decedent who are physically or mentally incapacitated from earning a living and were actually dependent in whole or in part upon the decedent for support.
- (4) Other adult children of the decedent who were actually dependent in whole or in part upon the decedent for support.
- (5) A parent of the decedent who was actually dependent in whole or in part upon the decedent for support.

Section 6604(a)

Collier suggests the addition of an example to the Comment to illustrate how the set-aside will work. The staff will make the suggested addition to the Comment to this section or another appropriate section.

Section 6604(b)

Collier comments:

I would suggest that a new paragraph (8) be added setting forth the proposed distribution of the property among those person who are entitled, that is, the spouse and one or more of the minor children.

Subdivision (a) of Section 6604 is intended to require that the proposed distribution be stated in the petition. This subdivision requires that the petition shall "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."

We believe that the provision of subdivision (a) is sufficient, but we could duplicate the substance of this provision of subdivision (a) in a new paragraph to be added to subdivision (b), to read:

(8) The requested disposition of the estate of the decedent under this chapter and the considerations that justify the requested disposition.

A better solution to the problem might be to add a provision to the Comment stating that the subdivision (a) requires that the petition state the requested disposition of the estate of the decedent.
Section 6605(b)

Collier asks whether the word "section" in the introductory language of subdivision (b) is appropriate or should it be "chapter" as used in other sections.

We would clarify the introductory portion of subdivision (b) of Section 6605 by revising it to read:

(b) If no proceeding for the administration of the estate of the decedent is pending and if the petition filed under this chapter is not joined with a petition for the probate of the decedent's will or for appointment of a personal representative of the decedent's estate, the petition filed under this chapter may be filed by any of the following:

The staff plans to replace Sections 6605 and 6606 with two new sections. One of the new sections would state who can file a petition under various circumstances. Together the two new sections would retain the substance of the existing sections with the revision suggested above.

Section 6606(c)

Collier suggests that it would be appropriate to allow the filing of this type of petition at any time prior to final distribution of the estate, rather than limiting it to being filed before the hearing on the petition for probate or after the filing of an inventory and appraisal in the probate. The existing language in Section 6606(c) retains a provision of existing law. However, the staff

believes that Mr. Collier's substitution would be appropriate in light of the provision of Section 6608 (requirement that inventory and appraisal be filed prior to hearing on petition). A petition to set aside a probate homestead may be filed upon the filing of the inventory or at any subsequent time during the administration of the estate." Accordingly, we suggest that the following be substituted for subdivision (c) of Section 6606:

(c) A petition may be filed under this section at any time prior to the final distribution of the estate.

Section 6607(a)

Collier suggests that subdivision (a) of Section 6607 be revised to read:

(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, ~~where 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.~~ ~~no notice of any type other than as prescribed in 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.

The deleted language is found in the existing statute. It appears that this language is intended to make clear that no notice of any type other than as prescribed in the subdivision is or may be required. Should this language be deleted? Note that the staff raises the issue in the last paragraph of the Draftsman's Note to Section 6610 on page 12 of the staff draft whether personal service of the notice of hearing should be required (rather than mailing) in view of the conclusive nature of the order obtained under the small estate set-aside statute. Of course, requiring personal service would increase the cost of obtaining the small estate set-aside order, the very thing the language that is contained in subdivision (a) of Section 6607 was intended to prevent.

Section 6608

Collier asks whether the court would have authority to waive the appointment of a probate referee under Section 605(a)(2)(C). It is the intent not to permit a waiver. To make this clear, we would revise the last sentence of Section 6608 to read:

The personal representative or the petitioner, as the case may be, may appraise the assets which a personal representative could appraise under [Section 605(a)(1)].

Section 6609(b)

The staff does not understand Mr. Collier's suggestion:

I would add the following language at the end of the second sentence "or any of them".

Section 6609(c)(1)

Collier states: "Personally, I believe that the property should not be set aside for a surviving spouse if that surviving spouse has remarried." The setting aside of the small estate is discretionary with the court and the court is required to consider the matters set out in subdivision (b) of Section 6609. If the remarried spouse is not entitled to a small estate set-aside, it will be necessary to probate the estate and obtain a family allowance for the surviving spouse until the small estate is exhausted. None of the other family protective provisions preclude a remarried spouse from obtaining the benefit of the family protective provisions.

Section 6609(c)(2)

Collier suggests a possible clarification of the statute. We will revise the Comment to this section or another section to make clear that the property can be set aside for the benefit of one minor child but not another. We think the language of the statute is sufficiently clear and is consistent with the language used in other family protective provisions.

Section 6612

The staff does not understand Mr. Collier's comment. If the court grants an order for a small estate set-aside, Section 6609(d) provides that "there shall be no further proceedings for the administration of the decedent's estate unless further estate is discovered." Section 6612 provides that if a petition requesting a small estate set-aside is joined with a petition for probate and the court determines not to make an order for a small estate set-aside (either because the estate is too large or because the court determines in the exercise of its discretion not to make the order), the court shall act on the petition for probate in the same manner as if no petition for a small estate set-aside had been filed. It does

not appear necessary to state that if the petition for a small estate set-aside is filed in a pending probate proceeding and the petition is denied, the probate proceeding then goes on as if no petition for a small estate set-aside had been filed. Perhaps it might be useful to state the above in the Comment to one of the sections of the statute.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

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WRITER'S DIRECT DIAL NUMBER

September 27, 1985

John H. DeMouilly
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94303

Re: Memorandum 85-74 (Small Estate Set-Aside)

Dear John:

The following are my personal comments with reference to the new code sections proposed in Memorandum 85-74 dealing with a small estate set-aside. There will be a report of one of the teams of the Executive Committee, Estate Planning, Trust and Probate Law Section, State Bar of California, in addition to these personal comments of mine.

I hope these comments will be of assistance to the Commission and its Staff. The comments are as follows:

Section 6600(a): Does the "decedent's estate" refer only to probate assets or does it refer to all assets of whatever kind or nature except as exempted in (b)? For example, if certain property is subject to transfer under Section 649.1 and the remaining property subject to probate if less than \$20,000, is the small estate set-aside available?

Section 6600(b)(1): The comment indicates that, as to property in which the decedent had a life or other terminable interest, such property is excluded. The note refers to retirement and insurance. Is a policy of life insurance on which the decedent was receiving monthly payments prior to death, but which has a lump sum payment to another by reason of death, included or excluded? Is a policy of insurance which simply becomes payable by reason of a decedent's death included or excluded? While the language referred to is found in the existing statute, Section 647, it perhaps is not as precise as it might be.

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Section 6601: Obviously, this changes existing law and refers to a minor child at the date of decedent's death even though the funds may not be set aside until the child has become an adult. Since this is a policy issue, I make no comment on it other than the fact that, I believe, the purpose of the set-aside was to provide support for the spouse and minor children and, by modifying the definition of minor child, the scope of the set-aside procedures have been expanded.

Section 6602: Adding language referring to a petition being filed under this chapter is an appropriate clarification. Allowing the property to be set aside for the surviving spouse or the minor children, or any one or more of said persons, is an improvement on existing law.

Section 6603: This new section is an appropriate addition and clarification.

Section 6604(a): This section, defining the nature of the petition to be filed, is appropriate as an addition to and clarification of existing law. It might be appropriate to add in the Comment an example to illustrate the point that, for example, the \$20,000 could be set aside to one of the minor children and exclude the other minor children and the spouse, or it might be set aside in unequal shares to minor children.

Section 6604(b): I would suggest that a new paragraph (8) be added setting forth the proposed distribution of the property among those persons who are entitled, that is, the spouse and one or more of the minor children.

Section 6605(b): Is the word "section" in the introductory language appropriate or should it be "chapter" as used in other sections? See, for example, the introductory language in Section 6606(a).

Section 6606(c): Section 644 contemplates filing a petition and then having an inventory and appraisement prepared of assets. It would seem appropriate to allow the filing of this type of petition at any time prior to final distribution of the estate, rather than limiting it to being filed before the hearing on the petition for probate or after the filing of an inventory and appraisement in the probate.

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Section 6607(a): I believe the words starting on the fifth line which state "there shall be no notice of any type other than as prescribed in this subdivision. In cases covered by this subdivision, . . ." could all be deleted. The sentence would then start "The petitioner shall give notice" etc.

Section 6607(b): If the petition to set aside property is joined with the petition for probate of will, it is likely that the court may admit the will to probate and continue the petition to set aside the estate until an inventory and appraisal has been filed. Normally a referee is not appointed to appraise assets until the will is admitted to probate or a personal representative has been appointed. Perhaps some recognition of this procedure should be noted in the footnote.

Section 6608: Does this section contemplate self-appraisal of assets under Section 605(c)? Is it not appropriate to have the referee establish the value of all assets other than cash assets? Section 644 currently refers to appointment of a referee. It would seem that the court should have an independent valuation of assets for purposes of a set-aside other than cash assets.

Section 6609(b): I would add the following language at the end of the second sentence "or any of them".

Section 6609(c) (1): Personally, I believe that the property should not be set aside for a surviving spouse if that surviving spouse has remarried.

Section 6609(c) (2): Perhaps the reference to the minor children of the decedent should be reworded to state one or more of the minor children of the decedent to make it clear that the property can be set aside for the benefit of one minor child but not another.

Section 6610: This is an appropriate clarification of existing law.

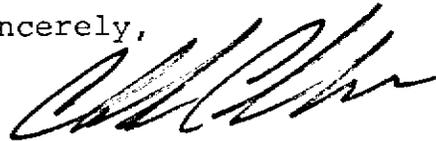
Section 6612: As noted earlier, the court may well admit a will to probate or appoint a personal representative, have an inventory filed and then consider the petition to set aside the estate if it is not clear at the inception that the estate will be less than \$20,000. Section 6612 does not contemplate this procedure and perhaps should be clarified.

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Section 6614: The general approach in that section seems reasonable, assuming that there is no vested right in a spouse or minor children to have the property set aside under the mandatory provisions of Section 640 that would have vested at death. Since this is a statutory set-aside right, presumably it doesn't created a vested right and therefore the approach in Section 6614 is appropriate.

In general, the rewording, reorganization and amplification of the language in these set-aside sections, now found in Sections 640 through 647, represent an improvement over existing language. Since there is extensive rewording, I have made very few comments about technical variations from existing code sections. Obviously, the nature of this set-aside is being modified significantly by the proposed changes.

Sincerely,



Charles A. Collier, Jr.

CAC:vjd

cc: James A. Willett, Esq.
Theodore J. Cranston, Esq.
James V. Quillinan, Esq.