

First Supplement to Memorandum 82-8

Subject: Study L-602 - Probate Law (Disposition of Existing California Provisions on Intestate Succession)

Exhibit 1 to this Memorandum collects the 12 Probate Code sections of Division 2 (succession) not disposed of in Memo 82-8 (intestate succession) or Memo 82-30 (escheat). The policy questions with respect to the provisions on quasi-community property (§§ 201.6-201.8) are discussed in Memo 82-15 (elective share of surviving spouse). The policy questions with respect to effect of homicide (Prob. Code § 258) are discussed in Memo 82-22.

This Memorandum proposes to do the following:

(1) Recodify the provisions in Division 2 relating to the administration of community and quasi-community property (§§ 202-206) in Division 3 (administration) without substantive change.

(2) Repeal and not continue Sections 251-253 (degree of kindred, lineal consanguinity, and collateral consanguinity). These sections appear to add nothing useful to the UPC's succession provisions.

Respectfully submitted,

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EXHIBIT 1

§ 201.6 (repealed). Election of surviving spouse in real property in this state of non-domiciliary decedent

201.6. Upon the death of any married person not domiciled in this State who leaves a valid will disposing of real property in this State which is not the community property of the decedent and the surviving spouse, the surviving spouse has the same right to elect to take a portion of or interest in such property against the will of the decedent as though the property were situated in the decedent's domicile at death. As used in this section real property includes leasehold interests in real property.

Comment. Former Section 201.6 is continued in Section [to be drafted, to go with UPC elective share provisions if adopted.]

§ 201.7 (repealed). Election of surviving spouse in quasi-community property

201.7. Whenever a decedent has made provision by a valid will for the surviving spouse and the spouse also has a right under Section 201.5 of this code to take property of the decedent against the will, the surviving spouse shall be required to elect whether to take under the will or to take against the will unless it appears by the will that the testator intended that the surviving spouse might take both under the will and against it.

[Note. This section presents a basic policy question, discussed in Memo 82-15 concerning elective share of surviving spouse.]

§ 201.8 (repealed). Recapture by surviving spouse of certain quasi-community property

201.8. Whenever any married person dies domiciled in this State who has made a transfer to a person other than the surviving spouse, without receiving in exchange a consideration of substantial value, of property in which the surviving spouse had an expectancy under Section 201.5 of this code at the time of such transfer, the surviving spouse may require the transferee to restore to the decedent's estate one-half of such property, its value, or its proceeds, if the decedent had a substantial quantum of ownership or control of the property at death. If the decedent has provided for the surviving spouse by will, however, the spouse cannot require such restoration unless the spouse has made an irrevocable election to take against the will under Section 201.5 of this code

rather than to take under the will. All property restored to the decedent's estate hereunder shall go to the surviving spouse pursuant to Section 201.5 of this code as though such transfer had not been made.

[Note. This section presents a basic policy question, discussed in Memo 82-15 concerning elective share of surviving spouse.]

§ 202 (repealed). Election to have community and quasi-community property administered

202.

(a) Except as provided in Section 204, when a husband or wife dies intestate, or dies testate and by his or her will bequeaths or devises all or a part of his or her interest in the community property or quasi-community property to the surviving spouse, it passes to the survivor subject to the provisions of Sections 203 and 205, and no administration is necessary.

(b) Notwithstanding subdivision (a), upon the election of the surviving spouse or the personal representative, guardian of the estate, or conservator of the property of the surviving spouse, the interest of the deceased spouse in the community property or quasi-community property or both, the interest of the deceased spouse and the surviving spouse in the community property or quasi-community property, or both, may be administered under Division 3 (commencing with Section 300). The election must be made within four months after the issuance of letters testamentary or of administration, or within such further time as the court may allow upon a showing of good cause, by a writing specifically evidencing the election filed in the proceedings for the administration of the estate of the deceased spouse and prior to the entry of an order under Section 655.

(c) Notwithstanding subdivision (a) or (b), the surviving spouse or the personal representative, guardian of the estate, or conservator of the property of the surviving spouse may file an election and agreement in the proceedings for the administration of the estate of the deceased spouse to have all or part of the interest of the surviving spouse in the community property or quasi-community property transferred by the surviving spouse or his or her personal representative, guardian, or conservator to the trustee under the will of the deceased spouse or the trustee of an existing trust identified by the will of the deceased spouse, to be administered and distributed by the trustee. The election and agreement must be filed before the entry of the decree of final distribution in the proceedings.

Comment. Former Section 202 is continued in Section 649.1.

§ 203 (repealed). Power to deal with community and quasi-community real property

203.

After 40 days from the death of a spouse, the surviving spouse or the personal representative, guardian of the estate, or conservator of the property of the surviving spouse shall have full power to sell, lease, mortgage or otherwise deal with and dispose of the community or quasi-community real property, unless a notice is recorded in the county in which the property is situated to the effect that an interest in the property is claimed by another under the will of the deceased spouse. The notice must also (1) describe the property in which an interest is claimed, and (2) set forth the name or names of the owner or owners of the record title to the property. There shall be endorsed on the notice instructions that it shall be indexed by the recorder in the name or names of the owner or owners of the record title to the property, as grantor or grantors, and in the name of the person claiming an interest in the property, as grantee. The right, title, and interest of any grantee, purchaser, encumbrancer, or lessee shall be as free of rights of devisees or creditors of the deceased spouse to the same extent as if the property had been owned as the separate property of the surviving spouse.

Comment. Former Section 203 is continued in Section 649.2.

§ 204 (repealed). Community and quasi-community property subject to administration

204.

When a deceased spouse disposes by will of all or part of his or her interest in the community property or quasi-community property to someone other than the surviving spouse or when the will of a deceased spouse contains a trust or limits the surviving spouse to a qualified ownership in the property, that part of the interest of the deceased spouse in the community property or quasi-community property disposed of to someone other than the surviving spouse, disposed of in trust, or limiting the surviving spouse to a qualified ownership in the property shall be subject to administration under Division 3 (commencing with Section 300). A will that provides for a devise or bequest of community property or quasi-community property to the surviving spouse if such spouse survives the deceased spouse by a specified period of time shall not be considered to create such a qualified ownership as to fall within the provision of this section, if the specified period of time has expired.

Comment. Former Section 204 is continued in Section 649.3.

§ 205 (repealed). Liability of surviving spouse for decedent's debts

205.

(a) Except as provided by Section 951.1, upon the death of a married person, the surviving spouse is personally liable for the debts of the deceased spouse chargeable against the community property and the debts of the deceased spouse chargeable against the separate property of the deceased spouse to the extent such separate property is characterized as quasi-community property under Section 201.5 by the provisions of Title 8 (commencing with Section 5100) of Part 5 of Division 4 of the Civil Code, unless the interests of both spouses in the community property or quasi-community property, or both, are administered under Division 3 (commencing with Section 300). The personal liability shall not exceed the value at the date of death, less the amount of any liens and encumbrances, of the interest of the surviving spouse (1) in the community property immediately prior to the death and (2) in quasi-community property arising by virtue of the death which is not exempt from execution plus the interest of the deceased spouse in such property passing to the surviving spouse without administration.

(b) If proceedings are commenced in this state for the administration of the estate of the deceased spouse and notice to creditors has been given by the personal representative, any action upon the liability of the surviving spouse pursuant to subdivision (a) shall be barred to the same extent as provided for claims under Article 1 (commencing with Section 700) of Chapter 12 of Division 3 except as to the following:

(1) Creditors who had commenced judicial proceedings for the enforcement of the debts and had served the surviving spouse with process prior to the date of the last publication of the notice to creditors.

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

(3) Creditors who file a timely claim in the proceedings.

(c) Except as provided by subdivision (b), any debt described in subdivision (a) may be enforced against the surviving spouse in the same manner as it could have been enforced against the deceased spouse if the deceased spouse had not died. In any action based upon the debt, the surviving spouse may assert any defenses, counterclaims, or setoffs which would have been available to the deceased spouse if the deceased spouse had not died.

Comment. Former Section 205 is continued in Section 649.4.

§ 206 (repealed). Community property held in certain revocable trusts

206.

Notwithstanding the provisions of Sections 201, 202, 203, 204 and 205, community property held in a revocable trust described in Section 5113.5 of the Civil Code shall be governed by the provisions, if any, in the trust for disposition in the event of death.

Comment. Former Section 206 is continued in Section 649.5.

§ 251 (repealed). Degree of kindred

251. The degree of kindred is established by the number of generations, and each generation is called a degree.

Comment. Former Section 251 is not continued. The revised succession provisions use the term "degree of kinship" instead of "degree of kindred." See, e.g., Sections 2-103, 2-106. The term "degree of kinship" is not statutorily defined, since its meaning is well understood.

§ 252 (repealed). Lineal consanguinity

252.

Lineal consanguinity, or the direct line of consanguinity, is the relationship between persons one of whom is a descendant of the other. The direct line is divided into a direct line descending, which connects a person with those who descend from him, and a direct line ascending, which connects a person with those from whom he descends. In the direct line there are as many degrees as there are generations. Thus, the child is, with regard to the parent, in the first degree; the grandchild, with regard to the grandparent, in the second; and vice versa as to the parent and grandparent with regard to their respective children and grandchildren.

Comment. Former Section 252 is not continued. The revised succession provisions use the term "issue" instead of "lineal descendants." Compare Sections 2-102A, 2-103, and 2-106 with former Section 221. "Issue" is a defined term. See Section 1-201.

§ 253 (repealed). Collateral consanguinity

253.

Collateral consanguinity is the relationship between people who spring from a common ancestor, but are not in a direct line. The degree is established by counting the generation from one relative up to the common ancestor and from the common ancestor to the other relative. In such computation the first

relative is excluded, the other included, and the ancestor counted but once. Thus, brothers are related in the second degree, uncle and nephew in the third degree, cousins german in the fourth, and so on.

Comment. Former Section 253 is not continued. The terms "collateral heirs" and "collateral kindred" are not used in the revised succession provisions.

§ 258 (repealed). Effect of homicide

258.

No person who has unlawfully and intentionally caused the death of a decedent, and no person who has caused the death of a decedent in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, Penal Code, shall be entitled to succeed to any portion of the estate or to take under any will of the decedent; but the portion thereof to which he would otherwise be entitled to succeed goes to the other persons entitled thereto under the provisions of this chapter or under the will of the decedent. A conviction or acquittal on a charge of murder or voluntary manslaughter shall be a conclusive determination of the unlawfulness or lawfulness of a causing of death, for the purposes of this section.

Comment. Former Section 258 is superseded by UPC Section 2-803.

[Note. The Comment is drafted on the assumption that the Commission will approve the staff recommendation in Memo 82-22, effect of homicide.]

ARTICLE 2.5. ADMINISTRATION OF COMMUNITY AND
QUASI-COMMUNITY PROPERTY

Probate Code § 649.1 (added). Election to have community and quasi-community property administered

649.1. (a) Except as provided in Section 649.3, when a husband or wife dies intestate, or dies testate and by his or her will bequeaths or devises all or a part of his or her interest in the community property or quasi-community property to the surviving spouse, it passes to the survivor subject to the provisions of Sections 649.2 and 649.4, and no administration is necessary.

(b) Notwithstanding subdivision (a), upon the election of the surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse, the interest of the deceased spouse in the community property or quasi-community property or both, the interest of the deceased spouse and the surviving spouse in the community property or quasi-community property, or both, may be administered under this division. The election must be made within four months after the issuance of letters testamentary or of administration, or within such further time as the court may allow upon a showing of good cause, by a writing specifically evidencing the election filed in the proceedings for the administration of the estate of the deceased spouse and prior to the entry of an order under Section 655.

(c) Notwithstanding subdivision (a) or (b), the surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse may file an election and agreement in the proceedings for the administration of the estate of the deceased spouse to have all or part of the interest of the surviving spouse in the community property or quasi-community property transferred by the surviving spouse or his or her personal representative, guardian, or conservator to the trustee under the will of the deceased spouse or the trustee of an existing trust identified by the will of the deceased spouse, to be administered and distributed by the trustee. The election and agreement must be filed before the entry of the decree of final distribution in the proceedings.

Comment. Section 649.1 is the same in substance as former Section 202.

Probate Code § 649.2 (added). Power to deal with community and quasi-community real property

649.2. After 40 days from the death of a spouse, the surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse shall have full power to sell, lease, mortgage or otherwise deal with and dispose of the community or quasi-community real property, unless a notice is recorded in the county in which the property is situated to the effect that an interest in the property is claimed by another under the will of the deceased spouse. The notice must also (1) describe the property in which an interest is claimed, and (2) set forth the name or names of the owner or owners of the record title to the property. There shall be endorsed on the notice instructions that it shall be indexed by the recorder in the name or names of the owner or owners of the record title to the property, as grantor or grantors, and in the name of the person claiming an interest in the property, as grantee. The right, title, and interest of any grantee, purchaser, encumbrancer, or lessee shall be as free of rights of devisees or creditors of the deceased spouse to the same extent as if the property had been owned as the separate property of the surviving spouse.

Comment. Section 649.2 is the same in substance as former Section 203.

Probate Code § 649.3 (added). Community and quasi-community property subject to administration

649.3 When a deceased spouse disposes by will of all or part of his or her interest in the community property or quasi-community property to someone other than the surviving spouse or when the will of a deceased spouse contains a trust or limits the surviving spouse to a qualified ownership in the property, that part of the interest of the deceased spouse in the community property or quasi-community property disposed of to someone other than the surviving spouse, disposed of in trust, or limiting the surviving spouse to a qualified ownership in the property shall be subject to administration under this division. A will that provides for a devise or bequest of community property or quasi-community property to the surviving spouse if such spouse survives the deceased spouse by a specified period of time shall not be considered to

create such a qualified ownership as to fall within the provision of this section, if the specified period of time has expired.

Comment. Section 649.3 is the same in substance as former Section 204.

Probate Code § 649.4 (added). Liability of surviving spouse for decedent's debts

649.4. (a) Except as provided by Section 951.1, upon the death of a married person, the surviving spouse is personally liable for the debts of the deceased spouse chargeable against the community property and the debts of the deceased spouse chargeable against the separate property of the deceased spouse to the extent such separate property is characterized as quasi-community property under Section [1-201], unless the interests of both spouses in the community property or quasi-community property, or both, are administered under this division. The personal liability shall not exceed the value at the date of death, less the amount of any liens and encumbrances, of the interest of the surviving spouse (1) in the community property immediately prior to the death and (2) in quasi-community property arising by virtue of the death which is not exempt from execution plus the interest of the deceased spouse in such property passing to the surviving spouse without administration.

(b) If proceedings are commenced in this state for the administration of the estate of the deceased spouse and notice to creditors has been given by the personal representative, any action upon the liability of the surviving spouse pursuant to subdivision (a) shall be barred to the same extent as provided for claims under Article 1 (commencing with Section 700) of Chapter 12, except as to the following:

(1) Creditors who had commenced judicial proceedings for the enforcement of the debts and had served the surviving spouse with process prior to the date of the last publication of the notice to creditors.

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

(3) Creditors who file a timely claim in the proceedings.

(c) Except as provided by subdivision (b), any debt described in subdivision (a) may be enforced against the surviving spouse in the same manner as it could have been enforced against the deceased spouse if the

deceased spouse had not died. In any action based upon the debt, the surviving spouse may assert any defenses, counterclaims, or setoffs which would have been available to the deceased spouse if the deceased spouse had not died.

Comment. Section 649.4 is the same in substance as former Section 205.

Probate Code § 649.5 (added). Community property held in certain revocable trusts

649.5. Notwithstanding Sections 2-001, [2-501.5], and the provisions of this article, community property held in a revocable trust described in Section 5113.5 of the Civil Code is governed by the provisions, if any, in the trust for disposition in the event of death.

Comment. Section 649.5 continues the substance of former Section 206.