

Memorandum 82-17

Subject: Study L-604 - Probate Law (Family Allowance, Small Estate Set-Aside, Probate Homestead, and Exempt Property)

Introduction

This memorandum deals with four sets of provisions for protection of the decedent's surviving family. The remaining family protection provisions are discussed in Memorandums 82-15 (elective share of surviving spouse) and 82-16 (family maintenance legislation and pretermission).

The California provisions on family allowance, probate homestead, and exempt property are all collected in Chapter 11 (Support of the Family) of Division 3 of the Probate Code. The small estate set-aside provisions are found in the immediately preceding chapter on summary administration. These provisions (Probate Code Sections 640-647, 660-684) are set forth in Exhibit 1 to this memorandum.

The Uniform Probate Code provisions on family allowance, homestead, and exempt property (Sections 2-401 to 2-404) are found in Part 4 (Exempt Property and Allowances) of Article II, and are set forth in Exhibit 2 to this memorandum. It is the staff's conclusion that, with some minor revisions, the existing California provisions on family allowance, probate homestead, and exempt property should be retained in preference to the UPC provisions. As the UPC itself notes, there is less need for national uniformity of law with respect to these provisions than there is for the substantive rules of intestate succession and wills. General Comment to Part 4 of Article II of the UPC (Exhibit 2).

However, with respect to the small estate set-aside provisions, the staff tentatively recommends replacing the California provisions with the UPC provisions for a lump-sum family allowance.

Supervised Versus Unsupervised Administration

The fundamental issue of supervised versus unsupervised administration is involved in all of these provisions. Except where the personal representative has been given powers of independent administration under the Independent Administration of Estates Act (Prob. Code §§ 591-591.7), California requires a petition, hearing, and court order before a family allowance, small estate, probate homestead, or exempt property will be set aside. See Prob. Code §§ 641, 643, 645, 660-662, 664, 681 (Exhibit

1). The UPC permits the cash homestead allowance, exempt property, and (subject to a \$6,000 lump-sum or \$500 per month limit) family allowance to be made by the personal representative without court involvement. See UPC § 2-404 (Exhibit 2).

The Commission's decision concerning supervised versus unsupervised administration in this area should be consistent with its ultimate decision concerning supervised versus unsupervised administration of estates generally--perhaps the central issue which the Commission will address when it considers Article III of the UPC (administration of estates). For the present, the staff recommends not disturbing the California scheme of court supervision with respect to these family protection provisions. However, this question will have to be reexamined when we reach Article III.

Family Allowance

Both California and the UPC have provisions which permit temporary support out of the decedent's estate for the surviving spouse and children, payable until the estate closes. See Prob. Code §§ 680-684 (Exhibit 1); UPC § 2-403 (Exhibit 2). The California and UPC provisions are similar, the substantive differences involving the question of supervised versus unsupervised administration, and the following four issues discussed in order below:

(1) Whether a family allowance may be granted from the estate of a non-domiciliary decedent.

(2) Whether a family allowance may be retroactive to the date of the decedent's death.

(3) The priority of a family allowance over competing claims.

(4) Whether a family allowance may be paid for the support of nondisabled adult children.

Application to estate of nondomiciliary decedent. If a decedent dies domiciled in another state, original probate proceedings are ordinarily held in the state of domicile; if the nondomiciliary decedent has property in California, ancillary proceedings may be had here for the main purpose of protecting California creditors of the decedent. See 7 B. Witkin, Summary of California Law Wills and Probate §§ 53-55, at 5576-79 (8th ed. 1974). In such a case, if the nonresident decedent has a spouse or children who reside in California, they may be awarded a

family allowance in the ancillary California proceedings whether or not the state of domicile makes provision for such an allowance. See In re Estate of Foreman, 16 Cal. App.2d 96, 60 P.2d 310 (1936). The rationale for this rule is that California has at least as much interest in protecting California family members of a nonresident decedent as it does in protecting the decedent's California creditors. Id.

The UPC follows the opposite rule: The family allowance is payable only if the decedent is domiciled in the state where application is made. UPC § 2-403 (Exhibit 2). It was the view of the UPC drafters that this was an important limitation on the right to a family allowance as well as the right to a homestead and exempt property. See General Comment to Part 4 of Article II of the UPC (Exhibit 2). The staff disagrees with this view. In the Foreman case above, it would have been unjust to deny the family allowance. Decedent was a resident of New York which did not have family allowance provisions. If California had declined to grant the allowance because the decedent was not a California domiciliary, the California family members would have been left unprotected, contrary to strong California policy. The staff believes that the California probate courts can be trusted to exercise discretion wisely and to decline to grant a family allowance in ancillary proceedings where an allowance has been granted in original proceedings at the decedent's domicile.

Accordingly, the staff recommends rejecting the UPC provision which limits the family allowance to cases where the decedent is a California domiciliary.

Retroactivity of family allowance to date of death. California expressly permits the family allowance to be made retroactive to the decedent's date of death. Prob. Code § 680 (Exhibit 1). The UPC authorizes a lump-sum payment of family allowance, but has no express provision permitting periodic payments to be retroactive. See UPC § 2-403 (Exhibit 2). An express retroactivity provision may be useful in some cases, and the staff would retain the California language.

Priority over competing claims. California gives the family allowance priority over "all other charges, except funeral charges, expenses of the last illness and expenses of administration" (Prob. Code § 680), and except a probate homestead which has priority over a family allowance.

Pigott, Family Allowance, in 1 California Decedent Estate Administration § 11.31, at 412 (Cal. Cont. Ed. Bar 1971). Under the UPC, the family allowance "has priority over all claims but not over the homestead allowance." UPC § 2-403 (Exhibit 2). Presumably "all claims" includes funeral charges, expenses of last illness, and expenses of administration, and therefore would give the family allowance priority over these expenses. The staff finds the California rule preferable and recommends rejecting the higher priority under the UPC.

Support of nondisabled adult children. California permits a family allowance for adult children only if "physically or mentally incapacitated from earning a living and . . . actually dependent in whole or in part upon the decedent for support." Prob. Code § 680 (Exhibit 1). The UPC does not mention disabled adult children, but permits a family allowance for adult children "who were in fact being supported by" the decedent. Presumably this would include disabled and nondisabled adult children when they were being supported by the decedent, but would not include disabled adult children who were not being supported by the decedent.

The California provision is useful, since a disabled adult child not being supported by the decedent may have a strong moral claim to such support. The UPC provision is useful by permitting the estate to continue to support an able-bodied adult child who is, for example, attending college and was being supported by the decedent. Accordingly, the staff would keep the California language and add the UPC language which permits a family allowance for a nondisabled adult child who was in fact being supported by the decedent.

Small Estate Set-Aside

California law requires the court summarily to set aside to the surviving spouse (or if none, to the decedent's minor children) the decedent's net estate if it does not exceed \$20,000 above liens, encumbrances, and any probate homestead set aside by the court. Prob. Code §§ 640, 645 (Exhibit 1). Entitlement is a matter of right unless the spouse has become disentitled by conduct such as desertion. See, e.g., Estate of Abila, 32 Cal.2d 559, 197 P.2d 10 (1948); In re Estate of Boeson, 201 Cal. 36, 41, 255 P. 800 (1927). The recipient is entitled to the award without regard to his or her own personal wealth. 1

California Decedent Estate Administration Supplement § 3.24, at 39 (Cal. Cont. Ed. Bar 1979). The award takes precedence over the decedent's will. *McMillan v. Boese*, 45 Cal. App.2d 764, 115 P.2d 37 (1941).

As originally enacted in 1851, it appears that the small estate set-aside was intended to be the equivalent of a lump-sum family allowance, and was to save time and expense in getting small estates (originally \$500 net or less) to the surviving family at the time of the family's greatest need. See 1 Cal. L. Revision Comm'n Reports 47, 53-54 (1957). The \$500 amount was successively increased to \$1,500 in 1872, to \$2,500 in 1921, to \$3,500 in 1959, to \$5,000 in 1961, to \$10,000 in 1974, and to \$20,000 in 1976.

Although originally the small estate set-aside provisions had no limit on the personal wealth of the surviving spouse or children, the Legislature introduced this concept in 1929, severely limiting the right to a set-aside: A potential recipient of a set-aside would be ineligible if having other property in excess of \$5,000 in value. *Id.* at 48. This figure was successively increased, reaching \$20,000 before its total repeal in 1972.

The UPC's closest analogue of the California small estate set-aside provisions is the UPC provision for a lump-sum payment of a family allowance. See UPC § 2-403 (Exhibit 2). The UPC provision has three significant advantages over the California provisions:

(1) The UPC provision is based on need (see Comment to UPC § 2-403--Exhibit 2), while the California provision is not.

(2) The UPC provision is applicable to large as well as small estates, while under California law the surviving spouse is protected against a disinheritance will if the estate consists of \$19,000 of cash or securities, all of which is the decedent's separate property, but has no such protection if the estate consists of \$21,000 of such property.

(3) The UPC gives children an independent right to a family allowance--most important where the decedent has children of a prior marriage. The California set-aside is for children only where there is no surviving spouse.

It would appear that the sole argument in favor of the California scheme is that, although the statute originally was a support provision, it has evolved over the years so that it now is primarily a way to avoid

administration, and not a support provision. This conclusion is buttressed by the fact that although the provisions were originally located with other provisions relating to support of the decedent's family (1 Cal. L. Revision Comm'n Reports, supra at 47), they are now in the chapter of the Probate Code relating to summary administration.

On the other hand, there is a separate set of provisions in the Probate Code for collection of small estates by declaration. See Prob. Code §§ 630-632. Under these provisions, if the decedent owned no real property in California, the value of the estate is \$30,000 or less, and the persons entitled to receive the estate either under the laws of intestacy or under the decedent's will are closely related to the decedent (spouse, children, issue of deceased children, parent, brother, sister, or issue of a deceased brother or sister of the decedent), such persons may collect the decedent's property by furnishing third persons holding the property with a declaration showing their entitlement to receive the property. This is done without the need to procure letters of administration or to await probate of the will. Prob. Code § 630. The purpose of these provisions is "to facilitate the transfer of a decedent's property in lieu of a formal probate administration," Broll, Summary Administration, in 1 California Decedent Estate Administration § 3.6, at 120 (Cal. Cont. Ed. Bar 1971). Thus these provisions permit a summary administration without upsetting the decedent's estate plan, suggesting that the purpose of the small estate set-aside provisions (which do upset the decedent's will) is primarily support, not administration-avoidance. In the staff's view, the awarding of the estate to the surviving spouse or children contrary to a disinheriting will can only be justified on the basis of the public policy in favor of support of the surviving family.

Viewed as a support scheme, the UPC lump-sum family allowance is clearly superior to California's small estate set-aside. If the surviving spouse cannot establish need, there will be more estate remaining to provide for children of the decedent, particularly children of a prior marriage. Also, the needy spouse will have protection where the estate is large, unlike California law.

Based on the assumption that the California small estate set-aside provisions are primarily support provisions, not administration-avoidance

provisions, the staff is inclined to recommend that the small estate set-aside provisions contained in Probate Code Sections 640 to 647 be repealed, and be replaced with a provision for a lump-sum award of a family allowance based on need. The staff solicits the views of our consultants and State Bar representatives as to whether the staff recommendation is sound.

Probate Homestead

In 1980, California's probate homestead provisions were revised on recommendation of the California Law Revision Commission. These provisions (Prob. Code §§ 660-666 - Exhibit 1) permit the probate court to set apart a dwelling for the use of the surviving spouse or minor children of the decedent. Prob. Code § 661 (Exhibit 1). The homestead shall be set apart for a limited period not beyond the lifetime of the surviving spouse or the minority of the children. Id. The purpose of the probate homestead is to preserve a home for the surviving members of the decedent's family. See, e.g., Taylor v. Madigan, 53 Cal. App.3d 943, 968, 126 Cal. Rptr. 376, 392 (1975).

The UPC "homestead" provision, on the other hand, does not provide a homestead at all, but rather provides a dollar allowance. See UPC § 2-401 (Exhibit 2). The suggested amount of the allowance is \$5,000 (id.) and it may be selected out of any property of the estate whether real or personal. See UPC § 2-404 (Exhibit 2).

The staff views the UPC homestead provisions as completely inadequate to serve California's policy of furnishing a home for the decedent's family. The staff recommends rejecting the UPC homestead provisions and retaining the recently-revised California provisions.

Exempt Property

California law permits the court in its discretion to set apart to the surviving spouse (or in case of his or her death, to the decedent's minor children) all or any part of the decedent's property which is "exempt from execution" (other than the dwelling which is controlled by the homestead provisions). Prob. Code § 660 (Exhibit 1). California law is silent on the question of whether it applies to nondomiciliary decedents; as a result, it would probably be construed to apply to nondomiciliary as well as domiciliary decedents. Cf. In re Estate of

Foreman, 16 Cal. App.2d 96, 60 P.2d 310 (1936) (family allowance).

The UPC provides that the surviving spouse (or if none, children) of a domiciliary decedent is entitled to a value not exceeding \$3,500 of household furniture, automobiles, furnishings, appliances, and personal effects. UPC § 2-402 (Exhibit 2). The surviving spouse (or guardians of minor children, or adult children) may select the property out of the estate to satisfy this provision (UPC § 2-404), and if there is not \$3,500 worth of exempt property, may select other assets of the estate.

Thus, it appears that there are three significant differences between the California and the UPC provisions regarding exempt property:

- (1) The California provisions are unlimited in amount; the UPC has a maximum of \$3,500.
- (2) California makes the award discretionary with the court; under the UPC, it is a matter of right and a court determination is not required.
- (3) California law probably applies to estates of nondomiciliary decedents as well as domiciliaries; the UPC applies to estates of domiciliaries only.

The staff prefers California law in all three of the above respects. The UPC limit of \$3,500 is inadequate to cover the furnishings and appliances of the family dwelling, let alone an automobile, clothing and other personal effects of the decedent. It is important to preserve the court's discretion to make an order granting or denying an exempt property allowance, since there may be equitable factors which militate against such an allowance. See, e.g., In re Estate of Fulton, 15 Cal. App.2d 202, 59 P.2d 508 (desertion). The exempt property provisions should be applied to estates of nondomiciliaries for the same reasons that the family allowance provisions should be so applied. See discussion supra under heading "Family Allowance." Accordingly, the staff recommends rejecting the UPC exempt property provisions, and retaining the present California provisions which are satisfactory.

Respectfully submitted,

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EXHIBIT 1

Probate Code §§ 640-647, 660-684

ARTICLE 2. SETTING ASIDE ESTATES NOT EXCEEDING TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500) IN VALUE [NOW TWENTY THOUSAND DOLLARS (\$20,000)]

Sec.

- 640. Authority to set aside estate.
- 641. Petition to set aside estate; allegations; time; verification; contents.
- 642. Notice of hearing; proceedings included in petition for probate or for letters.
- 643. Notice of hearing; proceedings under separate petition.
- 644. Inventory and appraisal; filing; inheritance tax referee.
- 645. Decree assigning estate to surviving spouse or children; title to property; restriction on right.
- 645.1. Decree assigning estate; conclusiveness; exception.
- 645.3. Personal liability for unsecured debts of decedent; duration.
- 646. Denial of assignment; grounds; defect.
- 647. Exclusion of joint tenancy, life, or other estate terminable at death.

Bracketed material in Article heading editorially supplied.

§ 640. Authority to set aside estate

If the decedent leaves a surviving spouse or minor child or minor children, and the net value of the whole estate, over and above all liens and encumbrances at the date of death and over and above the value of any homestead interest set apart out of decedent's estate under Section 660 or Section 661 of this code, does not exceed the sum of twenty thousand dollars (\$20,000), the same may be set aside to the surviving spouse, if there be one, and if there be none, then to the minor child or minor children of the decedent.

(Stats.1931, c. 281, § 640. Amended by Stats.1939, c. 819, § 1; Stats.1955, c. 1183, § 1; Stats.1959, c. 1290, § 1; Stats.1961, c. 1190, § 1; Stats.1974, c. 602, § 2; Stats.1976, c. 1028, § 2.)

Cross References

Family allowance, see § 680 et seq.

§ 641. Petition to set aside estate; allegations; time; verification; contents

Allegations showing that this article is applicable, together with a prayer that the estate be set aside as provided in this article, may be presented without filing a petition for probate of the will or for letters of administration, by petition of the person named in the will as executor or the surviving spouse or the guardian of the minor child or children of the decedent. Such allegations and prayer may also be included alternatively in the petition for probate of the will or for letters of administration or such allegations and prayer may be presented by separate petition filed by the personal representative of the

decedent, or the surviving spouse, or the guardian of the minor child or children, filed at any time before the hearing on the petition for probate of the will or for letters of administration or after the filing of the inventory. In all cases the petition shall be verified. The allegations shall include a specific description and an estimate of the value of all of the decedent's property, a list of all liens and encumbrances at the date of death, and a designation of any property as to which a homestead is set apart out of decedent's estate under Section 660 or 661.

(Stats.1931, c. 281, § 641. Amended by Stats.1939, c. 819, § 2; Stats.1955, c. 1183, § 2; Stats.1971, c. 1610, § 1.)

Cross References**Petition**

Letters of administration, see § 440.

Probate of will, see § 326.

Verification of pleadings, see Code of Civil Procedure § 446.

§ 642. Notice of hearing; proceedings included in petition for probate or for letters

If the allegations and prayer as provided in Section 641 are included in the petition for probate of the will or for letters of administration, the notice of hearing shall include a statement that a prayer for setting aside the estate to the surviving spouse or minor child or minor children, as the case may be, is included in the petition.

(Stats.1931, c. 281, p. 625, § 642. Amended by Stats.1939, c. 819, § 3; Stats.1955, c. 1183, § 3.)

Cross References

Notice of hearing, see §§ 327, 328, 441, 1200.

§ 643. Notice of hearing; proceedings under separate petition

(a) If a separate petition is filed under the provisions of Section 641 without there having been any other petition filed, there shall be no notice of any type other than as prescribed in this subdivision. In those cases, the clerk shall fix a day for the hearing thereof and the petitioner shall give notice of the hearing to each heir by mail not less than 10 days prior to the hearing, and the petitioner shall give notice for the period and in the manner required by Section 1200.5.

(b) If the hearing of the original petition for probate of the will or for letters of administration is set for a day more than 10 days after the filing of a separate petition filed with respect to the same estate, the latter shall be set for hearing at the same time as the former and notice thereof shall be given by the petitioner as provided in Section 1200.5; if not,

the separate petition shall be set for hearing at least 10 days after the date on which it is filed, and if the original petition has not already been heard it shall be continued until that date and heard at the same time.

(Stats.1931, c. 281, § 643. Amended by Stats.1955, c. 1183, § 4; Stats.1971, c. 1610, § 2; Stats.1980, c. 955, § 14.1.)

Cross References

Notices, see § 1200 et seq.

§ 644. Inventory and appraisal; filing; inheritance tax referee

Upon the filing of any petition provided for by this article, the executor or administrator, or the petitioner if no executor or administrator has been appointed, shall cause an inventory and appraisal to be prepared in the manner prescribed by law and filed within such time as the court may allow. The court shall appoint an inheritance tax referee as provided in Section 605, if none has been appointed previously. (Stats.1931, c. 281, § 644. Amended by Stats.1955, c. 1183, § 5; Stats.1970, c. 1282, § 15; Stats.1980, c. 955, § 14.5.)

Cross References

Inheritance tax referees, see Revenue and Taxation Code § 14501 et seq.

Inventory and appraisal, see § 605 et seq.

§ 645. Decree assigning estate to surviving spouse or children; title to property; restriction on right

If, upon the hearing of any petition provided for by this article, the court finds that the net value of the estate over and above all liens and encumbrances at the date of death of the decedent and over and above the value of any homestead interest set apart out of decedent's estate under Section 660 or Section 661 of this code, does not exceed the sum of twenty thousand dollars (\$20,000), as of the date of such death, and that the expenses of the last illness, funeral charges and expenses of administration have been paid, it shall, by decree for that purpose, assign to the surviving spouse of the decedent, if there be a surviving spouse, provided said surviving spouse shall not have theretofore remarried, or, if there be no surviving spouse, then to such child or children of the decedent as may then be minors, if any, the whole of the estate, subject to whatever mortgages, liens or encumbrances there may be upon said estate at the time of the death of the decedent. The title thereto shall vest absolutely in such surviving spouse, or if there be no such surviving spouse, the minor child or children subject to whatever mortgages, liens or

encumbrances there may be upon said estate at the time of the death of the decedent, and there must be no further proceedings in the administration, unless further estate be discovered.

(Stats.1931, c. 281, § 645. Amended by Stats.1939, c. 819, § 4; Stats.1949, c. 453, § 1; Stats.1955, c. 1183, § 6; Stats.1959, c. 1290, p. 3441, § 2; Stats.1961, c. 1190, § 2; Stats.1967, c. 1270, § 1; Stats.1972, c. 555, § 2; Stats.1974, c. 602, § 3; Stats.1976, c. 1028, § 3.)

Cross References

Administration of estates of decedents, see § 300 et seq.

Personal liability of spouse or minor child for unsecured debt, see § 645.3.

Transfer of personal property not exceeding \$20,000 in value, see § 630 et seq.

§ 645.1. Decree assigning estate; conclusiveness; exception

In the absence of fraud in the procurement an order of the superior court assigning an estate pursuant to the provisions of the preceding section, when it becomes final, is a conclusive determination of the jurisdiction of the court (except when based on the erroneous assumption of death), and cannot be collaterally attacked.

(Added by Stats.1945, c. 1360, § 1. Amended by Stats.1955, c. 1183, by § 7.)

§ 645.3. Personal liability for unsecured debts of decedent; duration

A surviving spouse or a minor child or children in whom title has vested pursuant to Section 645 shall be personally liable for the unsecured debts of the decedent. The personal liability shall not exceed the value of the estate at the date of death, less the amount of any liens and encumbrances and any homestead and other property set apart pursuant to Section 660 or Section 661. Such personal liability shall cease one year after title to the estate vests, except with respect to any actions or proceedings then pending in court. In any action based upon such an unsecured debt, the surviving spouse, or the minor child or children, or the guardian of such minor child or children, may assert any defenses, counterclaims, or setoffs which would have been available to the decedent if the decedent had not died.

(Added by Stats.1976, c. 1028, § 4.)

§ 646. Denial of assignment; grounds; effect

If the court finds that the net value of the estate exceeds twenty thousand dollars (\$20,000), or that there is neither a surviving spouse nor a minor child, it shall act upon the petition for probate or for letters

of administration in the same manner as though no petition to set aside the estate had been included, and the estate shall then be administered in the usual manner.

(Stats.1931, c. 281, § 646. Amended by Stats.1939, c. 819, § 5; Stats.1955, c. 1183, § 8; Stats.1959, c. 1290, § 3; Stats.1961, c. 1190, § 3; Stats.1963, c. 91, § 1; Stats.1967, c. 1270, § 2; Stats.1972, c. 555, § 3; Stats.1974, c. 602, § 4; Stats.1976, c. 1028, § 5.)

Cross References

Administration of estates of decedents, see § 300 et seq.

§ 647. Exclusion of joint tenancy, life, or other estate terminable at death

For the purposes of this article, any property or interest therein or lien thereon which, at the time of the decedent's death, was held by him as joint tenant, or in which he had a life or other estate terminable upon his death, shall be excluded in determining the estate of the decedent or its value.

(Added by Stats.1970, c. 513, § 2.)

CHAPTER 11. SUPPORT OF THE FAMILY

| Article | Section |
|--|----------------|
| 1. Homestead and Exempt Property | 660 |
| 2. Family Allowance | 680 |

ARTICLE 1. HOMESTEAD AND EXEMPT PROPERTY

| Sec. | |
|-------------|--|
| 660. | Possession pending inventory and subsequent time period; discretion to set apart property and homestead. |
| 661. | Setting apart and selection of homestead; time period; administration of property; rights of parties. |
| 662. | Setting for and notice of hearing. |
| 663. | Liability for claims. |
| 664. | Selection and setting apart of homestead; considerations; adjoining property. |
| 665. | Modification of term and conditions; termination of homestead rights; motion and notice. |
| 666. | Quasi-community property; separate property. |
| 667. | Repealed. |
| 668. | Repealed. |

§ 660. Possession pending inventory and subsequent time period; discretion to set apart property and homestead.

(a) Until the inventory is filed and for a period of 60 days thereafter or such other period as is ordered by the court for good cause, the decedent's surviving spouse and minor children are entitled to remain in possession of the family dwelling, the wearing apparel of the family, the household furniture and other property of the decedent exempt from execution.

(b) Upon the filing of the inventory or at any subsequent time during the administration, the court, on petition therefor, may in its discretion:

(1) Set apart to the surviving spouse, or, in case of his or her death, to the minor children of the decedent, all or any part of the property of the decedent exempt from execution other than the dwelling.

(2) Select and set apart one homestead in the manner provided in this article.

(Stats.1931, c. 281, § 660. Amended by Stats.1951, c. 438, § 4; Stats.1959, c. 1805, § 6; Stats.1980, c. 119, § 4.)

Subdivision (b) of § 22 of Stats.1980, c. 119, provides: "(b) A homestead set apart by order of the court prior to the effective date of this act pursuant to Sections 660 through 668, inclusive, of the Probate Code remains vested as provided therein and is a transfer subject to Part 8 (commencing with Section 13301) of the Revenue and Taxation Code."

Cross References

Appealability of orders setting apart homesteads, see § 1240.

Costs as charges of the estate, see § 683.

Exemption of homesteads, see Const. Art. 20, § 1.5.

Exemptions, generally, see Code of Civil Procedure § 690 et seq.

Family allowance, generally, see § 680 et seq.

Homestead, defined, see Civil Code § 1237.

Homesteads, generally, see Civil Code § 1237 et seq.

Inheritance tax, see Revenue and Taxation Code § 13622.

Partnership property, exclusion from this article, see Corporations Code § 15025.

Recordation of order setting apart homestead, see § 1222.

Setting aside estates not exceeding \$20,000 in value, see § 640 et seq.

§ 661. Setting apart and selection of homestead; time period; administration of property; rights of parties

(a) The homestead shall be set apart for the use of one or more of the following persons:

(1) The surviving spouse.

(2) The minor children of the decedent.

(b) The homestead shall be selected out of the following property, giving first preference to the community and quasi-community property of, or property owned in common by, the decedent and the person entitled to have the homestead set apart:

(1) If the homestead is set apart for the use of the surviving spouse or for the use of the surviving spouse and minor children, out of community property or quasi-community property.

(2) If the homestead is set apart for the use of the surviving spouse or for the use of the minor children, out of property owned in common by the decedent and the person entitled to have the homestead set apart, or out of the separate property of the decedent or, if the decedent was not married at the time of death, out of property owned by the decedent.

(c) The homestead shall not be selected out of property the right to possession of which is vested in a third person unless the third person consents thereto. As used in this subdivision, "third person" means a person whose right to possession of the property (1) existed at the time of the death of the decedent or came into existence upon the death of the decedent and (2) was not created by testate or intestate succession from the decedent.

(d) The property set apart as a homestead shall be set apart only for a limited period, to be designated in the order, and in no case beyond the lifetime of the surviving spouse, or, as to a child, beyond its minority. Subject to the homestead right, the property of the decedent remains subject to administration including testate and intestate succession. The rights of the parties during the period for which the homestead is set apart are governed, to the extent applicable, by the Legal Estates Principal and Income Law, Chapter 2.6 (commencing with Section 731) of Title 2 of Part 1 of Division 2 of the Civil Code. (Stats.1931, c. 281, § 661. Amended by Stats.1957, c. 490, § 5; Stats.1961, c. 636, § 14; Stats.1980, c. 119, § 5.)

Vesting and inheritance taxation of homesteads set apart by order of court prior to Jan. 1, 1981, pursuant to §§ 660 to 668, see note under § 660.

Cross References

Appealability of homestead orders, see § 1240.

Homesteads, generally, see Civil Code § 1237 et seq.

Management, control and disposition of homestead property of insane or incompetent persons, see § 1435.1 et seq.

Notice and hearing, see § 1200.

Recordation of order setting apart homestead, see § 1222.

Setting aside estates not exceeding \$20,000 in value, see § 640 et seq.

§ 662. Setting for and notice of hearing

When the petition to select and set apart a homestead is filed, the clerk shall set it for hearing by the court and the petitioner shall give notice thereof for the period and in the manner required by Section 1200.5.

(Amended by Stats.1980, c. 955, § 18.2.)

(Stats.1931, c. 281, § 662. Amended by Stats.1980, c. 119, § 6; Stats.1980, c. 955, § 18.2.)

Vesting and inheritance taxation of homesteads set apart by order of court prior to Jan. 1, 1981, pursuant to §§ 660 to 668, see note under § 660.

§ 663. Liability for claims

(a) Property of the decedent set apart as a homestead is liable for claims against the estate of the decedent, subject to the homestead right. The homestead right in property of the decedent is liable for claims that are secured by liens and encumbrances on

the property at the time of the decedent's death but is exempt to the extent of the dwelling exemption as to any claim that would have been subject to a dwelling exemption at the time of the decedent's death.

(b) The homestead right in the property of the decedent is not liable for claims against the person for whose use the homestead is set apart.

(c) Property of the decedent set apart as a homestead is liable for claims against the testate or intestate successors of the decedent or other successors to the property after administration, subject to the homestead right.

(Added by Stats.1980, c. 119, § 8.)

Former § 663 was repealed by Stats.1980, c. 119, § 7.

Vesting and inheritance taxation of homesteads set apart by order of court prior to Jan. 1, 1981, pursuant to §§ 660 to 668, see note under § 660.

§ 664. Selection and setting apart of homestead; considerations; adjoining property

In selecting and setting apart the homestead, the court shall consider the needs of the surviving spouse and minor children, the liens and encumbrances on the property, the claims of creditors, the needs of the heirs or devisees of the decedent, and 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. The court, in light of the foregoing and other relevant considerations as determined by the court in its discretion, shall select as a homestead the most appropriate property available that is suitable for use as a dwelling and shall set apart in addition to the dwelling such adjoining property as appears reasonable for such a term and upon such conditions (including, but not limited to, assignment by the homestead recipient of other property to the heirs or devisees of the property set apart as a homestead) as appear proper.

(Added by Stats.1980, c. 119, § 10.)

Former § 664 was repealed by Stats.1980, c. 119, § 9.

Vesting and inheritance taxation of homesteads set apart by order of court prior to Jan. 1, 1981, pursuant to §§ 660 to 668, see note under § 660.

§ 665. Modification of term and conditions; termination of homestead rights; motion and notice

(a) The court may by order modify the term or conditions of the homestead right or terminate the homestead right at any time prior to entry of a final decree of distribution of the decedent's estate if in

the court's discretion to do so appears appropriate under the circumstances of the case.

(b) A court order under this section shall be made upon motion of any of the following parties and notice to the others:

(1) The person for whose use the homestead is set apart.

(2) The testate or intestate successors of the decedent or other successors to the property set apart as a homestead.

(3) Persons having claims secured by liens or encumbrances on the property set apart as a homestead.

(Added by Stats.1980, c. 119, § 12.)

Former § 665 was repealed by Stats.1980, c. 119, § 11.

Vesting and inheritance taxation of homesteads set apart by order of court prior to Jan. 1, 1981, pursuant to §§ 660 to 668, see note under § 660.

§ 666. Quasi-community property; separate property

As used in this article:

(a) "Quasi-community property" means personal property, wherever situated, and real property situated in this state, heretofore or hereafter acquired in any of the following ways:

(1) By the decedent while domiciled elsewhere which would have been community property if the decedent had been domiciled in this state at the time of the acquisition of the property.

(2) In exchange for real or personal property, wherever situated, which would have been community property if the decedent had been domiciled in this state at the time of the acquisition of the property so exchanged.

(b) "Separate property" does not include quasi-community property.

(Added by Stats.1980, c. 119, § 14.)

Former § 666 was repealed by Stats.1980, c. 119, § 13.

Vesting and inheritance taxation of homesteads set apart by order of court prior to Jan. 1, 1981, pursuant to §§ 660 to 668, see note under § 660.

§§ 667, 668. Repealed by Stats.1980, c. 119, §§ 15,

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Vesting and inheritance taxation of homesteads set apart by order of court prior to Jan. 1, 1981, pursuant to §§ 660 to 668, see note under § 660.

ARTICLE 2. FAMILY ALLOWANCE

Sec.

680. Right to allowance; preference in payment; time of commencement.
681. Time of grant; continuance; modification.
682. Maintenance derived from other property; allowance to other members of family.
683. Costs.
684. Stay of payment prohibited; undertaking pending appeal; conditions.

§ 680. Right to allowance; preference in payment; time of commencement

The surviving spouse, minor children, and adult children who are physically or mentally incapacitated from earning a living and were actually dependent in whole or in part upon the decedent for support are entitled to such reasonable allowance out of the estate as shall be necessary for their maintenance according to their circumstances, during the progress of the settlement of the estate, which, in case of an insolvent estate, must not continue longer than one year after granting letters. Such allowance must be paid in preference to all other charges, except funeral charges, expenses of the last illness and expenses of administration, and may, in the discretion of the court or judge granting it, take effect from the death of the decedent.

(Stats.1931, c. 281, § 680. Amended by Stats.1951, c. 1089, § 1; Stats.1953, c. 1215, § 1; Stats.1972, c. 569, § 1.)

Cross References

Inheritance tax, see Revenue and Taxation Code § 13623.
Order of payment of expenses, charges and debts, see § 950.
Partnership property, exclusion from this article, see Corporations Code § 15025.
Payment of family allowance, see § 300.
Possession of homestead until inventory filed, see § 660.
Priority of payments where one or more eligible persons receives maintenance from other sources, see § 682.
Sale of property to pay family allowance, see §§ 750, 770.
Setting aside estates not exceeding \$20,000 in value, see § 640 et seq.

§ 681. Time of grant; continuance; modification

The allowance provided for in Section 680 may be granted before the inventory is filed, either by the court or a judge thereof; in which case it shall continue until modified by the court. After the inventory is filed, the court may grant the allowance, or may modify any allowance made before the filing of the inventory, upon the petition of any person interested and a hearing, after notice is given by the petitioner for the period and in the manner required by Section 1200.5.

(Stats.1931, c. 281, § 681. Amended by Stats.1980, c. 955, § 18.3.)

Cross References

Duration of family allowance, see § 680.
Mode of giving notice in certain instances, see § 1200.
Time for and place of filing inventory, see § 600.

§ 682. Maintenance derived from other property; allowance to other members of family

If any person or persons otherwise eligible for family allowance under Section 680 have a reasonable maintenance derived from other sources, and there are other persons entitled to a family allowance, the allowance shall be granted only to those who have not such maintenance.

(Stats.1931, c. 281, § 682. Amended by Stats.1951, c. 1089, § 2; Stats.1972, c. 569, § 2.)

§ 683. Costs

The costs of all proceedings provided for in this chapter must be paid by the estate as expenses of administration.

(Stats.1931, c. 281, § 683.)

Cross References

Costs, discretion to order payment by parties or from estate, see § 1232.

§ 684. Stay of payment prohibited; undertaking pending appeal; conditions

No stay shall be had of payment of any family allowance, or of any installment thereof, pending appeal from an order relating thereto, even though the court, acting under the provisions of Section 916 of the Code of Civil Procedure, shall dispense with or limit the security required of an appellant, if the person in whose favor the allowance is made shall, at any time before the making of such payment, execute and file a good and sufficient written undertaking, with two or more sureties, to the effect that they are bound in double the amount of such payment or payments, and that if the judgment or order appealed from, or any part thereof, be so modified or reversed that such payment, or any part thereof, proves to be unwarranted, the same shall, unless deducted from any final or partial distribution ordered in favor of such person for whom such allowance was awarded, be repaid and refunded into said estate, and, if not so repaid and refunded within 30 days after the trial court shall so order following such modification or reversal, judgment may be entered therefor, on motion of the personal representative of said estate, in favor of the said personal representative and against the principal and sureties on such undertaking, for such amount, together with interest and costs not exceeding the amount of such undertaking.

(Added by Stats.1941, c. 164, § 1. Amended by Stats.1951, c. 1089, § 3; Stats.1972, c. 569, § 3.)

EXHIBIT 2

UPC Article 2, Part 4

PART 4

EXEMPT PROPERTY AND ALLOWANCES

GENERAL COMMENT

This part describes certain rights and values to which a surviving spouse and certain children of a deceased *domiciliary* are entitled in preference over unsecured creditors of the estate and persons to whom the estate may be devised by will. If there is a surviving spouse, all of the values described in this Part, which total \$8,500 plus whatever is allowed to the spouse for support during administration, pass to the spouse. Minor or dependent children become entitled to the homestead exemption of \$5,000 and to support allowances if there is no spouse, and may receive some of the support allowance if they live apart from the surviving spouse. The exempt property section confers rights on the spouse, if any, or on all children, to \$3,500 in certain chattels, or funds if the unencumbered value of chattels is below the \$3,500 level. This provision is designed in part to relieve a personal representative of the duty to sell household chattels when there are children who will have them.

These family protection provisions supply the basis for the important small estate provisions of Article III, Part 12.

States adopting the Code may see fit to alter the dollar amounts suggested in these sections, or to vary the terms and conditions in other ways so as to accommodate existing traditions. Although creditors of estates would be aided somewhat if all family exemption provisions relating to probate estates were the same throughout the country, there is probably less need for uniformity of law regarding these provisions than for any of the other parts of this article. Still, it is quite important for all states to limit their homestead, support allowance and exempt property provisions, if any, so that they apply only to estates of decedents who were domiciliaries of the state.

Notice that Section 2-104 imposes a requirement of survival of the decedent for 120 hours on any spouse or child claiming under this Part.

Section 2-401. [Homestead Allowance.]

A surviving spouse of a decedent who was domiciled in this state is entitled to a homestead allowance of [\$5,000]. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance amounting to [\$5,000] divided by the number of minor and dependent children of the decedent. The homestead allowance is exempt from and has priority over all claims against the estate. Homestead allowance is in addition to any share

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passing to the surviving spouse or minor or dependent child by the will of the decedent unless otherwise provided, by intestate succession or by way of elective share.

COMMENT

See Section 2-802 for the definition of "spouse" which controls in this Part. Also, see Section 2-104. Waiver of homestead is covered by Section 2-204. "Election" between a provision of a will and homestead is not required unless the will so provides.

A set dollar amount for homestead allowance was dictated by the desirability of having a certain level below which administration may be dispensed with or be handled summarily, without regard to the size of allowances under Section 2-402. The "small estate" line is controlled largely, though not entirely, by the size of

the homestead allowance. This is because Part 12 of Article III dealing with small estates rests on the assumption that the only justification for keeping a decedent's assets from his creditors is to benefit the decedent's spouse and children.

Another reason for a set amount is related to the fact that homestead allowance may prefer a decedent's minor or dependent children over his other children. It was felt desirable to minimize the consequence of application of an arbitrary age line among children of the testator.

[Section 2-401A. [Constitutional Homestead.]]

The value of any constitutional right of homestead in the family home received by a surviving spouse or child shall be charged against that spouse or child's homestead allowance to the extent that the family home is part of the decedent's estate or would have been but for the homestead provision of the constitution.]

COMMENT

This optional section is designed for adoption only in states with a constitutional homestead provision. The value of the surviving spouse's constitutional right of homestead may be con-

siderably less than the full value of the family home if the constitution gives her only a terminable life estate enjoyable in common with minor children.

Section 2-402. [Exempt Property.]

In addition to the homestead allowance, the surviving spouse of a decedent who was domiciled in this state is entitled from the estate to value not exceeding \$3,500 in excess of any security interests therein in household furniture, automobiles, furnishings, appliances and personal effects. If there is no

surviving spouse, children of the decedent are entitled jointly to the same value. If encumbered chattels are selected and if the value in excess of security interests, plus that of other exempt property, is less than \$3,500, or if there is not \$3,500 worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the \$3,500 value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, except that the right to any assets to make up a deficiency of exempt property shall abate as necessary to permit prior payment of homestead allowance and family allowance. These rights are in addition to any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share.

COMMENT

Unlike the exempt values described in Sections 2-401 and 2-403, the exempt values described in this section are available in a case where the decedent left no spouse but left only adult children. The possible difference between beneficiaries of the exemptions described by Sections 2-401 and 2-403, and this section, explain

the provision in this section which establishes priorities.

Section 2-204 covers waiver of exempt property rights. This section indicates that a decedent's will may put a spouse to an election with reference to exemptions, but that no election is presumed to be required.

Section 2-403. [Family Allowance.]

In addition to the right to homestead allowance and exempt property, if the decedent was domiciled in this state, the surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported by him are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than one year if the estate is inadequate to discharge allowed claims. The allowance may be paid as a lump sum or in periodic installments. It is payable to the surviving spouse, if living, for the use of the surviving spouse and minor and dependent children; otherwise to the children, or persons having their care and custody; but in case any minor child or dependent child is not living with the surviving spouse, the allowance may be made partially to the child or his guardian or other person having his care and custody, and partially to the spouse, as

their needs may appear. The family allowance is exempt from and has priority over all claims but not over the homestead allowance.

The family allowance is not chargeable against any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share. The death of any person entitled to family allowance terminates his right to allowances not yet paid.

COMMENT

The allowance provided by this section does not qualify for the marital deduction under the Federal Estate Tax Act because the interest is terminable. A broad code must provide the best possible protection for the family in all cases, even though this may not provide desired tax advantages for certain larger estates. In estates falling in the federal estate tax bracket where careful planning may be expected, it is important to the operation of formula clauses that the family allowance be clearly terminable or clearly nonterminable. With the proposed section clearly creating a terminable interest, estate planners can create a plan which will operate with certainty. Finally, in order to facilitate administration of this allowance without court supervision it is necessary to provide a fairly simple and definite framework.

In determining the amount of the family allowance, account should be taken of both the previous standard of living and the nature of other resources available to the family to meet current living expenses until the estate can be administered and

assets distributed. While the death of the principal income producer may necessitate some change in the standard of living, there must also be a period of adjustment. If the surviving spouse has a substantial income, this may be taken into account. Whether life insurance proceeds payable in a lump sum or periodic installments were intended by the decedent to be used for the period of adjustment or to be conserved as capital may be considered. A living trust may provide the needed income without resorting to the probate estate. If a husband has been the principal source of family support, a wife should not be expected to use her capital to support the family.

Obviously, need is relative to the circumstances, and what is reasonable must be decided on the basis of the facts of each individual case. Note, however, that under the next section the personal representative may not determine an allowance of more than \$500 per month for one year; a Court order would be necessary if a greater allowance is reasonably necessary.

Section 2-404. [Source, Determination and Documentation.]

If the estate is otherwise sufficient, property specifically devised is not used to satisfy rights to homestead and exempt property. Subject to this restriction, the surviving spouse, the guardians of the minor children, or children who are adults may select property of the estate as homestead allowance and exempt property. The personal representative may make these selections if the surviving spouse, the children or the guardians of the minor children are unable or fail to do so within a reasonable time or if there are no guardians of the minor children. The personal representative may execute an instrument or deed of distribution to establish the ownership of property taken as homestead allowance or exempt property. He may determine the family allowance in a lump sum not exceeding \$6,000 or periodic installments not exceeding \$500 per month for one year, and may disburse funds of the estate in payment of the family allowance and any part of the homestead allowance payable in cash. The personal representative or any interested person aggrieved by any selection, determination, payment, proposed payment, or failure to act under this section may petition the Court for appropriate relief, which relief may provide a family allowance larger or smaller than that which the personal representative determined or could have determined.

COMMENT

See Section 3-902, 3-906 and 3-907.