

Tenth Supplement to Memorandum 82-70

Subject: Study L-625 - Probate Code (Tentative Recommendation--Family Protection §§ 250.010-253.070)

Attached is the portion of the recommended legislation relating to the following:

Temporary Possession of Family Dwelling and Exempt Property
§§ 250.010-250.020
Setting Aside Exempt Property Other Than Family Dwelling
§§ 250.110-250.120
Setting Aside Probate Homestead §§ 251.010-251.080
Family Allowance §§ 252.010-252.070
Family Maintenance §§ 253.010-253.070

Also attached is the preliminary portion of the tentative recommendation that relates to this portion of the recommended legislation.

Family Maintenance

Eligibility to receive family maintenance. The staff has made two revisions to Section 253.010 which determines who is eligible to receive family maintenance:

(1) As last seen by the Commission, the section permitted a family maintenance order in favor of the decedent's parent who is in need and unable to maintain himself or herself by work. The staff has narrowed this to permit family allowance only for a parent who was in fact being supported by the decedent. This is the standard for eligibility for the family allowance.

(2) As last seen by the Commission, the section permitted family maintenance for the decedent's minor child "who is not emancipated." The staff has broadened this by deleting the language that the minor not be emancipated.

Manner of giving notice of hearing. Section 253.060 requires that notice of a petition for family maintenance be given in the manner provided in Section 1200.5--that is, by mail to those who have requested special notice or who have filed a notice of appearance in the estate proceeding. (Additional notice can be required by the court under Section 1204, which permits the court to require such additional or further notice of a hearing as the court deems proper.)

Probate Commissioner Ann Stodden has suggested that the provision for notice of hearing on a petition for family maintenance should be broadened so that notice would be required to be given to all heirs,

devisees, and legatees. However, in its present form, the notice provision for family maintenance is consistent with the notice provisions under existing law for exempt property (Prob. Code § 1200.5), family allowance (Prob. Code 681), probate homestead (Prob. Code § 662), and small estate set-aside (Prob. Code § 643). Accordingly, the staff has retained the present scheme. However, Commissioner Stodden's suggestion raises the policy issue of whether these existing notice provisions are adequate as well as what type of notice should be required for the family maintenance hearing.

Respectfully submitted,

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Executive Secretary

Family Maintenance

During lifetime, a parent has a duty to support his or her minor children,¹ and a married person has a duty to support his or her spouse.² The duty of support survives the death of the parent or married person only in the case of a failed marriage where there has been an agreement or court order for support.³ However, in the usual case where there is no agreement or court order for support, both the child and spousal support obligations terminate at the death of the obligor.⁴

There is no sound policy reason why a child or spouse of the decedent should be able to enforce a post-death obligation of support where the marriage has failed, but not be able to obtain such support where the marriage is intact. There are other provisions in the Probate Code to protect the child or spouse of the decedent, such as probate homestead, family allowance, exempt property, and small estate set-aside.⁵

1. Civil Code §§ 196, 196a; 6 B. Witkin, Summary of California Law Parent and Child § 120, at 230 (Supp. 1982).
2. Civil Code §§ 242, 5100, 5132; 6 B. Witkin, Summary of California Law Husband and Wife §§ 9, 11, at 4879-82 (8th ed. 1974).
3. A child support obligation survives the parent's death only if support has been fixed by a divorce decree or property settlement agreement. 6 B. Witkin, Summary of California Law Parent and Child § 129, at 4646-47 (8th ed. 1974). Spousal support survives only if it is expressly made survivable in a property settlement agreement. 6 B. Witkin, Summary of California Law Husband and Wife § 204, at 5075 (8th ed. 1974). A support order that survives the death of the obligor may be enforced by a court order that the obligor's personal representative pay into court or to a trustee a lump sum sufficient to pay future installments as they become due. Prob. Code § 953 (payment into court of money to cover contingent claims against the estate or claims not yet due); 953.1 (payment to trustee) Code Civ. Proc. §§ 572-574 (procedure for payment into court); *Newman v. Burwell*, 216 Cal. 608, 615, 15 P.2d 511 (1932); *Newhall v. Newhall*, 227 Cal. App.2d 800, 810 n.7, 39 Cal. Rptr. 144 (1964).
4. 6 B. Witkin, Summary of California Law Parent and Child § 129, at 4647 (8th ed. 1974) (child support); *id.* Husband and Wife §§ 181, 204, at 5050, 5075 (spousal support).
5. Prob. Code §§ 640-647, 660-684. The proposed legislation makes no substantive changes in these provisions.

But these provisions are limited either in duration or amount⁶ and may not meet the need for long-term family support after the death of the spouse or parent.

The proposed law gives the court discretionary authority to order long-term support (family maintenance), to be paid out of the probate estate, for (1) the surviving spouse, (2) minor children, (3) adult children of the decedent who were being supported by the decedent before death, and (4) parents of the decedent who were being supported by the decedent before death. In determining whether to make a family maintenance order and what amount should be awarded, the court must consider such matters as the needs of the person to be awarded the family maintenance, the needs of the persons who would otherwise take the decedent's estate, the extent of support, if any, that was provided to the person by the decedent before the decedent's death, and other factors that would enter into a determination of support under the Family Law Act.⁷

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

Under the proposed law, no family maintenance order may be made in favor of a child of the decedent if the surviving parent of the child is entitled to substantially all of the estate or to substantially all the

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

7. See Civil Code § 4801.

income of the estate during the lifetime of the surviving parent. The surviving parent in such a case will ordinarily provide adequate support for the child.⁸ Moreover, the obligation of the surviving parent to support the child is enforceable by judicial proceedings if necessary.

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

PART 3. FAMILY PROTECTION

CHAPTER 1. TEMPORARY POSSESSION OF FAMILY DWELLING
AND EXEMPT PROPERTY§ 250.010. Temporary right to remain in possession

250.010. Until the inventory is filed and for a period of 60 days thereafter, or for such other period as may be ordered by the court for good cause on petition therefor, 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 the other property of the decedent exempt from enforcement of a money judgment.

Comment. Section 250.010 continues the substance of subdivision (a) of former Section 660. See Code Civ. Proc. §§ 695.010-695.070, 703.010-704.995, 706.050-706.051 (property exempt from enforcement of money judgment).

406/206

§ 250.020. Notice of hearing

250.020. A petition for an order under Section 250.010 may be filed by any interested person. The court clerk shall set the petition for hearing by the court, and the petitioner shall give notice of the hearing for the period and in the manner required by Section 1200.5.

Comment. Section 250.020 is new and is drawn from former Section 662 (probate homestead).

406/227

CHAPTER 2. SETTING ASIDE EXEMPT PROPERTY
OTHER THAN FAMILY DWELLING§ 250.110. Setting aside exempt property

250.110. Upon the filing of the inventory or at any subsequent time during the administration of the estate, the court in its discretion may on petition therefor set apart all or any part of the property of the decedent exempt from enforcement of a money judgment, other than the family dwelling, to any one or more of the following:

- (a) The surviving spouse.
- (b) The minor children of the decedent.

Comment. Section 250.110 continues the substance of a portion of subdivision (b) of former Section 660, except that Section 250.110 permits the court to award the exempt property to the decedent's minor children even where there is a surviving spouse, while the former section permitted an award to the minor children only in case of the death of the surviving spouse. This change in the former law adopts the rule as to a probate homestead under former Section 661, the substance of which is continued in Section 251.020. Section 250.110 permits, for example, the minor children to receive the furniture and household furnishings for a probate homestead set apart for the use of the minor children. See the Comment to Section 251.020.

406/210

§ 250.120. Notice of hearing

250.120. A petition for an order under Section 250.110 may be filed by any interested person. The court clerk shall set the petition for hearing by the court, and the petitioner shall give notice of the hearing for the period and in the manner required by Section 1200.5.

Comment. Section 250.120 is new and is drawn from former Section 662 (probate homestead).

406/228

CHAPTER 3. SETTING ASIDE PROBATE HOMESTEAD

§ 251.010. Authority of court

251.010. Upon the filing of the inventory or at any subsequent time during the administration of the estate, the court in its discretion may on petition therefor select and set apart one probate homestead in the manner provided in this chapter.

Comment. Section 251.010 continues the substance of a portion of subdivision (b) of former Section 660. Under Section 251.010, establishment of a probate homestead is discretionary with the court. The factors to be used by the court in exercising discretion are set forth in Section 251.040.

406/229

§ 251.020. Persons for whom homestead is to be selected

251.020. The probate homestead shall be set apart for the use of one or more of the following persons:

- (a) The surviving spouse.
- (b) The minor children of the decedent.

Comment. Section 251.020 continues subdivision (a) of former Section 661. Section 251.020 permits the probate homestead to be set apart for minor children of the decedent even if there is a surviving spouse. This may be desirable, for example, if the minor children live apart from the surviving spouse or where the minor children are not children of the surviving spouse.

406/230

§ 251.030. Property from which homestead is to be selected

251.030. (a) The probate 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.

(b) The probate 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.

Comment. Section 251.030 continues subdivisions (b) and (c) of former Section 661. Section 251.030 does not require that the probate homestead be selected out of real property. The probate homestead may be selected out of personal property such as a mobilehome. Under Section 251.030, the court may select a homestead out of separate property of the decedent despite the availability of community or quasi-community property or property held in common by the decedent and the person in whose use the homestead is set apart. However, the court must give preference to property other than the separate property of the decedent for selection as a probate homestead.

Subdivision (b) limits the property from which the homestead may be selected. A probate homestead may not be created on property of which a third person has the right to possession, whether by partial ownership,

lease, or otherwise, without the person's consent. The probate homestead can affect the possessory rights only of testate and intestate successors of the decedent. See also Section 100.380 ("quasi-community property" defined).

968/679

§ 251.040. Factors to be considered in setting apart homestead

251.040. (a) In selecting and setting apart the probate 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.

(b) The court, in light of subdivision (a) and other relevant considerations as determined by the court in its discretion, shall:

(1) Select as a probate homestead the most appropriate property available that is suitable for that use, including in addition to the dwelling itself such adjoining property as appears reasonable.

(2) Set the probate homestead so selected apart 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.

Comment. Section 251.040 continues former Section 664. Under Section 251.040, the court has broad discretion in selecting the probate homestead and may take into account a wide variety of factors in exercising its discretion. Section 251.040 expressly authorizes the court to condition the homestead on any terms that appear proper to the court. The court may select the homestead out of the separate property of the decedent but must give a preference to community or quasi-community property or other property held in common by the decedent and the person for whose use the homestead is set apart. See Section 251.030 and Comment thereto. The court must select the most appropriate property as the homestead and is not limited to the existing dwelling. The court is not limited to existing lots or parcels, but must set apart only so much of the property as is reasonable under the circumstances of the case.

§ 251.050. Duration of homestead; rights of parties

251.050. The property set apart as a probate 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 probate 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 probate 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.

Comment. Section 251.050 continues the substance of subdivision (d) of former Section 661. Section 251.050 requires that the probate homestead be set apart only for a limited period, regardless whether the homestead is selected out of the separate property of the decedent or otherwise. Under Section 251.050, the property remains subject to administration so that upon termination of the probate homestead right title to the property of the decedent set apart as a probate homestead vests in the heirs or devisees. Any portion of the probate homestead that is the property of the person for whom the homestead was set apart remains vested in the person at the termination of the probate homestead right. The rights of the homestead recipients and remaindermen are governed by the Legal Estates Principal and Income Law. The court setting apart the homestead may vary the requirements of the law where appropriate to do so. See Civil Code § 731.04. As to the rights of creditors during and after administration, see Section 251.070.

968/664

§ 251.060. Notice of hearing

251.060. A petition to select and set apart a probate homestead may be filed by any interested person. The court clerk shall set the petition for hearing by the court, and the petitioner shall give notice of the hearing for the period and in the manner required by Section 1200.5.

Comment. Section 251.060 continues the substance of former Section 662.

§ 251.070. Liability of homestead property for claims

251.070. (a) Property of the decedent set apart as a probate homestead is liable for claims against the estate of the decedent, subject to the probate homestead right. The probate 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 homestead exemption as to any claim that would have been subject to a homestead exemption at the time of the decedent's death under Article 7 (commencing with Section 704.710) of Chapter 4 of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure.

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

(c) Property of the decedent set apart as a probate 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 probate homestead right.

Comment. Section 251.070 continues former Section 663. Subdivision (a) of Section 251.070 sets the rules governing liability of probate homestead property for debts of the decedent. The first sentence makes clear that such property may be used to satisfy debts of the decedent, but any sale is subject to the probate homestead right of occupancy by the person for whose use the homestead is set apart. This codifies the rule of *Estate of Tittel*, 139 Cal. 149, 72 P. 909 (1903). The second sentence recognizes the common law rule that the probate homestead does not affect prior liens and encumbrances. See, e.g., *Estate of McCauley*, 50 Cal. 544 (1875); *Estate of Huelsman*, 127 Cal. 275, 59 P. 776 (1899). However, the court may select as a probate homestead property not subject to liens and encumbrances or property whose liens and encumbrances will be discharged in probate. See Section 251.040 (discretion of court). Preexisting liens and encumbrances on the property may be satisfied out of the probate homestead right. If the property would have been exempt from enforcement of a claim secured by a lien or encumbrance at the time of the decedent's death, however, the homestead recipient may claim a homestead exemption for the probate homestead right.

Subdivision (b) states the rule governing liability of the probate homestead right for debts of the person for whose use the homestead is set apart. Subdivision (b) creates an absolute exemption for the probate homestead right, both as to prior and subsequently incurred debts, regardless of liens created on the probate homestead right. Subdivision (b) does not preclude a creditor of the person for whose use the probate homestead is set apart from reaching any interest in the property the person may have apart from the probate homestead right; this may occur where the homestead was selected out of community property or property held in common by the decedent and the person for whose use the homestead

is set apart. In such a situation, the exemption from execution for a dwelling may be available to the person for whose use the homestead is set apart to protect his or her property interest.

Subdivision (c) states the rule governing liability of probate homestead property for debts of the heirs or devisees or other persons who may have acquired the property through administration. The probate homestead property is subject to administration and devolves as any other property, subject to the right of use of the homestead by the persons for whose use it is set apart. See Section 251.050. Under subdivision (c) of Section 251.070, the remainder interest but not the probate homestead right is subject to claims of creditors.

968/689

§ 251.080. Modification or termination of homestead rights

251.080. (a) The court may by order modify the term or conditions of the probate homestead right or terminate the probate 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 petition for an order under this section may be filed by any of the following:

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

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

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

(c) Notice of the hearing on the petition shall be given to all the persons listed in subdivision (b) (other than the petitioner) for the period and in the manner required by Section 1200.5.

Comment. Section 251.080 continues the substance of former Section 665 with the addition of subdivision (c). Section 251.080 gives the court authority to modify the probate homestead right until the entry of the final decree of distribution in recognition of the possibility of changed circumstances.

CHAPTER 4. FAMILY ALLOWANCE

§ 252.010. Persons for whom family allowance may be made

252.010. (a) The court may make an order awarding to one or more of the following persons such reasonable family allowance out of the estate as is necessary for the maintenance of the person during administration of the estate according to the circumstances:

- (1) The surviving spouse of the decedent.
- (2) A minor child of the decedent.
- (3) An adult child of the decedent who was in fact being supported by the decedent.
- (4) A parent of the decedent who was in fact being supported by the decedent.

(b) If a person otherwise eligible for family allowance has a reasonable maintenance from other sources and there are one or more other persons entitled to a family allowance, the family allowance shall be granted only to those who do not have a reasonable maintenance from other sources.

Comment. Subdivision (a) of Section 252.010 continues the substance of a portion of former Section 680 as amended by 1982 Cal. Stats. ch. [AB 3561]. [AB 3561 broadens prior law by omitting the former requirement that an adult child actually dependent on the decedent for support have been "physically or mentally incapacitated from earning a living." Thus under paragraph (3), a family allowance may be awarded to an adult child who was in fact being supported by the decedent without regard to whether the child was physically or mentally incapacitated. Under paragraph (3), for example, the court might award a family allowance to an adult child of the decedent who is attending college and was in fact being supported by the decedent. Paragraph (3) is drawn from a portion of Section 2-403 of the Uniform Probate Code.] Subdivision (b) continues the substance of former Section 682. As to the priority of the family allowance, see Section 950.

968/858

§ 252.020. Petition, notice, and hearing; ex parte order

252.020. (a) The court may grant or modify a family allowance on petition of any interested person.

(b) Before the inventory is filed, the court's order may be made or modified either ex parte or after notice of the hearing on the petition has been given for the period and in the manner provided in Section 1200.5.

(c) After the inventory is filed, the court's order shall be made or modified only after notice of the hearing on the petition has been given for the period and in the manner provided in Section 1200.5.

Comment. Section 252.020 continues the substance of a portion of former Section 681.

968/992

§ 252.030. Time of commencement of allowance

252.030. A family allowance commences on the date of the court's order or such other time as may be provided in the court's order, whether before or after the date of the order, but in no event may the allowance be made retroactive to a date earlier than the date of the decedent's death.

Comment. Section 252.030 codifies existing practice. See Pigott, Family Allowance, in 1 California Decedent Estate Administration §§ 11.12, 11.15, 11.18, at 400, 404, 406 (Cal. Cont. Ed. Bar 1971). The prohibition in subdivision (b) against an order which is retroactive to a date earlier than the date of decedent's death continues the substance of a portion of the second sentence of former Section 680.

969/006

§ 252.040. Termination of allowance

252.040. (a) A family allowance shall terminate no later than the final settlement of the estate or, if the estate is insolvent, no later than one year after the granting of letters.

(b) Subject to subdivision (a), a family allowance shall continue until modified or terminated by the court or until such time as the court may provide in its order.

Comment. Section 252.040 continues a portion of the first sentence of former Section 680 and a portion of the first sentence of former Section 681. The authority in Section 252.040 for the court to make an order terminating a family allowance or to include a termination date in its original order is new, but was implied under the former sections. See Pigott, Family Allowance, in 1 California Decedent Estate Administration §§ 11.15, 11.28, at 404, 410 (Cal. Cont. Ed. Bar 1971).

969/034

§ 252.050. [Reserved]

§ 252.060. Costs paid as expenses of administration

252.060. The costs of proceedings under this chapter shall be paid by the estate as expenses of administration.

Comment. Section 252.060 continues the substance of former Section 683.

969/037

§ 252.070. No stay on appeal if undertaking furnished

252.070. Notwithstanding Chapter 2 (commencing with Section 916) of Title 13 of Part 2 of the Code of Civil Procedure, the perfecting of an appeal from an order made under this chapter does not stay proceedings under this chapter or the enforcement of the order appealed from if the person in whose favor the order is made gives an undertaking in double the amount of the payment or payments to be made to that person. The undertaking shall be conditioned that if the order appealed from is modified or reversed so that the payment or any part thereof to the person proves to have been unwarranted, the payment or part thereof shall, unless deducted from any preliminary or final distribution ordered in favor of the person, be repaid and refunded into the estate within 30 days after the court so orders following the modification or reversal, together with interest and costs.

Comment. Section 252.070 continues the substance of former Section 684.

405/925

CHAPTER 5. FAMILY MAINTENANCE

§ 253.010. "Eligible person" defined

253.010. As used in this chapter, "eligible person" means:

- (a) The surviving spouse of the decedent.
- (b) A minor child of the decedent.
- (c) An adult child of the decedent who was in fact being supported by the decedent.
- (d) A parent of the decedent who was in fact being supported by the decedent.

Comment. Chapter 5 permits a family maintenance order to be made out of the decedent's estate for the support of the persons specified in Section 253.010. These persons are the same persons as those to whom a family allowance may be made under Section 252.010, but the standard for an award of family maintenance is more limiting than the standard that governs the award of a family allowance. See Section 253.040 and the Comment to that section. Unlike the provisions for a family allowance (Sections 252.010-252.070) which provide temporary support while the estate is being administered (see Section 252.040), the family maintenance provisions of this chapter permit a long-term award of support. Although former law made provision for a family allowance, no provision was made for family maintenance. Whether a court will order support under this chapter depends upon the circumstances of the particular case. See Section 253.040.

This chapter does not deal with the right of a former spouse of the decedent to obtain support from the estate when a property settlement agreement between the spouses so provides. This continues to be governed by the Family Law Act. See Civil Code § 4801(b); 6 B. Witkin, Summary of California Law Husband and Wife § 204, at 5075 (8th ed. 1974).

405/926

§ 253.020. Petition and notice

253.020. A petition for family maintenance may be filed by or on behalf of any eligible person. The court clerk shall set the petition for hearing, and the petitioner shall give notice of the hearing for the period and in the manner provided in Section 1200.5.

Comment. Section 253.020 is new. See also Section 253.010 ("eligible person" defined).

405/982

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

253.030. No order for family maintenance may be made in favor of a child of the decedent if the surviving parent of the child will receive by testate or intestate succession either (a) substantially all of the decedent's estate or (b) during the surviving parent's lifetime substantially all of the income from the decedent's estate.

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

§ 253.040. Circumstances to be considered by court

253.040. In determining whether to order family maintenance and in determining the amount of family maintenance to be awarded, the court shall consider all of the facts and circumstances of the particular case including, but not limited to, the following:

(a) The needs of the decedent's heirs or devisees whose interests would be adversely affected by an order for family maintenance.

(b) The needs of the eligible person in whose favor the order is to be made, taking into account all of the following:

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

(2) Property or benefits provided for the person by the decedent, including but not limited to insurance, death benefits, retirement benefits, joint tenancy, trust, or inter vivos gift.

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

(c) The extent of support, if any, that was provided to the person by the decedent before the decedent's death.

(d) If the eligible person is a surviving spouse of the decedent, the circumstances set forth in Section 4801 of the Civil Code.

Comment. Section 253.040 sets forth the matters the court must consider in determining whether to order family maintenance and in determining the amount of the award. See also Section 253.010 ("eligible person" defined). Although the persons to whom an award of family allowance and an award of family maintenance are the same (see Sections 252.010 and 353.010), the award of family maintenance is limited by the factors required to be considered under Section 253.040. Compare Section 252.010(b) (family allowance).

405/929

§ 253.050. Terms of order

253.050. (a) A family maintenance order may make provision out of the decedent's estate for one or more eligible persons in the manner and to the extent the court, in its discretion, determines to be appropriate under the circumstances of the particular case. The order shall not be made on any terms that unduly delay the closing of the estate.

(b) The order shall specify such terms, requirements, and conditions as the court determines to be appropriate under the circumstances of the

particular case, including but not limited to a provision that requires that:

(1) An amount be set aside out of the estate and paid into court as provided in Section 953.

(2) An amount be set aside out of the estate and paid to a trustee as provided in Section 953.1.

(3) An amount be paid directly to an adult person for whose benefit the order is made or, in the case of a minor or person for whom a conservator of the estate may be appointed, in the manner provided in Division 4 (commencing with Section 1400).

(4) The decedent's personal representative purchase an annuity for one or more eligible persons.

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

405/940

§ 253.060. Modification of order

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

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

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

(d) A petition for modification may be filed by any person who may file an initial petition or by any of the decedent's heirs or devisees and shall be made on the grounds that there has been a significant change in circumstances since the court's prior order. Notice of the

hearing of the petition for modification shall be given to the same persons and in the same manner as notice of hearing on an initial petition. In determining a petition for modification, the court shall consider the matters the court would consider in the case of an initial petition, but the court shall not modify the prior order unless the court determines that there has been a significant change in circumstances since the court's prior order.

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

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§ 253.070. No stay on appeal if undertaking furnished

253.070. (a) Notwithstanding Chapter 2 (commencing with Section 916) of Title 13 of Part 2 of the Code of Civil Procedure, the perfecting of an appeal from an order made under this chapter does not stay proceedings under this chapter or the enforcement of the order appealed from if the person in whose favor the order is made gives an undertaking in double the amount of the payment or payments to be made to that person. The undertaking shall be conditioned that if the order appealed from is modified or reversed so that the payment or any part thereof to the person proves to have been unwarranted, the payment or part thereof shall, unless deducted from any preliminary or final distribution ordered in favor of the person, be repaid and refunded into the estate within 30 days after the court so orders following the modification or reversal, together with interest and costs.

Comment. Section 253.070 is the same as Section 252.070.