

#L-625

7/7/82

Fourteenth Supplement to Memorandum 82-70

Subject: Study L-625 - Probate Code (Tentative Recommendation---
Division 3 §§ 300-1240)

Attached is the portion of the recommended legislation that makes necessary conforming revisions in Division 3 of the Probate Code, relating to administration of estates of decedents.

This material presents no substantial policy issue, but you should take special care to review Sections 351.5 and subdivision (d) of Section 754. In addition, sections that are entirely new have often been substantially revised in form but not substance, and you should read these sections to determine whether the redrafting is satisfactory.

There is no explanation in the preliminary portion of the tentative recommendation of this portion of the recommended legislation.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

DIVISION 3. ADMINISTRATION OF
ESTATES OF DECEDENTS

Probate Code § 300 (amended). Passage of decedent's property

SEC. _____. Section 300 of the Probate Code is amended to read:

300. When a person dies, the title to ~~his~~ the person's property, real and personal, passes to the person to whom it is devised or bequeathed by ~~his~~ the decedent's last will, or, in the absence of such disposition, to the persons who succeed to ~~his~~ the decedent's estate as provided in Division 2 ~~of this code~~ (commencing with Section 200.010) ; but all of ~~his~~ the decedent's property ~~shall be~~ is subject to the possession of the executor or administrator and to the control of the superior court for the purposes of administration, sale , or other disposition under the provisions of ~~Division 3 of this code~~ this division , and ~~shall be~~ is chargeable with the expenses of administering ~~his~~ the decedent's estate, and the payment of ~~his~~ the decedent's debts ~~and~~ , the family allowance ~~to the family and family maintenance~~ , except as otherwise provided in this code.

Comment. Section 300 is amended to add the reference to payment of family maintenance. See generally Sections 253.010-253.070.

38658

Probate Code § 323 (technical amendment). Persons who may petition for probate

SEC. _____. Section 323 of the Probate Code is amended to read:

323. Any executor, devisee or legatee named in a will, or any other person interested in the estate, may, at any time after the death of the testator, petition the court having jurisdiction to have the will proved, whether ~~the same be in writing or nuncupative or not~~ the will be in ~~his~~ the petitioner's possession ~~or not~~ , lost or destroyed, or beyond the jurisdiction of the state.

Comment. Section 323 is amended to delete the reference to nuncupative wills, the provisions authorizing such wills having been repealed in 1982. See 1982 Cal. Stats. ch. 187.

Probate Code § 328.3 (added). Duress, menace, fraud, or undue influence

SEC. _____. Section 328.3 is added to the Probate Code, to read:

328.3. A will or part of a will procured to be made by duress, menace, fraud, or undue influence, may be denied probate. A revocation procured by the same means may be declared void.

Comment. Section 328.3 continues former Section 22.

7835

Probate Code § 328.7 (added). Conditional will

SEC. _____. Section 328.7 is added to the Probate Code, to read:

328.7. A will, the validity of which is made conditional by its own terms, shall be granted or denied probate, or denied effect after probate, in conformity with the condition.

Comment. Section 328.7 continues former Section 24.

7836 N/Z

Probate Code § 350 (repealed). Proof of lost or destroyed will

SEC. _____. Section 350 of the Probate Code is repealed.

~~350. No will shall be proven as a lost or destroyed will unless proved to have been in existence at the time of the death of the testator, or shown to have been destroyed by public calamity, or destroyed fraudulently in the lifetime of the testator, without his knowledge, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses.~~

Comment. Former Section 350 is not continued. Thus any revoked will is provable in probate whether or not the will is physically in existence. The provisions of such a will are provable by a preponderance of the evidence and may be proved by a single witness.

405/997

Probate Code § 351 (technical amendment). Proof of lost or destroyed will

SEC. _____. Section 351 of the Probate Code is amended to read:

351. The petition for the probate of a lost or destroyed will ~~must~~ shall state, or be accompanied by a written statement of, the

testamentary words, or the substance thereof. If the will is established, the provisions ~~thereof must~~ of the will shall be set forth in the order admitting the will to probate, and the order must be entered at length in the minutes. The testimony of each witness ~~must~~ whose testimony is offered to prove the provisions of the will shall be reduced to writing, signed by ~~him~~ the witness and filed, and shall be admissible in evidence in any contest of the will if the witness has died or has permanently removed from the state.

Comment. Section 351 is amended to make clear that the testimony that must be reduced to writing is the testimony of the witnesses whose testimony is offered to prove the provisions of the will. See former Section 350 which related to testimony offered to prove the provisions of the will. See also Section 374 (perpetuation of testimony of subscribing witnesses).

7838

Probate Code § 351.5 (added). Lost will not presumed revoked

SEC. _____. Section 351.5 is added to the Probate Code, to read:

351.5. If after the testator's death the testator's will cannot be found, there is no presumption that the testator destroyed the will with intent to revoke it.

Comment. Section 351.5 is new and eliminates the presumption under prior law that the testator destroyed the will with intent to revoke it if it is shown (1) that the will was in possession of the testator before death, (2) that the testator was competent until death, and (3) that after death the will cannot be found. See 7 B. Witkin, Summary of California Law Wills and Probate § 381, at 5844 (8th ed. 1974). The presumption of prior law was one affecting the burden of producing evidence, not the burden of proof. Estate of Obernolte, 91 Cal. App.3d 124, 153 Cal. Rptr. 798 (1979). Section 351.5 is consistent with Section 3-407 of the Uniform Probate Code which puts the burden of establishing that a will has been revoked on the contestant of the will.

7830

Probate Code § 422 (technical amendment). Persons entitled to letters

SEC. _____. Section 422 of the Probate Code is amended to read:

422. (a) Administration of the estate of a person dying intestate must be granted to one or more of the following persons, who are entitled to letters in the following order:

(1) The surviving spouse, or some competent person whom he or she may request to have appointed.

- (2) The children.
- (3) The grandchildren.
- (4) The parents.
- (5) The brothers and sisters.
- (6) The next of kin entitled to share in the estate.
- ~~(7) The relatives of a previously deceased spouse, when such relatives are entitled to succeed to some portion of the estate.~~
- ~~(8)~~ (7) The public administrator.
- ~~(9)~~ (8) The creditors.
- ~~(10)~~ (9) Any person legally competent.

(b) A relative of the decedent who is entitled to priority under subdivision (a) is entitled to priority only if either of the following facts exist:

- (1) The relative is entitled to succeed to all or part of the estate.
- (2) The relative is a parent, grandparent, child, or grandchild of the decedent and either takes under the will of, or is entitled to succeed to all or part of the estate of, another deceased person who is entitled to succeed to all or part of the estate of the decedent.

Comment. Section 422 is amended to delete the reference to relatives of a predeceased spouse. Such relatives no longer take by intestate succession. See Section 220.030 (intestate share), 261.010 (right of relatives of predeceased spouse to escheated property).

38659

Probate Code § 632 (technical amendment). Estates not exceeding \$30,000

SEC. _____. Section 632 of the Probate Code is amended to read:

632. For the purpose of this article, any property or interest therein or lien thereon which, at the time of the decedent's death, was held by the decedent as joint tenant, or in which the decedent had a life or other estate terminable upon the decedent's death, or which was by the decedent as community property or quasi-community property and passed to the decedent's surviving spouse pursuant to Section 202 649.1, shall be excluded in determining the property or estate of the decedent or its value.

Comment. Section 632 is amended to substitute a reference to Section 649.1 which supersedes former Section 202.

Probate Code § 640 (technical amendment). Authority to set aside estate

SEC. _____. Section 640 of the Probate Code is amended to read:

640. 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~~ 250.010 or 251.010, 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.

Comment. Section 640 is amended to substitute references to provisions that replaced those formerly referred to in the section.

90874

Probate Code § 641 (technical amendment). Petition to set aside estate

SEC. _____. Section 641 of the Probate Code is amended to read:

641. 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 person 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~~ 250.010 or 251.010.

Comment. Section 641 is amended to substitute references to the provisions that supersede those formerly referred to in the section.

Probate Code § 645 (technical amendment). Decree

SEC. _____. Section 645 of the Probate Code is amended to read:

645. 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~~ 250.010 or 251.010 , 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 allowed.

Comment. Section 645 is amended to substitute references to the provisions that supersede those formerly referred to in the section.

999/312

Probate Code § 645.3 (technical amendment). Personal liability for unsecured debts of decedent

SEC. _____. Section 645.3 of the Probate Code is amended to read:

645.3. 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~~ 250.010, 250.110, or 251.010 . 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.

Comment. Section 645.3 is amended to substitute references to the provisions that supersede those formerly referred to in the section.

34702

Probate Code §§ 649.1-649.5 (added). Administration of community and quasi-community property

SEC. _____. Article 2.5 (commencing with Section 649.1) is added to Chapter 10 of Division 3 of the Probate Code, to read:

Article 2.5. Administration of Community and
Quasi-Community Property

§ 649.1. Election to have community and quasi-community property administered

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

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

(c) Notwithstanding subdivision (a) or (b), the surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse may file an election and agreement in

the proceedings for the administration of the estate of the deceased spouse to have all or part of the interest of the surviving spouse in the community property or quasi-community property transferred by the surviving spouse or the surviving spouse's personal representative, guardian, or conservator to the trustee under the will of the deceased spouse or the trustee of an existing trust identified by the will of the deceased spouse, to be administered and distributed by the trustee. The election and agreement must be filed before the entry of the decree of final distribution in the proceedings.

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

34726

§ 649.2. Power to deal with community and quasi-community real property

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

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

§ 649.3. Community and quasi-community property subject to administration

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

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

37012

§ 649.4. Liability of surviving spouse for decedent's debts

649.4. (a) Except as provided by Section 951.1, upon the death of a married person, the surviving spouse is personally liable for the debts of the deceased spouse chargeable against the community property and the debts of the deceased spouse chargeable against the separate property of the deceased spouse to the extent such separate property is characterized as quasi-community property under Section 100.380, unless the interests of both spouses in the community property or quasi-community property, or both, are administered under this division. The personal liability shall not exceed the value at the date of death, less the amount of any liens and encumbrances, of the interest of the surviving spouse (1) in the community property immediately prior to the death and (2) in quasi-community property arising by virtue of the death which is not exempt from the enforcement of a money judgment plus the interest of the deceased spouse in such property passing to the surviving spouse without administration.

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

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

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

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

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

Comment. Section 649.4 is the same in substance as former Section 205. "Cross-complaints" is substituted for "counterclaims" which appeared in former Section 205. The counterclaim is abolished. See Code Civ. Proc. § 428.80.

38027

§ 649.5. Community property held in certain revocable trusts

649.5. Notwithstanding the provisions of this article, community property held in a revocable trust described in Section 5113.5 of the Civil Code is governed by the provisions, if any, in the trust for disposition in the event of death.

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

Probate Code § 650 (technical amendment). Petition to have community or quasi-community property not administered in the estate

SEC. _____. Section 650 of the Probate Code is amended to read:

650. (a) A surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse may file a petition in the superior court in the county in which the estate of the deceased spouse may be administered alleging that administration of all or a part of the estate is not necessary for the reason that all or a part of the estate is community property or quasi-community property passing or belonging to the surviving spouse. The petition shall be verified and shall set forth the following information:

(1) The facts necessary to determine the county in which the estate of the deceased spouse may be administered if proceedings for the administration of the estate are not pending.

(2) The names, ages, and addresses of the heirs, devisees, and legatees of the deceased spouse, the names and addresses of all persons named as executors of the will of the deceased spouse, and the names and addresses of all persons appointed as executors of the will or administrators of the estate of the deceased spouse, which are known to the petitioner.

(3) A description of the property of the deceased spouse which the petitioner alleges is community property or quasi-community property passing to the surviving spouse, including the trade or business name of any community property or quasi-community property business which the deceased spouse was operating or managing at the time of death.

(4) The facts upon which the petitioner bases the allegation that all or a part of the estate of the deceased spouse is community property or quasi-community property passing to the surviving spouse.

(5) A description of any interest in the community property or quasi-community property, or both, which the petitioner requests the court to confirm to the surviving spouse as belonging to the surviving spouse pursuant to Section ~~204.5~~ 110.010 or 110.020 .

(b) If the petitioner bases the allegation that all or part of the estate of the deceased spouse is community property or quasi-community property passing to the surviving spouse upon the will of the deceased spouse, a copy of the will shall be attached to the petition.

(c) To the extent of the election, this section ~~shall~~ does not apply if the petitioner has elected pursuant to subdivision (b) of Section 649.1 either to have :

(1) ~~the~~ The interest of the deceased spouse in the community property or quasi-community property, or both , administered under this division.

(2) Both the interest of the deceased spouse and the surviving spouse in the community property or quasi-community property , or both, administered under this division ~~pursuant to subdivision (b) of Section 202~~ .

(d) The action authorized by this section may be taken by a guardian or conservator without authorization or approval of the court in which the guardianship or conservatorship proceeding is pending.

Comment. Section 650 is amended to correct the cross-references in view of the recodification of those provisions. A reference to quasi-community property has been added to paragraph (5) of subdivision (a) to conform to Section 655 and to subdivision (c) to conform that subdivision to Section 649.1.

7842

Probate Code § 655 (technical amendment). Court order

SEC. ____ . Section 655 of the Probate Code is amended to read:

655. (a) If the court finds that all of the property is community property or quasi-community property, or both, passing to the surviving spouse, it shall issue an order describing the property, determining that the property is community property or quasi-community property, or both, passing to the surviving spouse, and determining that no administration is necessary. If the petition filed under Section 650 includes a description of the interest of the surviving spouse in the community property or quasi-community property, or both, which belongs to the surviving spouse pursuant to Section ~~201~~ 110.010 or ~~201.5~~ 110.020 and the court finds that the interest belongs to the surviving spouse, it shall issue an order describing the property and confirming the ownership of the surviving spouse.

(b) If the court finds that all or a part of the property is not community property or quasi-community property passing to the surviving spouse, it shall do all of the following:

(1) Issue an order describing any property which is community property or quasi-community property passing to the surviving spouse,

determining that the property passes to the surviving spouse, and determining that no administration of the property is necessary; and issue any further orders which may be necessary to cause delivery of the property or its proceeds to the surviving spouse.

(2) If the petition filed under Section 650 includes a description of the interest of the surviving spouse in the community property or quasi-community property, or both, which belongs to the surviving spouse pursuant to Section ~~201~~ 110.010 or ~~201.5~~ 110.020 and the court finds that the interest belongs to the surviving spouse, issue an order describing the property and confirming the ownership of the surviving spouse and any further orders which may be necessary to cause ownership of the property to be confirmed in the surviving spouse.

(3) Issue an order that the property which is not community property or quasi-community property passing to the surviving spouse is subject to administration under this division.

(c) Upon becoming final, an order (1) determining that property is community property or quasi-community property passing to the surviving spouse or (2) confirming the ownership of the surviving spouse of property belonging to the surviving spouse under Section ~~201~~ 110.010 or ~~201.5~~ 110.020 shall be conclusive on all persons, whether or not they are in being.

Comment. Section 655 is amended to correct the cross-references to former Sections 201 and 201.5 in view of the recodification of those provisions as Sections 110.010 and 110.020.

8355

Probate Code §§ 660-684 (repealed). Support of the family

SEC. ____ . Chapter 11 (commencing with Section 660) of Division 3 of the Probate Code is repealed.

Comment. Chapter 11 (commencing with Section 660) is superseded by Part 3 (commencing with Section 250.010) of Division 2.

[Insert Disposition Table]

Probate Code §§ 660-664 (added). Legacies and interest

SEC. _____. Chapter 11 (commencing with Section 660) is added to Division 3 of the Probate Code, to read:

CHAPTER 11. LEGACIES AND INTEREST

§ 660. Testamentary intent controlling

660. The provisions of this chapter are in all cases to be controlled by a testator's express intention.

Comment. Section 660 is the same as former Section 163.

§ 661. Accrual of interest or income

661. In case of a bequest of the interest or income of a certain sum or fund, the interest or income accrues from the testator's death.

Comment. Section 661 is the same in substance as former Section 160.

32469

§ 662. Types of legacies; annuity

662. Legacies are distinguished and designated, according to their nature, as follows:

(a) A legacy of a particular thing, specified and distinguished from all others of the same kind belonging to the testator, is specific; if such legacy fails, resort can not be had to the other property of the testator.

(b) A legacy is demonstrative when the particular fund or personal property is pointed out from which it is to be taken or paid.

(c) An annuity is a bequest of certain specified sums periodically; if the fund or property out of which a demonstrative legacy or an annuity is payable fails, in whole or in part, resort may be had to the general assets, as in the case of a general legacy.

(d) A residuary legacy embraces only that which remains after all the bequests of the will are discharged.

(e) All other legacies are general legacies.

Comment. Section 662 is the same as former Section 161.

§ 663. Interest on annuities and legacies; commencement of annuities

663. (a) General pecuniary legacies, including general pecuniary legacies in trust, if not paid prior to the first anniversary of the testator's death, bear interest thereafter at the rate of interest payable on a money judgment entered in this state.

(b) Annuities commence at the testator's death and are due at the end of the annual, monthly or other specified period.

(c) Whenever an annuitant, legatee of a legacy for maintenance or beneficiary of a trust is entitled to periodic payments or trust income commencing at the testator's death, he or she is entitled to interest on the amount of any unpaid accumulations of such payments or income held by the executor or administrator on each anniversary of the decedent's death, computed from the date of such anniversary at the rate of interest payable on a money judgment entered in this state.

Comment. Section 663 is the same in substance as former Section 162.

30156

§ 664. Distribution of net income

664. (a) Unless otherwise provided by the will of the testator, subject to subdivision (b), all net income received during the period of administration from real and personal property not specifically or demonstrably devised or bequeathed, including net income from property sold during that period, shall be distributed pro rata as income to all of the following:

- (1) Any trust or trusts of all or any part of the residuary estate.
- (2) Any tenant or tenants for life or for a term of years of all or any part of the residuary estate.
- (3) Any person or persons entitled absolutely and free of trust to all or any part of the residuary estate.

(b) Except as otherwise provided by will of the testator, none of the income referred to in subdivision (a) shall be distributed as income of a general pecuniary legacy in trust, except that the interest on a pecuniary legacy in trust provided for in Section 742 shall be distributed as income to the trust.

Comment. Section 664 is the same in substance as former Section 162.5.

Probate Code § 704.2 (technical amendment). Claim for debts of deceased spouse

SEC. ____ . Section 704.2 of the Probate Code is amended to read:

704.2 A claim may be filed by the surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse for the payment of the debts of the deceased spouse described in Section ~~205~~ 649.4 . The claim must be filed prior to the filing of a petition for final distribution. It shall set forth the reason why the debts are not barred by subdivision (b) of Section ~~205~~ 649.4 and a statement whether the debts remain unpaid or have been paid by the surviving spouse. If the surviving spouse is personally liable for the debts, the claim shall also include an inventory of the separate property of the surviving spouse and any community property not administered in the estate and a statement of the value of the property less the amount of the liens and encumbrances upon the property as of the date of death of the deceased spouse. The statement may identify any property which is exempt from ~~execution~~ enforcement of a money judgment .

Comment. Section 704.2 is amended to correct the cross-reference to former Section 205 in view of the recodification of that section as Section 649.4.

8395

Probate Code § 736 (amendment). No sale of specifically devised property to exonerate other encumbered property

SEC. ____ . Section 736 of the Probate Code is amended to read:

736. When a testator devises ~~land~~ real property subject to a mortgage, deed of trust or other lien, and notwithstanding Section 204.400 the real property passes with a right of exoneration in accord with an intention indicated by the will, other property specifically devised or bequeathed shall not be sold for the purpose of exonerating the encumbered property, unless a contrary intention that such other property be sold is indicated by the will can be gathered from the terms of the will, read in the light of the circumstances surrounding its execution. A mere direction that all the testator's debts be paid is not sufficient evidence of such contrary intention .

Comment. Section 736 is amended in recognition of the new rule under Section 204.400 pursuant to which a specific devise passes subject to any mortgage, deed of trust, or other lien, unless the will provides for exoneration. See Sections 204.015, 204.400.

405/950

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

SEC. ____ . Section 750 of the Probate Code is amended to read:

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

Comment. Section 750 is amended to add the reference to the payment of family maintenance. See generally Sections 253.010-253.070.

9402

Probate Code § 754 (amended). Sale of estate property

SEC. ____ . Section 754 of the Probate Code is amended to read:

754. (a) In selling property to pay debts, legacies, family allowance, family maintenance, or expenses, there shall be no priority as between personal and real property.

(b) When a sale of property of the estate is necessary for any ~~such~~ purpose described in subdivision (a), or when it is for the advantage, benefit, and best interests of the estate and those interested therein that any property of the estate be sold, the executor or administrator may sell the ~~same~~ property, either at public auction or private sale, using his or her discretion as to which property to sell first, except as provided by Sections 750 and 751 ~~of this code~~.

The (c) If the property to be sold is the separate property of the decedent, the executor or administrator in making any such sale may sell the entire interest of the estate in the property or any lesser interest or estate therein.

(d) If the property to be sold is community or quasi-community property, the executor or administrator may sell half or less of the total amount of each class of fungible property, and half or less of each item of nonfungible property. The surviving spouse may object to a sale which does not comply with this subdivision without electing against the will of the decedent, unless the will expressly provides for an election if such objection is made.

Comment. Section 754 is amended to add the payment of family maintenance as a purpose for which estate property may be sold, and to provide different rules concerning how much estate property may be sold depending on whether the property is the separate property of the decedent or is community or quasi-community property. The provisions for family maintenance are found in Sections 253.010 to 253.070.

Subdivision (c), which authorizes sale of the entire interest of the estate in the decedent's separate property, continues prior law. Subdivision (d) is new and recognizes California's item theory of community property ownership, pursuant to which the surviving spouse has a half interest in each item of community property, rather than a half interest in the aggregate of all community property. See *Dargie v. Patterson*, 176 Cal. 714, 169 P. 360 (1917). Subdivision (d) provides a limited exception to item theory ownership in the case where the community property is fungible, such as shares of stock. In such a case, subdivision (d) authorizes sale (when otherwise necessary) of half of the total amount of such fungible property, rather than half of each item (e.g., half of each share of stock) as strict application of the item theory would require. It was not clear under prior law how Section 754 applied to sales of community property in the estate.

406/157

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

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

- (1) Expenses of administration;
- (2) Funeral expenses;
- (3) Expenses of last illness;
- (4) Family allowance;
- (5) Debts having preference by the laws of the United States;

(6) Wages, to the extent of nine hundred dollars (\$900), of each employee of the decedent, for work done or personal services rendered within 90 days prior to the death of the employer. If there is not sufficient money with which to pay all such labor claims in full the money available shall be distributed among the claimants in accordance with the amount of their respective claims;

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

(8) Family maintenance ordered under Chapter 5 (commencing with Section 253.010) of Part 3 of Division 2.

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

Comment. Section 950 is amended to add the reference to family maintenance.

28463 N/Z

Probate Code § 1050 (repealed). Gift before death

SEC. ____ . Section 1050 of the Probate Code is repealed.

~~1050. A gift before death shall be considered as an ademption of a bequest or devise of the property given; but such gift shall not be taken as an advancement to an heir or as an ademption of a general legacy unless such intention is expressed by the testator in the grant or otherwise in writing; or unless the donee acknowledges it in writing to be such.~~

Comment. Former Section 1050 is superseded by Sections 204.440 and 220.110.

28466 N/Z

Probate Code § 1051 (repealed). Advancement as part of estate; deduction from share

SEC. ____ . Section 1051 of the Probate Code is repealed.

~~1051.~~ Any property, real or personal, given by the decedent in his lifetime as an advancement to an heir, is a part of the estate of the decedent for the purposes of division and distribution thereof among his heirs, and must be taken by such heir toward his share of the estate of the decedent. If the amount of such advancement exceeds the share of the heir receiving the same, he must be excluded from any further portion in the division and distribution of the estate, but he shall not be required to refund any part of such advancement. If the amount so received is less than his share, he is entitled to so much more as will give him his full share of the estate of the decedent.

Comment. Former Section 1051 is not continued. The former California rules relating to advancement and ademption by satisfaction found in former Sections 1050, 1051, and 1052 are superseded by Sections 204.440 and 220.100. Former Section 1051 was a procedural section and has been omitted as unnecessary.

40300 N/Z

Probate Code § 1052 (repealed). Determination of value

SEC. _____. Section 1052 of the Probate Code is repealed.

~~1052.~~ If the value of the property so advanced is expressed in the conveyance, or in the charge thereof made by the decedent, or in the acknowledgment of the party receiving it, it must be held as of that value in the division and distribution of the estate; otherwise, it must be estimated according to its value when given, as nearly as the same can be ascertained.

Comment. The first portion of former Section 1052 is continued in Sections 204.440 and 220.100. The last portion of former Section 1052 is superseded by the same sections. See the Comments to Sections 204.440 and 220.100.

9404

Probate Code § 1053 (repealed). Advancement to predeceased heir

SEC. _____. Section 1053 of the Probate Code is repealed.

~~1053.~~ If an heir receiving an advancement dies before the decedent, leaving heirs, the advancement must be taken into consideration in the division and distribution of the estate, and the amount thereof must be allowed accordingly by the representatives or successors in interest of

the heir receiving the advancement, in like manner as if the advancement had been made directly to them.

Comment. Former Section 1053 is superseded by Section 220.100. The rule under former Section 1053 that if the donee of an advancement predeceases the donor, the amount of the advancement is deducted from the shares the heirs of the donee would receive from the donor's estate is reversed under Section 220.100: The advancement is no longer charged against the donee's issue unless such a provision is included in a contemporaneous writing by the donor or in a written acknowledgment by the donee.

38465

Prob. Code § 1054 (amended). Determination of questions as to advancements and adempments

SEC. _____. Section 1054 of the Probate Code is amended to read:

1054. All questions ~~as to advancements made, or alleged to have been made,~~ by the decedent to his heirs, arising under Section 204.440 (ademption) or 220.100 (advancement) shall be heard and determined by the court, and ~~must~~ shall be specified in the decree assigning and distributing the estate; and the decree of the court, when it becomes final, is conclusive on all parties interested in the estate.

Comment. Section 1054 is amended to refer to the section dealing with advancements and to extend the application of the section to adempments.

406/161

Probate Code § 1200.5 (amended). Manner of giving notice in certain instances

SEC. _____. Section 1200.5 of the Probate Code is amended to read:

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

(1) A petition under Section 641 of this code for the setting aside of an estate.

(2) A petition to set apart a homestead or exempt property.

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

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

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

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

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

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

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

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

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

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

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

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

(15) A petition of a trustee for instructions.

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

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

(18) A petition for family maintenance.

(b) At least 10 days before the time set for the hearing of the petition or account, the petitioner or person filing the account shall cause notice of the time and place of hearing to be mailed to the executor or administrator, when he or she is not the petitioner, to any coexecutor or coadministrator not petitioning, and to all persons (or to their attorneys, if they have appeared by attorney), who have requested notice or who have given notice of appearance in the estate in person or by attorney, as heir, devisee, legatee or creditor, or as otherwise interested, addressed to them at their respective post office addresses given in their request for special notice, if any, otherwise at their respective offices or places of residence, if known, and if not, at the county seat of the county where the proceedings are pending, or to be personally served upon such person.

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

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

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

Comment. Section 1200.5 is amended to add the reference to a petition for family maintenance. For the provisions relating to family maintenance, see Sections 253.010-253.070.

40323

Prob. Code § 1215 (technical amendment). Notice in trust proceedings

SEC. ____ . Section 1215 of the Probate Code is amended to read:
1215. As used in this article:

(1) "Notice" means notice of hearing which is to be sent by mail or personally served.

(2) "Trust proceeding" means a judicial proceeding involving a trust provided for by Chapter ~~18~~ ~~(commencing with Section 175)~~ of ~~Division 1~~ 8 (commencing with Section 206.500) of Part 1 of Division 2 , or Chapter 19 (commencing with Section 1120) of this division, including, but not limited to proceedings for instructions, for settlement of trustee's accounts or distribution of trust assets upon partial or final termination of the trust.

Comment. Section 1215 is amended to substitute a reference to the provisions that replaced the provisions formerly referred to in the section.

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

SEC. ____ . Section 1240 of the Probate Code is amended to read:

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

- (a) Granting or revoking letters testamentary or of administration.
- (b) Removing a trustee of a testamentary trust.
- (c) Admitting a will to probate or revoking the probate thereof.
- (d) Setting aside an estate claimed not to exceed twenty thousand dollars (\$20,000) in value.
- (e) Setting apart property as a homestead or claimed to be exempt from execution.
- (f) Granting or modifying a family allowance or family maintenance .
- (g) Directing or authorizing the sale or conveyance or confirming the sale of property.
- (h) Directing or authorizing the granting of an option to purchase real property.
- (i) Adjudicating the merits of any claim under Section 851.5, 852 or 853.
- (j) Allocating debts under Section 980.
- (k) Settling an account of an executor or administrator or trustee, or instructing or appointing a trustee.
- (l) Instructing or directing an executor or administrator.
- (m) Directing or allowing the payment of a debt, claim, legacy, or attorney's fee.
- (n) Fixing, directing, or allowing payment of a trustee's compensation.
- (o) Determining heirship or the persons to whom distribution should be made or trust property should pass.
- (p) Distributing property.
- (q) Determining that property is community property passing or belonging to the surviving spouse pursuant to Section 655.
- (r) Fixing an inheritance tax or determining that none is due.
- (s) Authorizing a personal representative to invest or reinvest any surplus moneys pursuant to Section 584.5.

Comment. Section 1240 is amended to add the reference to family maintenance. For the provisions relating to family maintenance, see Sections 253.010-253.070.