

Memorandum 83-39

Subject: Study L-826 - Probate Law and Procedure (Passage or Collection of Property Without Administration)

At the March 1983 meeting, the Commission asked the staff to bring back a revised draft of provisions for collection of small estates by affidavit (Prob. Code §§ 630-632) and for passage of community and quasi-community property to the surviving spouse without administration (Prob. Code §§ 202-206, to be recodified by AB 68 as Prob. Code §§ 649.1-649.5). The revised staff draft is attached to this Memorandum. Also attached to this Memorandum (Exhibit 1) is a letter from Charles Collier on behalf of the State Bar Estate Planning, Probate and Trust Law Section raising problems concerning the affidavit procedure.

Proposed Substantive Changes in Existing Affidavit Procedure

The attached staff draft would make the following substantive changes in the existing provisions for collection of small estates by affidavit:

(1) The draft deletes from existing law the restriction which prevents use of the affidavit procedure to collect personal property if the decedent owns any interest in California real property. The draft permits collection of personal property by affidavit whether or not the decedent owns any California real property. This change was suggested by the State Bar, and is consistent with the Uniform Probate Code. See UPC §3-1201.

(2) The draft increases the maximum estate value for use of the affidavit procedure from \$30,000 to \$100,000. This change is consistent with Commission sentiment expressed at the March meeting. However, the State Bar has some concern about this proposed increase. The Executive Committee of the Estate Planning, Probate and Trust Law Committee was "about evenly split" on whether the maximum estate value should be increased to \$100,000 or merely to \$50,000. (See Exhibit 1.) Concern was expressed that a higher limit might interfere with family allowance, spousal set-aside, and rights of creditors. However, the affidavit procedure should not interfere with any of these, since the affidavit procedure does nothing more than permit the decedent's closely-related heirs or devisees to collect the decedent's property by presenting an affidavit to the custodian of the property, and insulates the custodian from liability who relies on the affidavit. (See Prob. Code § 631.)

The affidavit procedure does not give title to the recipient of the property. *Brezzo v. Brangero*, 51 Cal. App. 79, 81, 196 P. 87 (1921). The estate may still be administered on petition of any person otherwise eligible to petition (Prob. Code § 631), and in that case the recipient of the property must turn it over to the executor or administrator. Broll, Summary Administration, in 1 California Decedent Estate Administration § 3.14, at 124 (Cal. Cont. Ed. Bar 1971).

The State Bar is also concerned about the possible estate and income tax ramifications of using the affidavit procedure. However, these problems would appear to be addressed by the rule that collection by affidavit does not determine or affect title.

The State Bar points out that existing law is not clear whether the maximum estate value refers to gross or net value. The staff has clarified this in the attached draft by providing that the maximum estate value refers to net value--that is, value "over and above all liens and encumbrances on such property at the date of death."

Proposed Substantive Change to Community and Quasi-Community Property Provisions

The attached staff draft proposes to expand existing provisions which permit community and quasi-community property to pass to the surviving spouse without administration to include the decedent's separate property to the extent the surviving spouse is otherwise entitled to the separate property under the decedent's will or by intestate succession. This will avoid the need to classify the property, and will avoid the need to administer the estate solely to deal with separate property.

The staff draft also broadens Section 650 of the Probate Code to include the decedent's separate property in property which the court may confirm to the surviving spouse. This will be useful to confirm title to real property to the surviving spouse, and thus to permit the surviving spouse to take title which is insurable. A petition under Section 650 may either be filed in a pending administration proceeding, or may be filed without the need for administration. See Prob. Code §§ 651-653.

Approval to Send Out Tentative Recommendation for Comment

The staff proposes to send out the attached draft for Comment with a view toward introducing a separate bill in 1984, or, if AB 25 and AB 68 become two-year bills, including this proposal in those bills.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

STAFF DRAFT

TENTATIVE RECOMMENDATION

relating to

PASSAGE OR COLLECTION OF PROPERTY WITHOUT ADMINISTRATION

Passage of Property to Surviving Spouse Without Administration

When a married person dies in California, the community and quasi-community property which passes to the surviving spouse¹ is not subject to probate administration unless the surviving spouse elects to have it administered.² If all of the estate property is community or quasi-community property which passes to the surviving spouse under the decedent's will or by intestate succession, there need be no administration at all. If some of the estate is the decedent's separate property, only that property must be administered.

This system has worked well in California to pass sizable amounts of wealth to the surviving spouse without the need for costly and time-consuming estate proceedings. Where all the property passes to the surviving spouse, there are usually no contending claimants requiring the interposition of a court. Creditors are protected by imposing on

1. All of the community and quasi-community property passes to the surviving spouse by intestate succession. Prob. Code §§ 201, 201.5. And most decedents who die testate leave their estate to the surviving spouse. See Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. Bar Foundation Research J. 321, 356. The decedent may, however, leave up to half of the community and quasi-community property to someone other than the surviving spouse. See Prob. Code § 201, 201.5. To that extent, the community and quasi-community property must be administered in the decedent's estate. See Prob. Code §§ 202, 204. Also, if the decedent's will leaves community or quasi-community property in trust or limits the surviving spouse to a qualified ownership in the property, it is to that extent subject to administration in the decedent's estate. Prob. Code § 204.
2. Prob. Code § 202. It may be advisable for the surviving spouse to elect to have the community and quasi-community property administered when there are complex investments or a family business that the surviving spouse may not be able to manage properly, complex creditors' situations or liabilities in excess of the value of the estate, strained family relations, when the surviving spouse is incompetent, or for certain tax purposes. See O. McCarroll, 1 California Decedent Estate Administration Supplement § 3.38, at 75 (Cal. Cont. Ed. Bar 1982).

the surviving spouse personal liability for the debts of the decedent chargeable against the community and quasi-community property.³ Creditors are presumably aware of the existence and whereabouts of the surviving spouse, and this scheme has not created undue hardship for creditors.

These justifications for passing the decedent's property to the surviving spouse without administration apply with just as much force to the decedent's separate property as they do to community and quasi-community property. There is no compelling reason why the decedent's separate property should be administered when the community and quasi-community property pass without administration. This distinction results in unnecessary time and resources being spent to classify the property, and may result in having estate proceedings to administer small amounts of separate property⁴ when the bulk of the estate passes to the surviving spouse without administration.

Accordingly, the Commission recommends that the provisions for passage of community and quasi-community property to the surviving spouse without administration be expanded to provide that there need be no administration of the decedent's separate property passing to the surviving spouse.⁵

3. Prob. Code § 205. The personal liability of the surviving spouse 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 enforcement of a money judgment plus the interest of the deceased spouse in such property passing to the surviving spouse without administration. Id.
4. Under other provisions of the Probate Code, the surviving spouse may have the estate summarily set aside if the net value of the estate does not exceed \$20,000. However, these provisions would not be usable if there are large amounts of community or quasi-community property, since half the value of such property is includable for the purpose of determining whether the estate value is less than \$20,000. Estate of Pezzola, 112 Cal. App.3d 752, 169 Cal. Rptr. 464 (1980).
5. The decedent's creditors would be protected by making the surviving spouse personally liable also for debts of the decedent chargeable against the separate property of the decedent, not to exceed the value of the surviving spouse's interest in community and quasi-community property plus the value of the property passing to the surviving spouse.

Collection of Small Estate by Affidavit

Existing California law permits close relatives of a decedent⁶ to collect the decedent's property by presenting an affidavit or declaration under penalty of perjury to the holder of the property if the estate does not exceed a net value of \$30,000, if the decedent owns no real property in California, and if the relative or relatives collecting the property are otherwise entitled to the property under the decedent's will or by intestate succession.⁷ This is merely a collection procedure and does not give title to the person collecting.⁸ The estate may still be administered,⁹ and in such case the person collecting is bound to turn the property over to the executor or administrator.¹⁰

Many decedent's estates are too small to justify being put through the time-consuming and costly probate process. Where there are no unpaid debts of the decedent and there is no disagreement among family members over distribution of the property, there is no need for probate of the estate. The affidavit procedure permits those presumptively entitled to the decedent's property to collect it expeditiously and without a cumbersome estate proceeding.¹¹ This procedure would be useful for estates of a value in the \$30,000 to \$100,000 range--an amount which makes the estate still too small to be administered economi-

6. The close relatives who may collect the property are the decedent's surviving spouse, children, lawful issue of deceased children, a parent, brothers, or sisters of the decedent, and lawful issue of a deceased brother or sister. Prob. Code § 630.
7. Prob. Code § 630.
8. Cf. *Brezzo v. Brangero*, 51 Cal. App. 79, 81, 196 P. 87 (1921) (decided under former Section 1454 of the Code of Civil Procedure, the predecessor section of Probate Code Sections 630 and 631).
9. Prob. Code & 631.
10. Broll, Summary Administration, in 1 California Decedent Estate Administration § 3.14, at 124 (Cal. Cont. Ed. Bar 1971); cf. Estate of Kevil, 98 Cal. App.2d 388, 392, 220 P.2d 555 (1950).
11. The Commission is informed that the affidavit procedure is presently used in about 20% of the estates in California. The maximum dollar amount has been repeatedly increased by the Legislature in recent years, being increased from \$1,000 to \$2,000 in 1961, to \$3,000 in 1967, to \$5,000 in 1972, to \$10,000 in 1974, to \$20,000 in 1976, and to the present \$30,000 in 1979.

cally in probate. Accordingly, the Commission recommends that the maximum estate value for use of the affidavit procedure be increased from \$30,000 to \$100,000.

Existing law permits the surviving spouse of the decedent to collect funds of the decedent, not to exceed \$500, on deposit in a bank by presenting an affidavit, without regard to whether the decedent owns any California real property.¹² However, with respect to other personal property of the decedent, the affidavit procedure may not be used if the decedent owns any interest in California real property. It may be desirable to administer real property in order to pass marketable title,¹³ but this is not a sufficient reason to withhold the benefit of the affidavit procedure to collect personal property. The Commission recommends that the existing restriction preventing use of the affidavit procedure if the decedent owns any interest in California real property be eliminated.¹⁴

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend the headings for Article 1 (commencing with Section 630) and Article 2.5 (commencing with Section 649.1) of Chapter 10 of Division 3 of, to amend Sections 630, 649.1, 649.3, 649.4, 650, 653, 655, and 656 of, and to repeal Section 630.5 of, the Probate Code, relating to probate law and procedure.

The people of the State of California do enact as follows:

12. Prob. Code § 630.5.

13. See 2 A. Bowman, *Ogden's Revised California Real Property Law* § 29.27, at 1449 (Cal. Cont. Ed. Bar 1975); Broll, Property Not Subject to Probate Administration, in 1 *California Decedent Estate Administration* § 4.69, at 167 (Cal. Cont. Ed. Bar 1971).

14. The Commission also recommends that existing law be clarified by providing that the maximum estate value for use of the affidavit procedure means net value--that is, the value over and above all liens and encumbrances on the decedent's property in this state at the date of death.

Heading for Article 1 (commencing with Section 630) of Chapter 10 of Division 3 of the Probate Code (amended)

SECTION 1. The heading for Article 1 (commencing with Section 630) of Chapter 10 of Division 3 of the Probate Code is amended to read:

Article 1. ~~Transfer of Personal Property Not Exceeding One Thousand Dollars (\$1,000) in Value~~ Collection of Small Estate by Affidavit

Probate Code § 630 (amended). Collection of decedent's estate by affidavit

SEC. 2. Section 630 of the Probate Code is amended to read:

630. (a) ~~When a decedent leaves no real property, nor interest therein nor lien thereon, in this state, and the total value of the decedent's property in this state, (excluding any motor vehicle, or mobilehome or commercial coach registered under the provisions of Part 2 (commencing with Section 18000) of Division 13 of the Health and Safety Code, of which the decedent is the owner or legal owner,) over and above all liens and encumbrances on such property at the date of death, over and above any amounts due to the decedent for services in the armed forces of the United States, and over and above the amount of salary not exceeding five thousand dollars (\$5,000), including compensation for unused vacation, owing to decedent for services from any employment, does not exceed thirty thousand dollars (\$30,000), one hundred thousand dollars (\$100,000), the surviving spouse, the children, lawful issue of deceased children, a parent, brothers or sisters of the decedent, the lawful issue of a deceased brother or sister, or the guardian or conservator of the estate of any person bearing such relationship to the decedent, or the trustee named under a trust agreement executed by the decedent during his or her lifetime, the primary beneficiaries of which bear such relationship to the decedent, if such person or persons has or have a right to succeed to the property of the decedent, or the sole beneficiary, or all of the beneficiaries under the last will and testament of the decedent, regardless of whether or not any beneficiary is related to the decedent, may, without procuring letters of administration, or awaiting the probate of the will, collect any money due the decedent, receive the tangible personal property of the decedent, and have any~~

evidences of a debt, obligation, interest, indebtedness or right, stock, or chose in action, transferred to such person or persons upon furnishing the person, representative, corporation, officer or body owing the money, having custody of such property or acting as registrar or transfer agent of such evidences of debt, obligation, interest, indebtedness or right, stock, or chose in action, with an affidavit or declaration under penalty of perjury showing the right of the person or persons to receive such money or property, or to have such evidences transferred.

(b) A transfer agent of any security shall change the registered ownership on the books of a corporation from the decedent to the successor or successors upon the presentation of an affidavit as provided in subdivision (a).

Comment. Section 630 is amended to permit use of the affidavit procedure to collect the decedent's personal property without regard to whether the decedent owns an interest in real property in this state, and to increase the maximum estate value for use of this procedure from \$30,000 to \$100,000. The language that the estate value is "over and above all liens and encumbrances on the decedent's property in this state on the date of death" is new and is drawn from Section 640. The reference to "tangible" personal property and evidences of an "obligation," "stock", or "chose in action" is drawn from Section 3-1201 of the Uniform Probate Code and is clarifying. Subdivision (b) is new and is drawn from UPC Section 3-1201.

405/983/NZ

Probate Code § 630.5 (repealed). Collection of \$500 or less from bank account

SEC. 3. Section 630.5 of the Probate Code is repealed.

~~630.5. Whether a person dies testate or intestate, and irrespective of the character of his or her property, if the value of the estate does not exceed five thousand dollars, the spouse of the decedent, if entitled by succession or by the last will and testament of the decedent to any money of the decedent on deposit in bank, may collect such money, not to exceed the total sum of five hundred dollars, without procuring letters testamentary or of administration, upon furnishing the bank with an affidavit showing the right of the affiant to receive such money.~~

Comment. Former Section 630.5 is superseded by Section 630 which has been amended to apply whether or not the decedent owns any real property in this state.

Heading for Article 2.5 (commencing with Section 649.1) of Chapter 10 of Division 3 (amended)

SEC. 4. The heading for Article 2.5 (commencing with Section 649.1) of Chapter 10 of Division 3 of the Probate Code is amended to read:

Article 2.5. Administration of Community and Quasi-Community Property Passage of Property to Surviving Spouse Without Administration

Probate Code § 649.1 (amended). Passage of property to surviving spouse

SEC. 5. Section 649.1 of the Probate Code is amended to read:

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 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, following property~~ may be administered under this division:

(1) The one-half of the community and quasi-community property that belongs to the decedent under Sections 100 and 101 and the separate property of the decedent.

(2) Both the property described in paragraph (1) and the one-half of the community and quasi-community property that belongs to the surviving spouse under Sections 100 and 101.

(c) 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.

~~(e)~~ (d) Notwithstanding subdivision (a) or (b), the surviving spouse or the personal representative, guardian of the estate, or conser-

vator 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 one-half of the community property~~ or quasi-community property, or both, that belongs to the surviving spouse under Sections 100 and 101 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 amended to expand the property of the decedent which may pass to the surviving spouse without administration to include the decedent's separate property.

406/253/NZ

Probate Code § 649.3 (amended). Property subject to administration

SEC. 6. Section 649.3 of the Probate Code is amended to read:

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~~ On the death of a married person, the following property of the decedent is subject to administration under this division:

(a) Property passing to someone other than the surviving spouse under the decedent's will or by intestate succession.

(b) Property disposed of in trust under the decedent's will.

(c) Property in which the decedent's will limits the surviving spouse to a qualified ownership. For the purpose of this subdivision, a devise or bequest of community property or quasi-community property to the surviving spouse if such spouse survives the deceased spouse that is conditioned on the surviving spouse surviving the decedent

by a specified period of time ~~shall not be considered to create such is~~ not a qualified ownership interest as to fall within the provision of this section, if the specified period of time has expired.

Comment. Section 649.3 is amended to make clear that the decedent's separate property which does not pass to the surviving spouse under Section 649.1 is subject to administration. The provision in subdivision (a) that property passing by intestate succession to someone other than the surviving spouse is subject to administration makes express the rule that was implied under former law.

968/605/NZ

Probate Code § 649.4 (amended). Surviving spouse's liability for decedent's debts

SEC. 7. Section 649.4 of the Probate Code is amended to read:

649.4. (a) Except as provided by in this section and 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 66, unless the interests of both spouses in the community property or quasi/community property, or both, are administered under this division~~ property in the decedent's estate to the same extent that property would have been liable had the decedent lived.

(b) ~~The personal liability imposed by subdivision (a)~~ The personal liability imposed by subdivision (a) shall not exceed the value at the date of death, less the amount of any liens and encumbrances, of the total of the following:

(1) ~~The interest of the surviving spouse (A) in the community property immediately prior to the death and (B) in quasi/community property arising by virtue of the death which one-half of the community and quasi-community property that belongs to the surviving spouse under Sections 100 and 101 that is not exempt from the enforcement of a money judgment.~~

(2) ~~The interest of the deceased spouse in such property passing one-half of the community and quasi-community property that belongs to the decedent under Sections 100 and 101 that passes to the surviving spouse without administration.~~

(3) ~~The separate property of the decedent that passes to the surviving spouse without administration.~~

(c) The surviving spouse is not liable for the debts of the deceased spouse if all of the property described in subdivision (b) is administered under this division.

~~(b)~~ (d) If proceedings are commenced in this state for the administration of the estate of the deceased spouse and the time for filing or presenting claims has commenced, any action upon the liability of the surviving spouse pursuant to subdivision (a) ~~shall be~~ is 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 expiration of the time for filing or presenting claims.

(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.

~~(e)~~ (e) Except as provided ~~by~~ in subdivision ~~(b)~~, (d), 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 amended to include separate property of the decedent passing to the surviving spouse without administration in the calculation of the maximum limit on the personal liability of the surviving spouse. This is consistent with Section 649.1 which newly permits separate property to pass to the surviving spouse without administration.

405/967/NZ

Probate Code § 650 (amended). Petition to have property not administered in the estate

SEC. 8. 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~~ passes or belongs 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 passes 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 100 or 101.

(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 passes 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 does not apply ~~if~~ to property that the petitioner has elected to have administered under this division as provided in pursuant to subdivision (b) of Section 649.1 ~~either to have~~

~~(1) 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.~~

(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 reflect the inclusion of separate property passing to the surviving spouse in the property of the decedent which need not be administered. See Section 649.1.

405/981/NZ

Probate Code § 653 (amended). Clerk to set petition for hearing; notice of hearing

SEC. 9. Section 653 of the Probate Code is amended to read:

653. If proceedings for the administration of the estate of a deceased spouse are pending at the time a petition described in Section 650 is filed or, if the proceedings are not pending and if the petition is not joined with a petition for probate of the will or administration of the estate of the deceased spouse, the clerk shall set the petition for hearing. At least 20 days prior to the date of the hearing on the petition, a notice of the hearing and a copy of the petition shall be personally served upon the following persons by the petitioner or mailed, postage prepaid, by the petitioner to the following persons, addressed to the addresses given in their request for special notice or notice of appearance, the addresses of their offices or places of residence, or, if neither of these addresses are known to the petitioner, the county seat of the county in which the proceedings are pending:

- (1) Any personal representative who is not the petitioner.
- (2) All legatees, devisees, and known heirs of the deceased spouse.
- (3) All persons or their attorneys who have requested special notice pursuant to Section 1202.
- (4) All persons or their attorneys who have given notice of appearance.
- (5) The Attorney General, addressed to the office of the Attorney General at Sacramento, California, if the petitioner bases the allegation that all or part of the estate of the deceased spouse ~~is community property or quasi/community property~~ passes to the surviving spouse upon the will of the deceased spouse and the will involves or may involve (i) a testamentary trust of property for charitable purposes other than a charitable trust with a designated trustee, resident in this state, or (ii) a bequest or devise for a charitable purpose without an identified legatee, devisee, or beneficiary.

(6) All other persons who are named in the will of the deceased spouse, 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~~ passes to the surviving spouse upon the will.

Comment. Section 653 is amended to reflect the inclusion of separate property passing to the surviving spouse in the property of the decedent which need not be administered. See Section 649.1.

405/984

Probate Code § 655 (amended). Court order

SEC. 10. 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 100 or 101 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~~ passes 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 100 or 101 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~~ does not pass 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~~ passes to the surviving spouse or (2) confirming the ownership of the surviving spouse of property belonging to the surviving spouse under Section 100 or 101 shall be conclusive on all persons, whether or not they are in being.

Comment. Section 655 is amended to reflect the inclusion of separate property passing to the surviving spouse in the property of the decedent which need not be administered. See Section 649.1.

405/988

Probate Code § 656 (amended). Order to protect creditors of decedent's business

SEC. 11. Section 656 of the Probate Code is amended to read:

656. In any case in which the court finds that all or a part of the ~~community property or quasi/community~~ property passing to the surviving spouse consists of a business or an interest in a business which the deceased spouse was operating or managing at the time of death, it shall require the surviving spouse to file a list of all of the known creditors of the business and the amount owing to each of them. The court may issue any order necessary to protect the interests of the creditors of the business, including the filing of an undertaking.

Comment. Section 656 is amended to reflect the inclusion of separate property passing to the surviving spouse in the property of the decedent which need not be administered. See Section 649.1.

**ESTATE PLANNING, TRUST AND
PROBATE LAW SECTION**
OF THE STATE BAR OF CALIFORNIA

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April 29, 1983

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John DeMouilly
Executive Director
California Law Revision Commission
Room D-2
4000 Middlefield Road
Palo Alto, California

Re: Probate Code §630

Dear John:

The Executive Committee of the Estate Planning, Trust and Probate Law Section at its meeting on April 16 gave further consideration to Probate Code §630 and possible expansion of that section to an amount up to \$100,000 as suggested by the Commission at its March meeting.

As you know, the Executive Committee had supported increase of that dollar amount under §630 to \$50,000.

The Executive Committee was about evenly split on whether the amount of property that should pass under §630 affidavit should be limited to \$50,000 or \$100,000. There were a number of concerns raised as the dollar limit increases which I would like to share with you, these are as follows:

- (1) A higher limit might well eliminate the ability of a surviving spouse to obtain a family allowance for herself or her children which allowance, as you know, is over and above any rights provided by the Will.

- (2) It would create situations where the statutory set aside under §640 would not be available.
- (3) There is always the question of what constitutes a valid will or valid codicils when property is transferred under a §630 affidavit. Increasing the dollar amounts under the §630 affidavit makes these problems more acute.
- (4) Although transferring property up to \$100,000 by an affidavit under §630 would not itself involve a federal estate tax or a California estate tax, that amount is in addition to any property transferred by joint tenancy, insurance proceeds, assets held in intervivos trusts, etc. In short, there may in fact be some federal or state death tax liability as the amount transferred under §630 increases.
- (5) With assets of \$100,000, there may be some unresolved income tax problems which again makes a transfer under §630 affidavit perhaps not desirable.
- (6) Section 630 as presently written is unclear as to whether it refers to the gross value of property being transferred or the net value. The Commission should clarify this area.
- (7) The rights of creditors on property transferred pursuant to §630 is not clear under the existing code sections. There was disagreement on the Executive Committee as to whether the transferees became liable for the debts of the decedent or whether they took the property free of debts.

In this regard §631 states that the payment or transfer shall not preclude administration where necessary to enforce payment of decedent's debts. This would suggest that the transferees are liable for the debts but if they are not paid then the creditor could start a probate. As dollar amounts increase under a §630 affidavit, the problems in this area would probably increase correspondingly.

John DeMouilly
April 29, 1983
Page Three

As to real property being included in the §630 affidavit, there is general support for the ability to transfer small parcels of real property by affidavit. However, the Executive Committee on further consideration felt that real property should be handled in a separate section. If there is a dollar limit, for example, of \$50,000 for transfer of real property, it would have to be made clear that that referred to the gross value of the property, not the equity interest in the property. Further, because of that dollar limit there would have to be a statutory method of valuation such as the valuation by a probate referee to establish that the value was less than \$50,000 in order for a title company to be willing to insure title. The desire to include real property under a §630 type affidavit was to allow transfer of desert lots and miscellaneous parcels that often have very minimal value which are not themselves really of sufficient value to justify a probate.

We hope these comments will be of assistance to the Commission when it gives consideration to §630.

Sincerely,



CHARLES A. COLLIER, JR.

CAC:jd
cc: Harley Spitler
Mary Yen
Kenneth Klug
Theodore Cranston