

Memorandum 85-35

Subject: Study L-1026 - Probate Code (Payment of Demands)

This memorandum includes a redraft of the existing Probate Code provisions governing payment of debts, expenses, charges, and taxes. It largely follows existing law, and there are only a few policy issues the staff wishes to note, below.

§§ 8620-8625. Allocation of claims between estate and surviving spouse

The draft statute preserves existing law that where property of both the estate and the surviving spouse would be liable for payment of a debt, the obligation for payment of the debt should be allocated proportionately between the estate and surviving spouse. Since almost all debts of either spouse are payable out of both community assets and the separate property of the spouse incurring the debt, it would appear that nearly all marital debts would require allocation under existing law.

However, the State Bar notes, and the Los Angeles County Bar agrees, that the allocation procedure is "rarely if ever used." This may be due to the fact that often the surviving spouse is the sole heir, or if not, has consented to the decedent's estate plan and does not desire allocation, or it is a long-term marriage and there is no longer any separate property.

Professor William A. Reppy, Jr., in his study for the Commission on liability of marital property for debts, would go beyond existing law and require that debts first be characterized as community or separate, and liability of property of the estate be assigned accordingly. Reppy, Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego L. Rev. 143, 180-181 (1981). Professor Reppy argues that at termination of marriage by dissolution the debts would be classified as separate or community in nature and assigned to the spouses accordingly, and the same rule should apply at termination of marriage by death.

The staff does not agree. The claim allowance and payment process is already sufficiently complex without throwing another variable into the equation. It is not clear what debts are for the benefit of the

community and what debts are for the separate benefit of a spouse--this is a litigation factor that will further complicate probate. Even prenuptial debts are not necessarily separate in nature, since they may have been incurred for items such as automobiles that are consumed by the community after marriage.

The staff believes the existing allocation requirement is basically fair--dividing responsibility between the estate and the surviving spouse in proportion to the assets of each. The situation at death is different from the situation at dissolution--the argument is between the surviving spouse and the heirs of the decedent rather than between two spouses with equal interest. Moreover, the decedent is unavailable to testify as to the motivation and purposes of the debt.

Existing law appears to be fair and simple, and not to consume the estate in litigation. The staff has retained it in the present draft.

§ 9245. Where property not in possession of personal representative

§ 9246. Court order to effectuate proration

These two sections continue existing Sections 975 and 976, which authorize the court to order heirs, devisees, and beneficiaries not before the court to pay over their prorated share of estate taxes. Commissioner Stodden comments that these provisions "are nice in theory but totally unenforceable as to an out-of-state resident who is taking outside of the will." She suggests serious consideration as to whether these sections should be continued.

The staff believes that even though the court's order may not be enforceable in some situations, it is probably useful to have the authority present in the statute in case there is some basis for exercise of long-arm jurisdiction, resulting in a judgment that is entitled to full faith and credit out of state. In any case, a court order directing an out-of-state resident to pay may in fact be obeyed, even though obedience may not be required.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

90851

PART 8. PAYMENT OF DEBTS, EXPENSES, CHARGES, AND TAXES

CHAPTER 1. GENERAL PROVISIONS

§ 8600. Definitions

8600. As used in this chapter:

(a) "Demand against the estate" means an established claim, an expense of administration, or a charge against the estate.

(b) "Established claim" means an allowed and approved claim payable in due course of administration.

(c) "Wage claim" means a claim for 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.

Comment. Section 8600 is intended for drafting convenience. Subdivisions (a) and (b) are new. Subdivision (c) continues the substance of former Section 950(6) and a portion of former Section 951.

90853

§ 8601. Order of payment

8601. (a) The demands 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) Wage claims.

[(6) Mortgages and liens, including but not limited to judgment liens, in the order of their priority, so far as they may be paid out of the proceeds of the property subject to the lien. If the proceeds are insufficient for that purpose, the part of the debt remaining unsatisfied shall be classed with the general demands against the estate.]

- (7) All other demands against the estate.

(b) The demands of each class are without preference or priority one over another. No demand of any class shall be paid until all those

of prior classes are paid in full. If the estate is insufficient to pay all demands of any class in full, each demand in that class shall be paid a proportionate share of the available estate.

(c) Notwithstanding any other provision of this chapter, demands having preference by the laws of the United States or by the laws of this state shall be given the preference required by such laws.

Comment. Section 8601 continues the substance of former Section 950 and a portion of former Section 952, except that Section 8601 makes clear that United States and California preferred demands must be recognized to the extent required by law. Subdivision (a)(7) includes judgments that are not liens rendered against the decedent during lifetime. See Section 7880 (claims established by judgment).

Note. Subdivision (a)(6) is subject to further review and coordination with related provisions.

27647

§ 8602. Immediate payment of priority demands

8602. (a) Except as provided in subdivision (b), the personal representative is not required to pay any demand against the estate [or any legacy] until payment has been ordered by the court, as prescribed in this chapter.

(b) As soon as the personal representative has sufficient funds, after retaining sufficient funds to pay expenses of administration, the personal representative shall pay the following demands:

- (1) Funeral expenses.
- (2) Expenses of last illness.
- (3) Family allowance.
- (4) Wage claims.

Comment. Section 8602 continues the substance of former Section 951.

992/911

§ 8603. Payment of demands on court order

8603. (a) Upon the settlement of any account of the personal representative after the time to make claims has expired, the court shall order payment of the demands against the estate, as the circumstances of the estate permit. If there are not sufficient funds to pay all of the demands, the order shall specify the amount to be paid each.

[(b) If the estate is exhausted by the payment ordered, the account of the personal representative constitutes a final account. The personal representative is entitled to discharge on proof showing the personal representative has complied with the order.]

Comment. Section 8603 continues the substance of the first, second, and fourth sentences of former Section 952.

Note. Subdivision (b) is subject to further review.

27400

§ 8604. Interest

8604. (a) Except as provided in subdivision (b), no greater rate of interest shall be paid upon any claim after its allowance and approval than 10 percent per annum. If the estate is insolvent, no greater rate of interest shall be paid upon any demand, [from the time of the first publication of notice to creditors,] than is allowed upon judgments.

(b) For claims based upon written contract, the rate of interest specified in the contract shall be paid in accordance with the terms of the contract until the claim is paid in full.

(c) If any demand bears interest, whether made as a claim or not, the personal representative, by order of the court, may pay the amount then accumulated and unpaid, or any part of such amount, at any time when there are [sufficient funds properly applicable to the payment], whether the demand is then due or not. The interest shall thereupon cease to accrue upon the amount paid.

Comment. Section 8604 continues the substance of former Section 733.

101/158

§ 8605. Enforcement of order for payment

8605. (a) An order for payment of a demand against the estate may be enforced in the manner provided for the enforcement of a money judgment generally.

(b) The personal representative is personally liable and liable on the bond for payment of a demand against the estate to the extent of the order for payment of the demand.

Comment. Section 8605 continues the substance of former Section 954.

§ 8606. Disputed and contingent claims

8606. (a) If there is a claim not due, or a contingent or disputed claim, the amount of the claim or the part that would be payable if the claim were due, established, or absolute, shall be paid into court. The amount paid into court shall remain there, to be paid over to the creditor when the claim is due, established, or absolute or, if the claim is not established, to be paid over or distributed as the circumstances of the estate require.

[(b) If a creditor whose claim is established but is not yet due appears and assents to a deduction from the claim of the legal interest for the time the claim has yet to run, the creditor is entitled to be paid accordingly.]

[(c) The payments provided in this section shall not be made when the estate is insolvent, unless a pro rata distribution is ordered.]

Comment. Section 8606 continues the substance of former Section 953.

Note. The meaning of subdivisions (b) and (c) is under review.

100/953

§ 8607. Trust for contingent claim

8607. (a) As used in this section, "contingent claim" means a contingent claim that is payable in installments or upon the happening of a stated event.

(b) Notwithstanding any other statute, the court may in its discretion appoint a trustee to whom payment of a contingent claim shall be made, with the direction to the trustee to invest the money as authorized by the court or in securities or other assets that are legal investment for savings banks. The court in determining the amount of the contingent claim shall compute the present value of the claim, giving consideration to a reasonable interest rate upon the funds to be invested.

(c) The trustee shall make the payments as ordered by the court. Upon completing the payments any excess funds in possession of the trustee shall be paid in accordance with the decree of distribution.

Comment. Section 8607 continues the substance of former Section 953.1, with the exception of the transitional provision, which is no longer necessary.

§ 8608. Deposit for unknown claimant

8608. (a) Whenever an estate is in all other respects ready to be closed, and it is made to appear to the satisfaction of the court, by affidavit or by evidence taken in open court, that an established claim has not been and cannot be paid because the claimant cannot be found, the court shall make an order fixing the amount of the claim, with interest, if any, and directing the personal representative to deposit that amount with the county treasurer of the county in which the proceedings are pending.

(b) The county treasurer shall give a receipt for the deposit, and is liable for the deposit upon the official bond of the county treasurer. The receipt shall be deemed and received by the court as a voucher in favor of the personal representative with the same force and effect as if executed by the claimant.

(c) Any money deposited with the county treasurer under the provisions of this section shall be received, accounted for, and disposed of as provided by Section 1444 of the Code of Civil Procedure. Any money deposited in the State Treasury under the provisions of this section shall be deemed to be so deposited under the provisions of Article 1 (commencing with Section 1440) of Chapter 6 of Title 10 of Part 3 of the Code of Civil Procedure.

Comment. Section 8608 continues the substance of former Section 738.

CROSS-REFERENCES

Code Civ. Proc. § 166, Actions at chambers

09026

§ 8609. Omitted creditor

8609. (a) When the accounts of the personal representative have been settled and an order made for the payment of demands and distribution of the estate, a creditor whose claim was not included in the order for payment has no right to require creditors who have been paid, or heirs or devisees, to contribute to the payment of the claim.

(b) If the personal representative failed to give notice to creditors as prescribed by law, the creditor may recover on the bond of the personal representative for the amount for which the claim would properly have been established.

Comment. Section 8609 continues the substance of former Section 955.

§ 8610. After payment of demands

8610. (a) If all of the demands have been paid, the court shall direct the payment of legacies and the distribution of the estate among the persons entitled, as provided in Part 10 (commencing with Section 8800).

(b) If there are demands remaining unpaid or if, for other reasons, the estate is not in a condition to be closed, the administration may continue for such time as may be reasonable.

Comment. Section 8610 continues the substance of former Section 956.

CHAPTER 2. ALLOCATION OF CLAIMS BETWEEN ESTATE AND
SURVIVING SPOUSE

§ 8620. When allocation may be made

8620. If it appears that a claim against the estate is also payable, in whole or in part, by the surviving spouse, the personal representative or any interested person may petition for an order to allocate responsibility for the claim at any time prior to the filing of a petition for final distribution.

Comment. Section 8620 continues the substance of former Section 980(a). CF. Section 48 ("interested person" defined).

§ 8621. Petition for allocation

8621. The petition shall include all of the following:

- (a) All claims known to the petitioner that are asserted to be subject to allocation.
- (b) The reason why the claims should be allocated.
- (c) The allocation and the basis for allocation asserted by the petitioner.

Comment. Section 8621 continues the substance of former Section 980(b).

§ 8622. Inventory of property of surviving spouse

8622. If it appears from the petition that allocation would be affected by the value of the separate property of the surviving spouse and any community property and quasi-community property not administered in the estate and if an inventory of the property and the value of the property has not been furnished by the surviving spouse, the court shall make an order to show cause why the information should not be furnished.

Comment. Section 8622 continues the substance of former Section 980(c).

27404

§ 8623. Notice of hearing

8623. Notice of the hearing of the petition and the order to show cause shall be given for the period and in the manner prescribed by [Section 1200] and a copy of the petition and the order shall be served not less than 10 days prior to the time set for the hearing upon the surviving spouse and, if the personal representative is not the petitioner, upon the personal representative.

Comment. Section 8623 continues the substance of former Section 980(d).

27246

§ 8624. Allocation

8624. (a) The personal representative and the surviving spouse may provide for allocation by agreement, and, upon a determination by the court that the agreement substantially protects the rights of interested persons, the allocation provided in the agreement shall be ordered by the court.

(b) In the absence of an agreement, each claim shall be apportioned to all of the property of the spouses liable at the date of death for the debt that is the basis of the claim, in the proportion determined by the value of the property less any liens and encumbrances at the date of death, and the responsibility to pay the claim shall be allocated accordingly.

Comment. Section 8624 continues the substance of former Section 980(e).

§ 8625. Order implementing allocation

8625. Upon making a determination as provided in this chapter, the court shall make an order that:

(a) Directs the personal representative to charge the amounts allocated to the surviving spouse against any property or interests of the surviving spouse that are in the possession of the personal representative.

(b) Summarily directs the surviving spouse to make payment of the allocation to the personal representative to the extent that property or interests of the surviving spouse that are in the possession of the personal representative are insufficient to satisfy the allocation.

(c) Directs the personal representative to make payment of the amounts allocated to the estate.

Comment. Section 8625 continues the substance of former Section 980(f).

§ 8626. Funeral expenses and last illness expenses

8626. Notwithstanding any other statute, funeral expenses and expenses of last illness are payable out of the estate of a deceased spouse and shall not be charged to the community share of the surviving spouse, whether or not the surviving spouse is financially able to pay the expenses and whether or not the surviving spouse or any other person is also liable for the expenses.

Comment. Section 8626 continues the substance of former Section 951.1.

Note. The terminology of this section will be reviewed for consistency of usage.

CHAPTER 3. PRORATION OF ESTATE TAXES

§ 8630. Definitions

8630. Except where the context otherwise requires, as used in this chapter:

(a) "Person interested in the estate" means any person who receives or is the beneficiary of any property transferred pursuant to a transfer

which is subject to a tax imposed by any federal or California estate tax law, now existing or hereafter enacted.

(b) "Gross estate" or "estate" means all property included for federal estate tax purposes in determining the federal estate tax pursuant to the federal estate tax law.

Comment. Section 8630 continues the substance of former Section 977.

969/017

§ 8631. Proration among persons interested in estate

8631. (a) Except as provided in subdivision (b), if it appears upon an accounting or in an appropriate action or proceeding that a personal representative, trustee, or other fiduciary has paid an estate tax to the federal government or the State of California under the provisions of any federal or California estate tax law, now existing or hereafter enacted, upon or with respect to property required to be included in the gross estate of a decedent under the provisions of the law, the amount of tax so paid shall be equitably prorated among the persons interested in the estate.

(b) This section does not apply in any of the following cases:

(1) Where a testator otherwise directs in his or her will.

(2) Where by written instrument executed inter vivos direction is given for apportionment within the fund of taxes assessed upon the specific fund dealt with in the inter vivos instrument.

Comment. Section 8631 continues the substance of former Section 970. Cf. Section 8630 (definitions).

999/325

§ 8632. Manner of proration

8632. The proration required by this chapter shall be made by the court having jurisdiction [in probate] of any property in the estate in the proportion, as near as may be, that the value of the property, interest or benefit of each person bears to the total value of the property, interests and benefits received by all such persons interested in the estate.

Comment. Section 8632 continues the substance of former Section 971.

§ 8633. Allowance for exemptions and deductions

8633. (a) In making a proration of the federal estate tax, allowances shall be made for exemptions granted by the act imposing the tax and for deductions allowed by the act for the purpose of arriving at the value of the net estate.

(b) In making a proration of the California estate tax, allowances shall be made for (1) exemptions granted by the act imposing the federal estate tax and attributable to property located in this state, and (2) deductions allowed by the act for the purpose of arriving at the value of the net estate and attributable to property located in this state.

Comment. Section 8633 continues the substance of former Section 972.

§ 8634. Trusts and temporary interests

8634. If a trust is created, or other provision made whereby a person is given an interest in income, or an estate for years, or for life, or other temporary interest in any property or fund, the federal and California estate taxes on both the temporary interest and on the remainder thereafter shall be charged against and be paid out of the corpus of the property or fund without apportionment between remainders and temporary estates.

Comment. Section 8634 continues the substance of former Section 973.

§ 8635. Where property not in possession of personal representative

8635. If property required to be included in the gross estate does not come into the possession of the personal representative, the personal representative is entitled, and has the duty, to recover from the person in possession, or from the persons interested in the estate, the proportionate amount of the federal and California estate taxes payable by the persons interested in the estate with which the persons interested in the estate are chargeable under the provisions of this chapter, and the court may by order direct the payment of the amount of taxes by the persons to the personal representative.

Comment. Section 8635 continues the substance of former Section 975.

§ 8636. Court order to effectuate proration

8636. The court, upon making a determination as provided in this chapter, shall make an order:

(a) Directing the personal representative or other fiduciary to charge the prorated amounts against the persons against whom the federal and California estate taxes have been prorated insofar as the personal representative or other fiduciary is in possession of property or interests of the persons against whom the charge may be made.

(b) Summarily directing all other persons against whom federal and California estate taxes have been prorated or who are in possession of property or interests of such persons to make payment of the prorated amounts to the personal representative or other fiduciary.

Comment. Section 8636 continues the substance of former Section 976.

CROSS-REFERENCES

Definition

Court § 30

EXHIBIT 2

969/022

Probate Code § 950 (repealed)

Comment. The substance of former Section 950 is continued in Sections 8600 (definitions) and 8601 (order of payment).

Probate Code § 951 (repealed)

Comment. The substance of former Section 951 is continued in Sections 8600(b) ("wage claim" defined) and 8602 (immediate payment of priority demands).

Probate Code § 951.1 (repealed)

Comment. The substance of former Section 951.1 is continued in Section 8626 (funeral expenses and last illness expenses).

Probate Code § 952 (repealed)

Comment. The substance of former Section 952 is continued in Sections 8601(b) (order of payment) and 8603 (payment of demands on court order).

Probate Code § 953 (repealed)

Comment. The substance of former Section 953 is continued in Section 8606 (disputed and contingent claims).

Probate Code § 953.1 (repealed)

Comment. The substance of former Section 953.1 is continued in Section 8607 (trust for contingent claim), with the exception of the transitional provision, which is no longer necessary.

Probate Code § 954 (repealed)

Comment. The substance of former Section 954 is continued in Section 8605 (enforcement of order for payment).

Probate Code § 955 (repealed)

Comment. The substance of former Section 955 is continued in Section 8609 (omitted creditor).

Probate Code § 956 (repealed)

Comment. The substance of former Section 956 is continued in Section 8610 (after payment of demands).

Probate Code § 970 (repealed)

Comment. The substance of former Section 970 is continued in Sections 8630(a) ("person interested in estate" defined) and 8631 (proration among persons interested in estate).

Probate Code § 971 (repealed)

Comment. The substance of former Section 971 is continued in Section 8632 (manner of proration).

Probate Code § 972 (repealed)

Comment. The substance of former Section 972 is continued in Section 8633 (allowance for exemptions and deductions).

Probate Code § 973 (repealed)

Comment. The substance of former Section 973 is continued in Section 8634 (trusts and temporary interests).

Probate Code § 975 (repealed)

Comment. The substance of former Section 975 is continued in Section 8635 (where property not in possession of personal representative).

Probate Code § 976 (repealed)

Comment. The substance of former Section 976 is continued in Section 8636 (court order to effectuate proration).

Probate Code § 977 (repealed)

Comment. The substance of former Section 977 is continued in Section 8630 (definitions).

Probate Code § 980 (repealed)

Comment. The substance of the first sentence of subdivision (a) of former Section 980 is continued in Section 8620 (when allocation may be made). The second sentence is superseded by Section 48 ("interested person" defined). The substance of subdivision (b) is continued in Section 8621 (petition for allocation). The substance of subdivision (c) is continued in Section 8622 (inventory of property of surviving spouse). The substance of subdivision (d) is continued in Section 8623 (notice of hearing). The substance of subdivision (e) is continued in Section 8624 (allocation). The substance of subdivision (f) is continued in Section 8625 (order implementing allocation).