

#L-1032

0031a
4/5/85

Memorandum 85-49

Subject: Study L-1032 - Probate Code (Small Estate Set-Aside)

Attached to this memorandum is a draft statute relating to the small estate set-aside. This draft supersedes existing Probate Code Sections 640-647.5.

The draft statute generally continues existing law with one significant change. The policy issues raised by the draft are noted in the "Draftsman's Note" which follows the text and Comment to various sections in the draft. At the meeting, we will consider the draft section by section.

We have compiled the new provisions with the family protection provisions in Part 3. This is because we view the small estate set-aside provisions primarily as a means by which the spouse or minor children, or all of them, may have the property set apart for them even though the decedent may have given it by will to another. In this respect, the set-aside provisions are comparable to the probate homestead provisions and the exempt property set aside provisions which are compiled with the family protection provisions.

Attached as Exhibit 1 are Comments showing the disposition of the existing sections that would be superseded by the attached draft.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Outline of Draft Statute

PART 3. FAMILY PROTECTION

CHAPTER 4. SMALL ESTATE SET-ASIDE

- § 6600. "Minor child" defined
- § 6601. Net value of decedent's estate must not exceed \$20,000;
exclusions in determining value
- § 6602. Petition to set aside small estate
- § 6603. Venue
- § 6604. Contents of petition
- § 6605. Filing petition with no probate proceeding
- § 6606. Filing petition in connection with probate proceeding
- § 6607. Notice of hearing
- § 6608. Inventory and appraisement
- § 6609. Court order
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PART 3. FAMILY PROTECTION

CHAPTER 4. SMALL ESTATE SET-ASIDE

§ 6600. "Minor child" defined

6600. As used in this chapter, "minor child" means a child of the decedent who was under the age of 18 at the time of the decedent's death and who survived the decedent.

Comment. Section 6600 is a new provision that makes clear that the determination whether a child is a minor is made at the time of the death of the decedent. Former Section 645 was unclear as to the time that determined whether a child of the decedent was entitled to a small estate set-aside.

CROSS-REFERENCES

Definitions

Child § 26

§ 6601. Net value of decedent's estate must not exceed \$20,000; exclusions in determining value

6601. (a) The procedure provided in this chapter may be used only if the net value of the decedent's estate, over and above all liens and encumbrances at the date of death and over and above the value of any probate homestead interest set apart out of the decedent's estate under Section 6520, does not exceed twenty thousand dollars (\$20,000).

(b) For the purposes of this chapter:

(1) Any property or interest 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 interest terminable upon the decedent's death, shall be excluded in determining the estate of the decedent or its value.

(2) A multiple-party account to which the decedent was a party at the time of the decedent's death shall be excluded in determining the estate of the decedent or its value, whether or not all or a portion of the sums on deposit are community property, to the extent that the sums on deposit belong after the death of the decedent to a

surviving party, P.O.D. payee, or beneficiary. As used in this subdivision, the terms "multiple-party account," "party," "P.O.D. payee," and "beneficiary" have the meaning given those terms by Section 5101.

Comment. Subdivision (a) of Section 6601 continues the substance of a portion of former Section 640. Subdivision (b) continues the substance of former Section 647.

CROSS-REFERENCES

Definitions

Community property §28

Probate homestead § 60

Property § 62

DRAFTSMAN'S NOTE. The phrase "decendent's estate" has been substituted for the phrase "the decedent's whole estate". What is the meaning of "whole estate"? Does this phrase have a different meaning than the words "decedent's estate" used in many other places in the Probate Code? Presumably we are taking only about the decedent's real property located in California and the decedent's personal property wherever located, but that is not clear. Since Section 6608 (continuing former Section 644) requires an inventory and appraisement to be prepared in the manner prescribed by law, we are concerned only with property that would have been included in an inventory and appraisement for probate purposes and property that a probate referee will have an opportunity to appraise in California.

In computing the value of the estate, should property set apart pursuant to Section 6510 (setting aside exempt property other than family dwelling) be excluded? See subdivision (b) of Section 6611, continuing the substance of existing Section 645.3.

§ 6602. Petition to set aside small estate

6602. A petition may be filed under this chapter to obtain an order setting aside the decedent's estate to the decedent's surviving spouse and minor children, or one or more of them, as provided in this chapter.

Comment. Section 6002 is new. The procedure provided by this chapter may be used only for a "small estate." See Section 6601. See also the Comment to Section 6609.

CROSS-REFERENCES

Definitions

Child § 26

Minor child § 6600

Surviving spouse § 78

§ 6603. Venue

6603. The petition shall be filed in the superior court of the county in which the estate of the decedent may be administered.

Comment. Section 6603 is a new provision that specifies the county in which the petition is to be filed. The section is consistent with a provision of Section 9560 (determination or confirmation of property passing or belonging to surviving spouse).

§ 6604. Contents of petition

6604. (a) The petition shall allege that this chapter applies and request that an order be made setting aside the estate of the decedent to the surviving spouse and minor children of the decedent, or one or more of them, as provided in this chapter.

(b) The petition shall include the following information:

(1) If proceedings for administration of the estate are not pending, the facts necessary to determine the county in which the estate of the decedent may be administered.

(2) A specific description and estimate of the value of the decedent's estate and a list of all liens and encumbrances at the date of death.

(3) A designation of any property as to which a probate homestead is set apart out of the decedent's estate under Section 6520.

Comment. Section 6604 continues the substance of the portion of former Section 641 specifying the contents of the petition, except that paragraph (1) of subdivision (b) is new. See also the Comment to Section 6609.

CROSS-REFERENCES

Definitions

Child § 26

Minor child § 6600

Probate homestead § 60

Property § 62

Surviving spouse § 78

Verification of petition § ____

DRAFTSMAN'S NOTE. In subdivision (b)(2) of Section 6604 "decedent's estate" has been substituted for "all of the decedent's property."

§ 6605. Filing petition with no probate proceeding

6605. A petition may be filed under the chapter without filing a petition for probate of the will or for appointment of a personal

representative. A petition filed under this section may be filed by the person named in the will of the decedent as executor, by the surviving spouse, by the guardian of a minor child of the decedent, or by a child of the decedent who was a minor at the time the decedent died. The guardian may file a petition under this section without authorization or approval of the court in which the guardianship proceeding is pending.

Comment. Section 6605 continues the substance of a portion of former Section 641 with two additions:

(1) The provision that permits the filing of a petition by a child of the decedent who was a minor at the time the decedent died.

(2) The last sentence which is consistent with subdivision (a) of Section 9611 (collection of small estate without administration).

CROSS-REFERENCES

Definitions

Child § 26

Minor child § 6600

Personal representative § ____

Surviving spouse § 78

Will § 88

§ 6606. Filing petition in connection with probate proceeding

6606. (a) A petition filed under this chapter may be joined with a petition for the probate of the decedent's will or for appointment of a personal representative of the decedent's estate.

(b) If proceedings for the administration of the estate of the decedent are pending, a petition under this chapter shall be filed in those proceedings without the payment of an additional fee.

(c) A petition filed under this section may be filed by the person named in the will of the decedent as executor, by the personal representative of the decedent, by the surviving spouse, by the guardian of a minor child of the decedent, or by a child of the decedent who was a minor at the time the decedent died. The guardian may file a petition under this section without authorization or approval of the court in which the guardianship proceeding is pending.

Comment. Section 6606 continues the substance of a portion of former Section 641 with three revisions:

(1) The provision of subdivision (b) that a petition under this chapter may be filed in a pending probate proceeding without the payment of an additional fee is drawn from Section 9562 (determination or confirmation of property passing or belonging to surviving spouse).

(2) The last sentence of subdivision (c) is new. See the Comment to Section 6605.

(3) Omitted is the provision of former Section 641 that required that the petition be filed at any time before the hearing on the petition for probate of the decedent's will or for the appointment of a personal representative or after the filing of the inventory. See Section 6608 (inventory and appraisal to be filed prior to hearing on petition).

CROSS REFERENCES

Definitions

Child § 26

Minor child § 6600

Personal representative § ____

Surviving spouse § 78

Will § 88

§ 6607. Notice of hearing

6607. (a) Where proceedings for the administration of the estate of the decedent are not pending when the petition is filed under this chapter and the petition is not joined with a petition for the probate of the decedent will or appointment of a personal representative of the estate of the decedent, there shall be no notice of any type other than as prescribed in this subdivision. In cases covered by this subdivision, the petitioner shall give notice of the hearing to each heir by mail not less than 10 days before the hearing, and the petitioner shall give notice for the period and in the manner required by Section [1200.5].

(b) If the petition under this chapter is joined with a petition for the probate of the decedent's will or for appointment of a personal representative of the estate of the decedent, notice of the hearing on the petition under this chapter shall be given to the same persons and in the manner prescribed in Chapter 2 (commencing with Section 7230) of Part 2 of Division 7 and shall be included in the notice of hearing required by that chapter.

(c) If proceedings for the administration of the estate of the decedent are pending when the petition is filed under this chapter and the hearing of the petition for probate of the will or appointment of a personal representative of the estate of the decedent is set for a

day more than 10 days after the filing of the petition under this chapter, the petition under this chapter shall be set for hearing at the same time as the petition for probate of the will or for appointment of a personal representative, and notice of hearing on the petition filed under this chapter shall be given by the petitioner as provided in Section [1200.5]. If the hearing of the petition for probate of the will or appointment of a personal representative is not set for hearing for a day more than 10 days after the filing of the petition under this chapter, the petition filed under this chapter shall be set for hearing at least 10 days after the date on which it is filed, and notice of the hearing on the petition filed under this chapter shall be given by the petitioner as provided in Section [1200.5]; and, if the petition for probate of the will or appointment of a personal representative has not already been heard, unless the court otherwise orders, that petition shall be continued until that date and heard at the same time.

Comment. Subdivision (a) of Section 6607 continues the substance of subdivision (a) of former Section 643. Subdivision (b) supersedes former Section 642. Subdivision (b) of Section 6607 is comparable to subdivision (a) of Section 9566 (determination or confirmation of property passing or belonging to surviving spouse). Subdivision (c) continues the substance of subdivision (b) of former Section 643.

CROSS-REFERENCES

Clerk to set petition for hearing § ____

Definitions

Heirs § 44

Personal representative § ____

Will § 88

DRAFTSMAN'S NOTE. Should notice under subdivision (a) of Section 6607 be given to the devisees under the decedent's will as well as to the "heirs"? Is the reference to Section [1200.5] in subdivision (a) of Section 6607 appropriate in view of the fact that there is no pending probate proceeding? (Section 1200.5 relates to notice of certain specified petitions in a pending proceeding and requires that notice be mailed to the executor or administrator, to any co-executor or co-administrator, and to all persons who have requested notice or have given notice of appearance in the estate proceeding.)

§ 6608. Inventory and appraisal

6608. If a petition is filed under this chapter, the personal representative, or the petitioner if no personal representative has been appointed, shall file with the clerk of the court, prior to the

hearing of the petition, an inventory and appraisalment in the form set forth in Section [600]. The appraisalment shall be made as set forth in [Chapter 9 (commencing with Section 600)]. The personal representative or the petitioner, as the case may be, may appraise the assets which a personal representative could appraise under Section [605].

Comment. Section 6608 continues the requirement of former Section 644 that an inventory and appraisalment be filed. The former provision has been revised to conform to the new provisions relating to inventory and appraisalment. The requirement that the inventory and appraisalment be filed before the hearing of the petition has been substituted for the requirement of former Section 644 that the inventory and appraisalment be filed within such time as the court may allow.

CROSS-REFERENCES

Definitions

Personal representative § __

DRAFTSMAN'S NOTE. Should the court be given discretion to dispense with the requirement of an inventory and appraisalment by a probate referee if the petitioner provides a declaration that establishes to the satisfaction of the court that the estate is a "small estate"? This authority would avoid the expense of an inventory and appraisalment in a case where the net value of the estate is clearly less than \$20,000.

§ 6609. Court order

6609. (a) The court shall make an order under this section if the court determines both of the following:

(1) The net value of the decedent's estate over and above all liens and encumbrances at the date of death and over and above the value of any probate homestead interest set apart out of the decedent's estate under Section 6520, does not exceed twenty thousand dollars (\$20,000), as of the date of the decedent's death.

(2) The expenses of the last illness, funeral changes, and expenses of administration have been paid.

(b) In an order under this section, the court shall assign the whole of the decedent's estate, subject to all liens and encumbrances on the estate at the date of the decedent's death, to one or more of the following persons:

- (1) The surviving spouse of the decedent.
- (2) The minor children of the decedent.

(c) The court has discretion in determining the person or persons to whom the decedent's estate is to be assigned under subdivision (b); but the court, in exercising its discretion, shall consider the situations and needs of the surviving spouse and minor children.

(d) The court may issue any further orders which may be necessary to cause delivery of the estate to the person or persons entitled to it under the order.

(e) Title to the decedent's estate vests absolutely in the surviving spouse, minor children, or any or all of them, as provided in the order, subject to all liens and encumbrances on the estate at the date of the decedent's death, and there shall be no further proceedings in the administration of the decedent's estate unless further estate is discovered.

Comment. Section 6609 continues the substance of former Section 645 with the changes noted below:

(1) Subdivision (b) permits the court to assign the estate to the minor children of the decedent even if there is a surviving spouse. This may be desirable, for example, if the minor children live apart from the surviving spouse or where the minor children are not children of the surviving spouse. This is consistent with Section 6521 governing probate homesteads and Section 6510 governing setting aside of exempt property other than the family dwelling. Former law required that the estate be assigned to the surviving spouse even where there were one or more minor children.

(2) The word "mortgages," which was found in former Section 645, has been omitted as unnecessary, mortgages being included within the phrase "liens and encumbrances."

(3) Subdivision (d) is a new provision drawn from former Section 655 (determination or confirmation of property passing or belonging to surviving spouse).

CROSS-REFERENCES

Definitions

Child § 26
Minor children § 6600
Probate homestead § 60
Surviving spouse § 78

DRAFTSMAN'S NOTE. Section 6609 makes a significant change in existing law: The section permits the court to assign the small estate to one or more of the minor children of the decedent, even where there is a surviving spouse. Under existing law, the small estate must be awarded to the surviving spouse even where there are minor children. This change is consistent with the change made in the new probate homestead provision, which permits the probate homestead to be awarded

to the surviving spouse, one or more of the minor children, or both the surviving spouse and one or more of the minor children. The award of the small estate to a minor child or children may be desirable, for example, where the minor children are living apart from the surviving spouse or are not children of the surviving spouse. The proposed change would make the small estate set-aside provisions consistent with the provisions governing award of a probate homestead and the provisions governing the setting aside of exempt property other than the family dwelling.

§ 6610. Effect of order

6610. (a) Except as provided in subdivision (b), an order of the court under Section 6609, when it becomes final, is a conclusive determination of the jurisdiction of the court and cannot be collaterally attacked.

(b) Subdivision (a) does not apply in any of the following cases:

(1) The presence of fraud in the procurement of the court order.

(2) The court order is based on the erroneous assumption of death.

Comment. Section 6610 continues the substance of former Section 645.1. The section is consistent with Section 7217 (effect of order admitting a will to probate or appointing a personal representative).

DRAFTSMAN'S NOTE. Section 6610 should be compared to Section 9568 (determination or confirmation of property passing or belonging to surviving spouse). Both sections should be reviewed and a consistent provision included in place of the two different sections as now drafted. What is the meaning of "conclusive determination of the jurisdiction of the court"?

§ 6611. Liability for unsecured debts of decedent

6611. (a) Subject to the limitations and conditions specified in this section, the person or persons in whom title vested pursuant to Section 6609 are personally liable for the unsecured debts of the decedent.

(b) The personal liability of a person under this section shall not exceed the fair market value at the date of the decedent's death of the property title to which vested in that person pursuant to Section 6609, less the amount of any liens and encumbrances and any probate homestead and other property set apart pursuant to Section 6510 or 6520 out of that property.

(c) The personal liability under this section ceases one year after the date the court makes its order under Section 6609 except with respect to an action or proceeding then pending in court.

(d) In any action or proceeding based upon an unsecured debt of the decedent, the surviving spouse, the child or children, or the guardian of the minor child or children, may assert any defense, cross-complaint, or setoff which would have been available to the decedent if the decedent had not died.

Comment. Section 6611 continues the substance of former Section 645.3, but the language used in subdivision (b) of Section 6611 makes clear that the personal liability of a person who takes only a share or portion of the decedent's estate is limited to the net value of the share (fair market value less liens and encumbrances and any probate homestead or exempt property set apart out of the share), rather than the net value of the entire estate.

CROSS-REFERENCES

Definitions

Child § 26

Minor child § 6600

Probate homestead § 60

Surviving spouse § 78

DRAFTSMAN'S NOTE. The language of the existing provision is modified to make clear the answer to the following question: If the estate is awarded, for example, in equal shares to three children, is each child personally liable to the extent of the value of the estate, or only to the extent of one-third of the value of the estate (the share he or she received)?

§ 6612. Order where estate not set aside

6612. If a petition filed under this chapter is joined with a petition for the probate of the decedent's will or for appointment of a personal representative of the decedent's estate and the court finds that the net value of the decedent's estate exceeds the amount specified in paragraph (1) of subdivision (a) of Section 6609 or that there is neither a surviving spouse nor a minor child, the court shall act on the petition for probate of the decedent's will or appointment of a personal representative in the same manner as if no petition had been filed under this chapter, and the estate shall then be administered in the same manner as if no petition had been filed under this chapter.

Comment. Section 6612 continues the substance of former Section 646.

CROSS-REFERENCES

Definitions

Child § 26
Minor child § 6600
Personal representative § ____
Surviving spouse § 78
Will § 88

§ 6613. Applicability of chapter

6613. (a) This chapter applies only if both of the following requirements are satisfied:

(1) A petition is filed under this chapter on or after [the operative date of this code].

(2) No petition was filed with respect to the estate of the decedent under former Sections 640 to 647.5, inclusive, before [the operative date of this code].

(b) In case a petition was filed under former Sections 640 to 647.5, inclusive, before [the operative date of this code], the case shall be governed by the law applicable to the petition prior to [the operative date of this code].

Comment. Section 6613 supersedes former Section 647.5 and preserves the effect of that section for cases where a petition was filed under former Sections 640 to 647.5, inclusive, prior to the operative date of this code. See Section ____ (operative date).

DRAFTSMAN'S NOTE. The significant change this chapter makes in existing law is that it permits the estate to be set aside to the minor children even where there is a surviving spouse. Under existing law, the estate must be set aside to the surviving spouse, even where there are minor children. Do we want to make this chapter apply to cases where the decedent died before the operative date of the chapter? Do we want to make this chapter apply where a petition for a small estate set-aside was filed before the operative date of this chapter but not determined before the operative date of this chapter? Do we want this chapter to apply where the decedent died before the operative date of this chapter but no petition or probate proceeding has been filed or commenced prior to the operative date of this chapter? To the extent that we continue to apply prior law after the operative date of the new code we impose a significant burden on the courts and lawyers because they will have to search out the old law for a number of years after the operative date of the new code.

DISPOSITION OF REPEALED PROBATE CODE SECTIONS

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

Comment. The portion of former Section 640 that restricted the small estate set-aside procedure to estates having a net value not exceeding \$20,000 is continued in subdivision (a) of Section 6601. The portion relating to setting aside the estate to the surviving spouse or minor children is superseded by Sections 6602 and subdivision (b) of Section 6609. See the Comment to Section 6609.

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

Comment. The portion of former Section 641 relating to the allegations and contents of the petition is continued in substance in Section 6604. The portion relating to the filing of a petition without filing a petition for probate of the will or for letters is continued in substance in Section 6605 with two additions. See the Comment to Section 6605. The portion relating to including the petition alternatively in a petition for probate of the will or for letters or filing the petition in a pending probate proceeding is continued in substance in Section 6606 with three revisions. See the Comment to Section 6606. The provision requiring verification of the petition is omitted as unnecessary in view of the general requirement of Section _____ that all petitions be verified.

Probate Code § 642 (repealed). Notice of hearing where petition included in petition for probate or letters

Comment. Former Section 642 is superseded by subdivision (b) of Section 6607.

Probate Code § 643 (repealed). Notice of hearing where separate petition

Comment. Subdivision (a) of former Section 643 is continued in substance in subdivision (a) of Section 6607. Subdivision (b) is continued in substance in subdivision (c) of Section 6607.

Probate Code § 644 (repealed). Inventory and appraisalment

Comment. Former Section 644 is superseded by Section 6608.

Probate Code § 645 (repealed). Court order

Comment. Former Section 645 is continued in substance in Section 6609 except that the court is given authority to set aside the estate to one or more of the minor children even where there is a surviving spouse. See the Comment to Section 6609.

Probate Code § 645.1 (repealed). Effect of order

Comment. Former Section 645.1 is continued in substance in Section 6610.

Probate Code § 645.3 (repealed). Liability for debts

Comment. Former Section 645.3 is continued in substance in Section 6611 with a clarifying revision. See the Comment to Section 6611.

Probate Code § 646 (repealed). Procedure where order denied

Comment. Former Section 646 is continued in substance in Section 6612.

Probate Code § 647 (repealed). Exclusions in determining value of estate

Comment. Former Section 647 is continued in substance in subdivision (b) of Section 6601.

Probate Code § 647.5 (repealed). Application of article

Comment. Former Section 647.5 is superseded by Section 6613. See the Comment to that section.