

First Supplement to Memorandum 85-72

Subject: Study L-1031 - Estates and Trusts Code (Passage of Property to Surviving Spouse Without Administration)

Charles A. Collier, Jr., made a careful study of the draft statute attached to Memorandum 85-72. He submitted a number of suggestions for technical or clarifying revisions in the draft statute and official Comments. A copy of his letter is attached as Exhibit 1 to this Supplement. His suggestions are discussed below.

Many of Mr. Collier's suggestions will be adopted by the staff and do not involve any policy determinations. With respect to these suggestions, which will be adopted by the staff, we merely state "Adopted" and do not include any further discussion below.

In the discussion below, we number and consider the comments of Mr. Collier in the same order as set out in his letter (attached as Exhibit 1). We have highlighted the portion of this Supplement that we suggest be discussed at the meeting. We have also noted some technical or editorial revisions the staff plans to make before we distribute the tentative recommendation for review and comment.

1. Adopted.
2. Adopted.
3. Adopted.
4. No change suggested by Mr. Collier.
5. Mr. Collier comments:

5. Section 9620: The clarification in subparagraphs (a), (b) and (c) are helpful and appropriate. Query if the creditors have a right to levy on the proceeds of a sale or other transfer for value under Section 9620. If the surviving spouse gifts the property away under this section, does it cut off the rights of creditors entirely?

There is nothing in Section 9620 that protects the proceeds of a sale or transfer from the rights of devisees or creditors of the deceased spouse. The section only protects the grantee, purchaser, encumbrancer, or lessee. Perhaps the section should be revised to make clear that proceeds are not protected. Also, it might be appropriate to restrict the protection of a grantee, purchaser, encumbrancer, or lessee to one who acquires the interest for a valuable consideration.

6. Mr. Collier questions whether it would be appropriate to permit the surviving spouse to collect \$5,000 from each employer if the deceased spouse had several employers. The staff does not believe that this should be permitted. To make clear that it is not permitted, the staff suggests the following revisions in Section 9640:

(1) After the first sentence of subdivision (a), insert the following new sentence:

Not more than five thousand dollars (\$5,000) in the aggregate may be collected under this section from all of the employers of the decedent.

(2) Add the following to paragraph (6) of subdivision (b) of Section 9640:

I do not have, nor does anyone on my behalf have, a pending request to collect compensation owed by another employer for personal services of the decedent under Sections 9640 to 9645, inclusive, of the California Probate Code. I have not, nor has anyone on my behalf, collected any compensation owed by an employer for personal services of the decedent under Sections 9640 to 9645, inclusive, of the California Probate Code except the sum of \$_____ which was collected from _____. I request that I be paid the salary or other compensation owned by you for personal services of the decedent, including compensation for unused vacation, not to exceed five thousand dollars (\$5,000), less the amount of \$_____ which was previously collected.

Mr. Collier suggests that subdivisions (c) and (d) might be combined. However, these provisions cannot be combined because the standard of what constitutes reasonable proof under subdivision (c) differs from the standard of what constitutes reasonable proof under subdivision (d), and the staff believes that the difference in the standards is appropriate.

7. Mr. Collier suggests:

Section 9643: In the second sentence following the words "surviving spouse", you might consider adding the following: "or the person acting on behalf of the surviving spouse as provided in Section 9640".

The staff does not recommend this addition; we would prefer that the right of a person to bring an action on behalf of the surviving spouse be determined under the general rules of law that determine who can bring an action on behalf of another.

8. The wording questioned by Mr. Collier is correct and should not be changed. You do not "allege" an order in a petition; you "request" that the court make an order.
9. Mr. Collier has uncovered a typographical error in subdivision (a)(2) of Section 8651 (page 17 of the staff draft). The word "incorporated in the fourth line of paragraph (2) should be "unincorporated." We will make this correction.

Mr. Collier asks whether "unincorporated business" includes a partnership as well as a sole proprietorship. It would seem clear that it does. This appears to be the correct result as a matter of policy since the deceased spouse as a general partner would be liable for the partnership debts. If the deceased spouse is a limited partner, Section 8651 does not apply because the section applies only if the deceased spouse was "operating or managing" the business at the time of death.

10. Adopted. But we will later develop language that can be used uniformly throughout the code.
11. Adopted. See comment to item 10 above.
12. The suggestion concerning the text of Section 9655 is adopted.

Mr. Collier suggests that the Comment to subdivision (a) of Section 9655 state that it "restates without substantive change former Section 654." The staff does not believe that this is accurate; we believe that the substantive effect of subdivision (a) is to make two changes in existing law which are noted in the Comment. We will substitute "restates" for "continues" in the Comment relating to subdivision (a) as suggested by Mr. Collier.

Mr. Collier suggests the following with reference to the Comment to subdivision (b) of Section 9655: "With reference to subdivision (b), since there are significant changes, perhaps it would be better to refer to this as "replacing former Section 653 while making the following changes". The problem with using this language is that it is vague. It is more precise to say, as does the existing Comment, that "Subdivision (b) of Section 9655 restates the substance of former Section 653 with the following changes: [then follows a description of the changes]."

13. Mr. Collier comments:

Section 9656: With reference to the Draftsman's Note, I believe the language relating to the authority of the court to make orders that may be necessary to cause ownership of the property to be confirmed or to cause delivery of the property to the surviving spouse should be retained. While it is true there may be instances where the court does not have jurisdiction over all the parties, in many cases the court will have that jurisdiction and can make an appropriate order. Any order of necessity is limited by the court's jurisdiction in any event.

The staff believes that Mr. Collier has made a good point and we suggest that the deleted provisions be restored before the tentative recommendation is distributed to interested persons for review and comment.

14. Adopted. Section 9660 on page 23 of the staff draft should be renumbered as Section 9659.

15. We will substitute "Sections 650 to 658, inclusive," for Sections 650-658.

16. No change suggested.

17. Covered in Memorandum 85-79.

Technical and editorial revisions

(a) Letter of transmittal. Correct typographical errors in second paragraph so that it reads: "This tentative recommendation sets forth the Commission's tentative conclusions concerning the portion of the new code relating to passage of property to a surviving spouse without administration."

(b) Comment to Section 9622. In the second sentence, substitute "649.2" for "9622."

(c) Correct other typographical errors in section references in Comments.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

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August 28, 1985

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California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94303

Re: Memorandum 85-72 (Passage of Property
to Surviving Spouse Without Administration)

Dear John:

Reference is made to our exchange of letters on August 13 and August 16. Memorandum 85-72 has been assigned to one of our teams made up of members of the Executive Committee of the Estate Planning, Probate and Trust Law Section, State Bar, for review and comment. We expect to have the comments of that team available prior to the meeting in Sacramento on September 12 and 13.

The comments which follow are my personal comments with reference to Memorandum 85-72. I hope they will be of assistance to you and the Commission. These comments are as follows:

1. Section 9600: The Comment, I think, would be more accurate if the word "continues" is replaced with the word "restates".

2. Section 9601: The Comment, I believe, would be more accurate if the word "continues" is replaced with the word "restates".

3. Section 9602: The Comment in the second and third sentences might be modified to state that this recognizes existing practice, since many practitioners have elected to probate only a portion of the surviving spouse's community or quasi-community property.

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4. Section 9604: As to the comment raised in the Draftsman's Note, I believe that subsection (b) is correct as to the applicability of these sections.

5. Section 9620: The clarification in subparagraphs (a), (b) and (c) are helpful and appropriate. Query if the creditors have a right to levy on the proceeds of a sale or other transfer for value under Section 9620. If the surviving spouse gifts the property away under this section, does it cut off the rights of creditors entirely?

6. Section 9640: Presumably, if the decedent held two jobs, the surviving spouse could collect \$5,000 from each employer under this section. Is that appropriate? Subsections (c) and (d), dealing with a claim presented on behalf of the surviving spouse by another, might be combined to require reasonable proof of the identity and authority of the person acting on behalf of the surviving spouse.

7. Section 9643: In the second sentence following the words "surviving spouse", you might consider adding the following: "or the person acting on behalf of the surviving spouse as provided in Section 9640".

8. Section 9650: In subparagraph (a), fourth line, the word "requesting" has been substituted for the word "alleging" in the existing law. Does this have any significance?

9. Section 9651: Paragraph (a)(2) refers to "incorporated business" and then continues with reference to an unincorporated business. I don't understand the reference to an "incorporated business" unless you are referring to one where the decedent was a sole shareholder. Generally, any creditors of an incorporated business would simply file their claims against the corporation. There would no shareholder liability in that case. Also, does an "unincorporated business" refer to a partnership as well as a sole proprietorship? I think the section needs some clarification.

10. Section 9653: I would suggest in the third line following the word "will" that the words "or administration of the estate" be inserted and that the language at the end of the section dealing with "the appointment of a personal representative of the estate of the deceased spouse" be deleted. I think the reference to "appointment" is misleading because that may arise where there is an appointment of a successor executor, successor administrator, etc., that is,

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it may not relate only to the initial petition for probate of a will or for administration. I believe the language of the existing law is clearer in this instance and should be retained. With reference to the Comment, I think that the word "continues" probably should be replaced with the word "restates".

11. Section 9654: The same comments relate to the provisions dealing with the appointment of a personal representative as perhaps involving a successor personal representative. Again, I believe some clarification is appropriate. In the Comment, I believe it would be more accurate to state that Section 9654 restates for clarification former Section 652 rather than "continues".

12. Section 9655: In both subparagraphs (a) and (b) in the second line, I believe the words "for administration" are more accurate than the existing language dealing with appointment of a personal representative. In the Comment, dealing with subsection (a), I believe it would be more accurate to state that it "restates without substantive change former Section 654". With reference to subdivision (b), since there are significant changes, perhaps it would be better to refer to this as "replacing former Section 653 while making the following changes".

13. Section 9656: With reference to the Draftsman's Note, I believe the language relating to the authority of the court to make orders that may be necessary to cause ownership of the property to be confirmed or to cause delivery of the property to the surviving spouse should be retained. While it is true there may be instances where the court does not have jurisdiction over all of the parties, in many cases the court will have that jurisdiction and can make an appropriate order. Any order of necessity is limited by the court's jurisdiction in any event.

14. Section 9660: I believe this should be qualified in the first sentence by inserting either at the beginning of the sentence or after the word "spouse" in the second line the following: "except as provided in Section 9658".

15. Section 9660: This section is misnumbered, as there already is a Section 9660 (Inventory and Appraisement). In the fourth line of the Comment, I believe the section should refer to Sections 650 through 658.

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16. In general, the language used in Memorandum 85-72 tracks quite closely the existing language in Sections 649 through 658.

17. It would be helpful if the Comments could be consistent for all draftsmen, indicating the following basic categories:

a. An existing section or sentence is continued without change.

b. An existing section or sentence is continued with changes for clarification only and without substantive change.

c. An existing section or sentence is restated without substantive change.

d. A section or sentence is replaced by a new section or sentence which makes the following changes from prior law.

e. An existing section or sentence is deleted as unnecessary.

As noted, these are personal comments. I hope they will be of assistance to you and the Commission.

Sincerely,



Charles A. Collier, Jr.

CAC:vjd

cc: Kenneth M. Klug, Esq.
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