

1-1-1987

Administration of Estates

University of the Pacific; McGeorge School of Law

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>

Part of the [Legislation Commons](#)

Recommended Citation

University of the Pacific; McGeorge School of Law, *Administration of Estates*, 18 PAC. L. J. 445 (1987).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol18/iss2/10>

This Greensheet is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

Administration of Estates

Administration of Estates; compensation of executors and administrators

Probate Code § 901 (amended).
AB 3220 (Robinson); 1986 STAT. Ch. 961
Sponsor: California Land Title Association

Existing law establishes a graduated schedule¹ for the compensation of administrators and executors of a decedent's estate when no compensation is provided for in the will, or when compensation provided by the will is waived.² Under prior law, the compensation rate for the portion of an estate with a value³ exceeding \$1,000,000 was one percent of that portion of the estate.⁴ Chapter 961 revises the amount of compensation allowed for the portion of an estate between \$10,000,000 and \$25,000,000 to one-half of one percent.⁵ Under Chapter 961 compensation for the portion of an estate in excess of \$25,000,000 is to be a reasonable amount as determined by the court.⁶

CWG

1. CAL. PROB. CODE § 901 (4% of the first \$15,000; 3% of the next \$85,000; 2% of the next \$900,000; 1% of the next \$9,000,000). *See also In re Effron's Estate*, 117 Cal. App. 3d 915, 927, 173 Cal. Rptr. 93, 100 (1981) (statutory compensation schedule does not violate due process of law or Sherman Anti-Trust Act).

2. CAL. PROB. CODE § 901. *See generally* 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* § 353 (8th ed. 1974) (discussion of probate compensation).

3. CAL. PROB. CODE § 901 (commission is based on the total amount of the inventory, plus gains exceeding appraisal value on sales, plus receipts, less losses on sales, without reference to encumbrances or other obligations on property of the estate). *See also Devine, Inventorying a California Decedent's Estate*, 46 L.A.L. BULL. 495 (1971) (discussion on inventorying and appraising a decedent's estate).

4. 1978 Cal. Stat. ch. 1395, sec. 1, at 4616 (amending CAL. PROB. CODE § 901).

5. CAL. PROB. CODE § 901.

6. *Compare id. with Estate of Getty*, 143 Cal. App. 3d 455, 466, 191 Cal. Rptr. 897, 904 (1983) (trial court not free to depart from statutory fee schedule in estate valued at approximately \$1.2 billion).

Administration of Estates; executors

Probate Code §§ 370, 571, 902 (amended).
AB 1489 (Connelly); 1986 STAT. Ch. 14
Sponsor: California Bankers Association
Support: State Bar Probate Law Section

Existing law authorizes any interested person¹ to contest a will.² Chapter 14 recognizes that an executor³ named in the will has no duty to defend a contest of the will until the executor is formally appointed by the court.⁴ Existing law requires the executor or administrator of an estate to take into possession all the real⁵ and personal⁶ property⁷ of the decedent, and to collect all debts due the decedent or the estate.⁸ Chapter 14 immunizes an executor or administrator from civil or criminal liability, who, in good faith, takes possession of property reasonably believed to be part of the decedent's estate.⁹ If the property is later determined not to be part of the estate, the executor or administrator must deliver possession of the property to the legal owner, together with all rents, issues, and profits derived from the property and received by the executor or administrator, less compensation for certain services the executor or administrator has rendered to the estate.¹⁰

1. CAL. PROB. CODE § 48 (definition of interested person); *see also* Jay v. Superior Court, 10 Cal. App. 3d 754, 757, 89 Cal. Rptr. 466, 468 (1970) (an interested person is one who has a pecuniary interest in devolution of a testator's estate that may be impaired or defeated by probate of the will, or may be benefitted by having the will set aside).

2. CAL. PROB. CODE § 370 (specifies method by which an interested party may contest a will); *see also id.* § 88 (definition of will).

3. *Id.* § 6203 (definition of executor).

4. *Id.* § 370. *Cf.* Estate of Perreira, 191 Cal. App. 2d 369, 373, 12 Cal. Rptr. 589, 593 (1961) (an executor named in the will has the right to oppose or resist a contest to the will).

5. CAL. PROB. CODE § 68 (definition of real property).

6. *Id.* § 58 (definition of personal property).

7. *Id.* § 62 (definition of property).

8. *Id.* § 571(a).

9. *Id.* § 571(c). The executor or administrator must make reasonable efforts to determine title to the property taken into possession, and is entitled to receive all rents, issues, and profits from the property so possessed. *Id.*

10. *Id.* The executor or administrator may deduct for expenses incurred in the protection and maintenance of the property and in the collection of rents, issues, and profits. These expenses may properly include reasonable compensation to the executor or administrator for services rendered in connection with duties as set forth in Chapter 14, which services were either of benefit to the estate, or essential to the preservation, protection, and maintenance of the property. Services which benefit the estate are an expense of administration of the estate, and essential services are to be deducted from the rents, profits, and issues derived from the estate. Insufficient rents, issues, and profits are compensated for in the form of a lien against the property. *Id.*

Existing law also empowers the court to compensate the executor or administrator for the performance of extraordinary services,¹¹ including the successful defense of a will.¹² Chapter 14, however, allows compensation for the successful defense of a will contested before the will is admitted to probate,¹³ and for the good faith defense of a will after the will is admitted to probate,¹⁴ so long as the executor or administrator has been formally appointed by the court.¹⁵

MGN

11. *Id.* § 902 (enumeration of extraordinary services which are compensable); 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* § 363 (1984).

12. CAL. PROB. CODE § 902 (contested either before or after the will is admitted to probate).

13. *Id.* §§ 320-334 (procedures for the probate of wills).

14. *Id.* § 902.

15. CAL. PROB. CODE § 902. *See id.* § 370 (duty to defend is triggered only by formal appointment).

Administration of Estates; personal property acquired from a predeceased spouse

Probate Code § 6402.5 (amended).

SB 1218 (Keene); 1986 STAT. Ch. 873

Sponsor: Brandenburger & Davis, Probate Research Firm

Existing law provides that if a decedent acquired real property interests from a predeceased spouse,¹ and the decedent does not leave a surviving spouse or issue, the real property interests pass to the surviving issue of the predeceased spouse.² Under prior law, if a decedent died intestate, the decedent's personal property was

1. CAL. PROB. CODE § 59 (definition of predeceased spouse). The predeceased spouse must have died within 15 years prior to the death of the decedent. *Id.* § 6402.5(a).

2. *Id.* § 6402.5(a)(1). If the surviving issue of the predeceased spouse are all of the same degree of kinship to the predeceased spouse, they take equally; if of unequal degree, they take by representation according to the guidelines of Probate Code § 240. *Id.* *See also* Estate of Riley, 119 Cal. App. 3d 204, 208, 173 Cal. Rptr. 813, 815 (1981) (Probate Code § 6402.5 (formerly § 229) was enacted so that, in the absence of testamentary disposition, a decedent's property would return to the family from which title was derived). *See generally* Review of Selected 1980 California Legislation, 12 PAC. L.J. 251 (1981); Review of Selected 1979 California Legislation, 11 PAC. L.J. 299 (1980) (intestate succession).

distributed to surviving heirs without regard to the original source of the property.³ Chapter 1207 mandates that if a decedent does not leave a surviving spouse or issue, specified personal property⁴ interests aggregating \$10,000 or more in value and acquired from a predeceased spouse who died within five years prior to the decedent pass to the surviving issue of the predeceased spouse, in accordance with the distribution scheme applicable to real property.⁵

JEC

3. See CAL. PROB. CODE §§ 6400-6414 (intestate succession provisions).

4. Under Chapter 1207, personal property includes personal property valued at \$10,000 or more, in which there is a written record of ownership. *Id.* § 6402.5(e).

5. *Id.* § 6402.5(b). Personal property passes as follows: (1) if the decedent is survived by issue of a predeceased spouse, to the surviving issue of the predeceased spouse; if they are all of the same degree of kinship to the predeceased spouse they take equally, but if of unequal degree those of more remote degree take by representation; (2) if no surviving issue of a predeceased spouse, to the surviving parents of the predeceased spouse equally; (3) if no surviving issue or parents of the predeceased spouse, but the decedent is survived by issue of a parent of the predeceased spouse, to the surviving issue of the parents of the predeceased spouse, the issue taking equally if they are all of the same degree of kinship to the predeceased spouse, but if of unequal degree those of more remote degree take by representation; (4) if no surviving issue, parents, or issue of parents of the predeceased spouse, to the decedent's next of kin in the manner provided in Probate Code § 6402; (5) if the portion of the decedent's estate attributable to the decedent's predeceased spouse would otherwise escheat to the State because the decedent has no next of kin, that portion must pass to the next of kin of the predeceased spouse, who will take in the same manner as the next of kin of the decedent taking under Probate Code § 6402. *Id.* Under Chapter 1207, the claimant heir bears the burden of proof to show the exact personal property to be disposed of to the heir. *Id.* § 6402.5(c). Chapter 1207 further states that if the petitioning party believes in good faith that the aggregate fair market value of the personal property is less than \$10,000, the petitioning party need not give notice to the issue or next of kin of the predeceased spouse. If the property is subsequently determined to be valued at \$10,000 or more, however, notice shall be given to the issue or next of kin of the predeceased spouse as provided by law. *Id.* § 6402.5(d).

Administration of Estates; small estates

Code of Civil Procedure §§ 353.5, 385 (amended); Health and Safety Code § 18102 (amended); Probate Code § 1406 (repealed and new); §§ 630, 631, 631.1, 632, 640, 641, 642, 643, 644, 645, 645.1, 645.3, 646, 647, 647.5, 649.1, 649.2, 649.3, 649.4, 649.5, 649.6, 650, 651, 652, 653, 654, 655, 656, 657, 658, 970, 971, 972, 973, 975, 976, 977 (repealed); §§ 6600, 6601, 6602, 6603, 6604, 6605, 6606, 6607, 6608, 6609, 6610, 6611, 6612, 6613, 6614, 6615, 13000, 13002, 13004, 13006, 13050, 13051, 13052, 13053, 13054, 13100, 13101, 13102, 13103, 13104, 13105, 13106, 13107, 13108, 13109, 13110, 13111, 13112, 13113, 13114, 13115, 13150, 13151, 13152, 13153, 13154, 13155, 13156, 13157, 13200, 13201, 13202, 13203, 13204, 13205, 13206, 13207, 13208, 13209, 13500, 13501, 13502, 13503, 13504, 13505, 13506, 13540, 13541, 13542, 13550, 13551, 13552, 13553, 13554, 13600, 13601, 13602, 13603, 13604, 13605, 13606, 13650, 13651, 13652, 13653, 13654, 13655, 13656, 13657, 13658, 13659, 13660, 20100, 20101, 20110, 20111, 20112, 20113, 20114, 20115, 20116, 20117, 20120, 20121, 20122, 20123, 20124, 20125, 20200, 20201, 20210, 20211, 20212, 20213, 20214, 20215, 20220, 20221, 20222, 20223, 20224, 20225 (new); §§ 584.2, 584.3, 584.5, 584.6, 605, 704.2, 707, 718.6, 771.3, 851.5, 854, 910, 1080, 1191, 1469 (amended); Vehicle Code §§ 5910, 9916 (amended). AB 2625 (McAlister); 1986 STAT. Ch. 738 Sponsor: California Law Revision Commission

Revises conditions relating to small estates to permit set-aside to minor children, when there is a surviving unmarried spouse, and to a remarried surviving spouse; defines decedent's estate to include all of decedent's personal property, wherever located, and all of decedent's real property located in California; revises affidavit procedures for collecting and transferring decedent's personal property and real property of small value without administration; revises procedure for collecting compensation owed to decedent spouse; revises provisions relating to the proration of estate taxes; establishes methods for prorating generation-skipping transfer taxes.

I. SETTING ASIDE SMALL ESTATES

Under prior law, a court was required to set aside a small estate to a decedent's unmarried surviving spouse or minor child¹ if the

1. A small estate set-aside is a useful summary method for collecting the estate and transferring

court found that the net value of the decedent's whole estate² did not exceed \$20,000, and that the expenses of the last illness, funeral charges, and expenses of administration had been paid.³ Furthermore, prior law did not permit the court to assign the estate to a minor child if the surviving spouse had not remarried.⁴ Under Chapter 738,⁵ specified persons⁶ may petition⁷ to set aside the decedent's estate⁸ to the decedent's surviving spouse⁹ and minor children.¹⁰ If the court finds that the net value¹¹ of the estate does not exceed \$20,000, the court has the discretion to assign the estate to the surviving spouse

the record title to estate property. SEE California Law Revision Commission, *Recommendation Relating to Probate Law*, 18 CAL. L. REV. COMM'N REP. 1105 (1985) [hereinafter cited as *Recommendation*]. The purpose of the small estate set-aside in Chapter 738 is to make the entire estate available for the support of the surviving spouse or minor children when the breadwinner dies leaving only a small estate. *Id.*

2. One commentator has criticized the phrase "whole estate" as being unclear. BROLL, 1 CALIFORNIA DECEDENT ESTATE ADMINISTRATION, *Summary Administration* § 3.24, at 129 (1971).

3. 1983 Cal. Stat. ch. 842, sec. 32, at 3039 (amending CAL. PROB. CODE §§ 640, 645).

4. 1983 Cal. Stat. ch. 842, sec. 34, at 3039 (amending CAL. PROB. CODE § 645).

5. Chapter 738 applies only to cases where the decedent dies on or after July 1, 1987. If the decedent dies before July 1, 1987, existing law continues to govern. CAL. PROB. CODE § 6614.

6. *Id.* § 6606(a) (the executor named in the decedent's will, the decedent's surviving spouse, a decedent's minor child, the guardian of the decedent's minor child, the decedent's personal representative).

7. *Id.* § 6604 (specifies the contents of the petition). The petition must be filed in the superior court of a county in which the decedent's estate may be administered. *Id.* § 6603. Prior to the hearing to set aside the decedent's estate, the petitioner or the petitioner's representative must file an inventory and appraisal compiled pursuant to Probate Code §§ 600-615. *Id.* § 6608.

8. *Id.* § 6600 (decedent's estate includes all of the decedent's personal property wherever located, and all real property located in California). This new definition of decedent's estate will eliminate uncertainty whether an estate qualifies for a small estate set-aside, but will not preclude a court from taking into account the decedent's real property located in another state in determining whether to order a set-aside, since, under Chapter 738, the court can consider all relevant factors in making a determination. See *Recommendation, supra* note 1, at 1112.

9. Under Chapter 738, if the surviving spouse has remarried at the time the petition is heard, a rebuttable presumption arises that the surviving spouse's needs do not justify setting aside the small estate, or any portion thereof, to the surviving spouse. *Id.* § 6609(b).

10. *Id.* § 6602. Any child of the decedent who was under 18 years of age at the time of the decedent's death and survives the decedent qualifies as a minor under Chapter 738. *Id.* § 6601. The petition to set aside the decedent's estate may be filed with a petition for probate of the decedent's will, or with a petition for the administration of the decedent's estate. *Id.* § 6607(b). The petition to set aside the decedent's estate may also be filed when proceedings for probate of the decedent's will or administration of the decedent's estate are pending. *Id.* § 6607(c).

11. *Id.* § 6602 (definition of net value). Chapter 738 incorporates prior law by excluding any property in which the decedent had a terminable-at-death interest, and any multiple party account to which the decedent was a party, when determining the net value of the decedent's estate. *Id.* § 6600(b) (incorporating 1983 Cal. Stat., ch. 92, sec. 4, at 679 (amending CAL. PROB. CODE § 647)).

and minor children,¹² unless the court determines that such an order is inequitable.¹³ Persons to whom the decedent's estate has been assigned¹⁴ become personally liable for the decedent's unsecured debts.¹⁵

II. DISPOSITION OF ESTATES WITHOUT ADMINISTRATION

A. Affidavit Procedure for Collection or Transfer of Personal Property

Under prior law, specified persons¹⁶ could submit an affidavit¹⁷ to collect money due the decedent, or any personal property of the decedent, if the value of the decedent's real property in California did not exceed \$10,000, and the combined value of the decedent's real and personal property did not exceed \$60,000.¹⁸ Under Chapter 738, if the gross value¹⁹ of the decedent's personal and real property

12. Allowing an assignment to minor children when there is an unmarried surviving spouse may be desirable, for example, if the minor children who live apart from the surviving spouse are not children of the surviving spouse. *See Recommendation, supra* note 1, at 1113.

13. *Id.* § 6609(a). The court must consider the needs of the surviving spouse and minor children, the liens and encumbrances on the property of the decedent's estate, creditors' claims, the needs of heirs and devisees, the decedent's intent, and any other relevant considerations. *Id.* § 6609(b). The court must also ensure that unpaid expenses of the decedent's last illness, funeral charges, and expenses of administration are paid before assigning the decedent's estate. *Id.* § 6609(d). The small estate set-aside may give to the surviving spouse or minor children property that would otherwise go to another under the decedent's will or by intestate succession. *See Recommendation, supra* note 1, at 1107; *Estate of Pezzola*, 112 Cal. App. 3d 752, 761, 169 Cal. Rptr. 464, 473 (1980). In addition, giving the court discretion provides the flexibility needed to treat fairly the decedent's dependents and those who would otherwise take the property, and is consistent with the discretionary nature of the family protection provisions. *Recommendation, supra* note 1, at 1107.

14. Under Chapter 738, title to property in the decedent's estate vests absolutely in the assignee, subject to all liens and encumbrances on the property at the date of the decedent's death. CAL. PROB. CODE § 6609(e).

15. *Id.* § 6611(a). Personal liability cannot exceed the fair market value of the property assigned under Chapter 738 at the time of the decedent's death, less the total of the following: The amount of liens and encumbrances on that property; the value of any probate homestead interest set apart under Probate Code § 6520 (regarding setting aside one probate homestead); and the value of any other property set aside under California Probate Code § 6510 (regarding property exempt from administration). *Id.* § 6611(b). The personal liability ceases one year after the court makes the order under Chapter 738, except as to actions then pending in court. *Id.* § 6611(c).

16. 1985 Cal. Stat. ch. 982, sec. 15, at 402 (amending CAL. PROB. CODE § 630) (specifying the surviving spouse, the children, the issue of deceased children, parents, brothers or sisters of the decedent, the issue of a deceased brother or sister, the grandparents, or the guardian or conservator of the estate of any person bearing such relationship to the decedent).

17. The affidavit must show the right of a person to receive the money or property. *Id.*

18. *Id.* This summary procedure did not give title to the person collecting the property as against other claimants to the property. *See Recommendation, supra* note 1, at 1013.

19. CAL. PROB. CODE § 13050 (specifies property that is to be excluded in determining the gross value of the decedent's estate).

in California does not exceed \$60,000, and if 40 days have elapsed since the decedent's death, a successor of the decedent²⁰ may collect, receive, or have any particular item of the decedent's property²¹ upon furnishing an affidavit that declares, among other items, that no other person has a right to the property.²² Chapter 738 also requires the successor of the decedent to present reasonable proof of identity,²³ and evidence of ownership, to the holder of the decedent's property.²⁴ If the decedent's estate includes any real property, an inventory and appraisalment of the real property must accompany the affidavit.²⁵

A person who secures payment, delivery, or transfer of the decedent's property under Chapter 738 becomes personally liable²⁶ for the decedent's unsecured debts, and is liable to any person having a superior right to the property.²⁷ If proceedings for the administration of the decedent's estate are commenced, the personal representative of the decedent's estate may compel a person who receives property under Chapter 738 to restore that property to the estate.²⁸

20. *Id.* § 13006 (definition of successor of the decedent).

21. *Id.* § 13004 (definition of particular item of the decedent's property).

22. *Id.* §§ 13100, 13101. *See id.* § 13101 (specifying the contents of the affidavit). This affidavit procedure may not be used regarding real property. *Id.* § 13115. Chapter 738 also requires a certified copy of the decedent's death certificate to be attached to the affidavit. *Id.* § 13101(c).

23. *Id.* § 13104(b) (lists requirements for reasonable proof of identity).

24. *Id.* §§ 13102(a), 13104(a). If evidence of ownership is not presented, the holder of the decedent's property may require the person presenting the affidavit to indemnify the holder against all liability arising out of the transfer of the property. *Id.* § 13102(b).

25. *Id.* § 13103. A probate referee must compile the inventory and appraisalment pursuant to Probate Code §§ 600-615 (regarding inventory and appraisalment of the decedent's property). *Id.* Prior law only required the successor to present an affidavit to collect or receive the decedent's real property. *See Recommendation, supra* note 1, at 1042.

26. Personal liability cannot exceed the fair market value of the property at the time the successor presents the affidavit, plus the net income the successor has received from the property, less any liens and encumbrances. CAL. PROB. CODE § 13112(b). If the successor disposed of the property, interest on the fair market value of the property accruing from the date of disposition at the rate payable on a money judgment must be included in the measure of liability. *Id.*

27. *Id.* §§ 13109, 13110. Under Chapter 738 a person gains a superior right to the decedent's property by testate or intestate succession from the decedent. *See id.* § 13110(a). If the successor secures the property fraudulently, the successor may be liable to the person with a superior right for three times the fair market value of the decedent's property. *Id.* § 13110(b). An action to impose liability under Chapter 738 must be brought within three years after the affidavit was presented to the holder of the decedent's property, or three years after the discovery of the fraud, whichever is later. *Id.* § 13110(c).

28. *Id.* § 13111 (specifies extent of the successor's liability to the decedent's estate). The personal representative must bring an action to enforce liability within three years after presentation of the affidavit or discovery of the fraud, whichever is later. *Id.* Once the successor restores the real property to the decedent's estate, the successor is no longer liable regarding the decedent's property. *Id.* § 13112(a).

B. Determining Succession to Real Property

Under prior law, only the decedent's surviving spouse could obtain title to real property without administering the decedent's estate, by filing a petition²⁹ showing that the property belonged or passed to the surviving spouse.³⁰ Under Chapter 738, if the gross value³¹ of the decedent's personal and real property in California does not exceed \$60,000, a successor of the decedent³² may file a petition³³ 40 days after the decedent's death requesting the court³⁴ to determine that the petitioner succeeded to real property of the decedent and that administration of the decedent's estate is unnecessary.³⁵ The petitioner becomes personally liable for the decedent's unsecured debts upon receiving the real property.³⁶

C. Affidavit Procedure for Real Property of Small Value

Under Chapter 738, if the gross value³⁷ of the decedent's real property in California does not exceed \$10,000, a successor to the decedent's interest in real property³⁸ located in California may file an affidavit, 6 months after the decedent's death,³⁹ claiming a right

29. The petition was filed in the superior court in the county in which the estate of the deceased spouse would have been administered. 1984 Cal. Stat. ch. 45, sec. 16, at 187 (amending CAL. PROB. CODE § 650).

30. 1984 Cal. Stat. ch. 45, sec. 16, at 187 (amending CAL. PROB. CODE § 650).

31. See *supra* note 19 and accompanying text.

32. See *supra* note 20 and accompanying text.

33. *Id.* § 13152(a) (specifies the contents of the petition). An inventory and appraisalment of the decedent's real and personal property in California made pursuant to Probate Code §§ 600-615 (regarding appraisalment and inventory of decedent's property) must be attached to the petition. *Id.* § 13152(b). The petitioner must also attach a copy of the decedent's will if the claim is based on the will. *Id.* § 13152(c).

34. The petition must be filed in the superior court of the county in which the decedent's estate may be administered. *Id.* § 13151.

35. *Id.* § 13154 (specifies the findings the court must make before issuing an order).

36. *Id.* § 13156(a). The petitioner's liability is limited to the fair market value of the property at the time of the decedent's death less any liens and encumbrances. *Id.* § 13156(b).

37. See *supra* note 19 and accompanying text.

38. See *supra* note 20 and accompanying text.

39. *Id.* § 13200(a) (specifies the contents of the affidavit). The affidavit must be filed in the superior court of the county in which the decedent was domiciled at the time of death, or, if the decedent was not domiciled in California, in any county where the decedent's real property is located. *Id.* An inventory and appraisalment compiled by a probate referee pursuant to Probate Code §§ 600-615 (regarding appraisalment and inventory of the decedent's property) must be attached to the affidavit. *Id.* § 13200(c). A notary public must certify the identity of each person executing the affidavit. *Id.* § 13200(b). The petitioner must also attach a copy of the decedent's will, if the claim is based on the will. *Id.* § 13200(d). Chapter 738 also requires a copy of the decedent's death certificate to be attached to the affidavit. *Id.* § 13200(e).

of succession to the real property.⁴⁰ Upon receipt of the affidavit, the clerk of the court must issue a certified copy of the affidavit.⁴¹ The county recorder of the county where the real property is located must record and index the certified copy of the affidavit.⁴² Each person certified as a successor to the decedent's real property becomes personally liable for the decedent's unsecured debts.⁴³ In addition, the successor may be liable to any person having a superior right,⁴⁴ and to the decedent's estate for restitution of the real property.⁴⁵

D. Collection of Compensation Owed to Deceased Spouse

Chapter 738 provides that the surviving spouse⁴⁶ may collect salary⁴⁷ owed by an employer of the decedent, not in excess of \$5,000, by furnishing to the employer reasonable proof of identity,⁴⁸ and an affidavit declaring that the surviving spouse is entitled to the decedent's earnings.⁴⁹ Receipt of the affidavit and payment of the compensation discharges the employer from further liability regarding the decedent's compensation.⁵⁰ After receiving the compensation, the surviving spouse may be liable to a person having a superior right to the decedent's compensation.⁵¹

40. *Id.* § 13200(a). Section 13200(a) is drawn from Arizona probate law. *See Recommendation, supra* note 1, at 1056. *Compare* CAL. PROB. CODE § 13200(a) with ARIZ. REV. STAT. ANN. §§ 14-3971, 14-3972 (Supp. 1984-85).

41. *Id.* § 13202.

42. *Id.* The county recorder must index the certified copy of the affidavit in the index of grantors and grantees. *Id.*

43. *Id.* § 13204. Personal liability cannot exceed the fair market value of the property at the time the successor presents the affidavit, plus the net income the successor has received from the property, less any liens and encumbrances. *Id.* § 13207(b). If the successor disposed of the property, interest on the fair market value of the property from the date of disposition at a rate payable on a money judgment must be included in the measure of liability. *Id.*

44. *Id.* § 13205(a). If the person certified as a successor to the decedent's real property fraudulently executed the affidavit, the successor may be liable to a person with a superior right for three times the fair market value of the property. *Id.* § 13205(b). Chapter 738 provides a five year statute of limitations, commencing from the date the clerk issues the certified copy of the affidavit. This period is tolled during the minority of the person having the superior right. *Id.* § 13205(c).

45. *Id.* § 13206 (specifies the extent of the successor's liability to the decedent's estate). Once the successor restores the real property to the decedent's estate, the successor is no longer liable regarding the decedent's real property. *Id.* § 13207(a).

46. A guardian or conservator of the surviving spouse's estate may act without the approval of the court in which the guardianship or conservatorship proceeding is pending. *Id.* § 13600(c).

47. Under Chapter 738, any compensation for personal services or for unused vacation qualifies as salary. *Id.* § 13600(a).

48. *Id.* § 13601 (specifies reasonable proof of identity).

49. *Id.* § 13601 (specifies the contents of the affidavit).

50. *Id.* § 13603.

51. *Id.* § 13605. If payment is received fraudulently, the surviving spouse may be liable

E. Attorney's Fees—Property Passing or Belonging to Surviving Spouse

Under prior law, court approval was necessary to receive attorney's fees for filing a petition requesting an order to pass ownership of property to a surviving spouse without administration of the estate.⁵² Chapter 738, however, permits the client and the attorney to determine the attorney's fees by private agreement.⁵³

III. PRORATION OF ESTATE AND GENERATION-SKIPPING TRANSFER TAXES

Under Chapter 738, estate taxes⁵⁴ and generation-skipping transfer taxes⁵⁵ must be equitably prorated⁵⁶ among persons interested in the estate⁵⁷ and transferees.⁵⁸ If federal law and California law conflict, however, Chapter 738 provides that federal law directs the manner of proration of estate taxes⁵⁹ and generation-skipping transfer taxes.⁶⁰ Chapter 738 further provides that if the executor of the estate makes an election concerning specially valued qualified real property,⁶¹ the proration of the estate taxes must be based upon the amount of federal estate tax that would be payable but for the election.⁶²

to a person with a superior right for three times the amount of the payment. The surviving spouse is also accountable to the personal representative of the decedent's estate. *Id.*

52. 1931 Cal. Stat. ch. 173, sec. 11, at 324 (amending CAL. PROB. CODE 910(b)) (the attorney's fees must be reasonable).

53. CAL. PROB. CODE § 13660. Regardless whether a private agreement exists, a petition may be filed with the court to resolve a dispute concerning the reasonableness of the attorney's fees. *Id.*

54. *Id.* § 20100(a) (definition of estate tax).

55. *Id.* § 20200(a) (definition of generation-skipping transfer tax).

56. Under Chapter 738, the proration of taxes must be made in the proportion that the value of the property received by each person or transferee bears to the total value of all property received by all persons or transferees. *Id.* §§ 20111, 20211. Chapter 738 also allows for specified credits, exemptions, and deductions. *Id.* §§ 20112, 20212.

57. *Id.* § 20100(b) (definition of person interested in the estate).

58. *Id.* §§ 20111, 20211. *See id.* § 20211(c) (definition of transferees).

59. Chapter 738 does not apply to the extent the decedent expressly directs that the property be applied to the satisfaction of an estate tax, or that an estate tax be prorated to the property, in a written inter vivos or testamentary instrument. *Id.* § 20110(b)(1).

60. *Id.* §§ 20110(b)(2), 20210(b)(2). Chapter 738 does not apply to the extent the transferor expressly directs, in a written instrument, that the property be applied to the satisfaction of a generation-skipping transfer tax, or that a generation-skipping transfer tax be prorated to the property. *Id.* § 20210(b)(1).

61. I.R.C. § 2032A (1986) (defines qualified real property). The election must be made pursuant to Federal Internal Revenue Code § 2032A (regarding the taxation of qualified real property). CAL. PROB. CODE § 20114(b).

62. CAL. PROB. CODE § 20114. Any reduction of the estate taxes resulting from the election, or any additional tax resulting from an early disposition or cessation of the qualified use, must be allocated to the persons receiving the qualified real property. *Id.* *See also Recommendation, supra* note 1, at 1139-40 (illustrating the operation of Probate Code § 20114).

The personal representative,⁶³ any person interested in the estate,⁶⁴ the trustee,⁶⁵ or a transferee⁶⁶ may commence a proceeding⁶⁷ to have a court determine the proration of estate taxes and generation-skipping transfer taxes, and any right of reimbursement.⁶⁸ The proration order of the court is appealable and enforceable as a judgment,⁶⁹ and may later be modified by the court.⁷⁰

TJL & MGN

63. *Id.* § 20100(c) (definition of personal representative).

64. *See supra* note 58 and accompanying text.

65. *Id.* § 20200(d) (definition of trustee).

66. *See supra* note 59 and accompanying text. Chapter 738 also provides that a nonresident may commence an action in California against a person who is interested in the estate, or a transferee, who is a resident of California or owns property in California for a federal estate tax, or an estate tax or death duty payable to another state, apportioned to the person (or transferee). *Id.* §§ 20125(a), 20225(a).

67. Chapter 738 provides statutory schemes for judicial proceedings. *See CAL. PROB. CODE* §§ 20120-20125, 20220-20225.

68. *Id.* §§ 20120, 20220. A person who pays an estate tax, or a generation-skipping transfer tax, greater than the amount prorated to that person is given a right of reimbursement under Chapter 738, and is also subrogated to the position of the personal representative, or trustee, in enforcing the right. *Id.* §§ 20117, 20215.

69. *Id.* §§ 20123, 20223.

70. *Id.* §§ 20124, 20224.

Administration of Estates; supplemental inventories—date of appraisal

Probate Code § 2613 (amended).

SB 1910 (Rosenthal); 1986 STAT. Ch. 144

Sponsor: State Bar of California

Support: Los Angeles County Bar Association

Under existing law, whenever property of a ward or conservatee¹ is discovered or acquired² after the original estate inventory³ has been filed,⁴ the guardian⁵ or conservator⁶ is required to file with the court

1. CAL. PROB. CODE § 1411 (definition of conservatee).

2. *Id.* § 2613 (acquisition by the guardian or conservator).

3. *Id.* § 2610 (requirements for an inventory and appraisal). *See id.* § 600 (listing assets required to be included in an inventory).

4. *Id.* § 2610(a) (the guardian or conservator must file an estate inventory and appraisal within 90 days after appointment, or within such time as the court may allow).

5. *Id.* § 2600(b) (definition of guardian).

6. *Id.* § 2600(a) (definition of conservator).

a supplemental inventory and appraisal of the property.⁷ Existing law requires an estate to be appraised as of the date of the guardian's or conservator's appointment.⁸ Chapter 144 specifies that any assets discovered or acquired after the original filing of the inventory and appraisal must be appraised as of the date the property was discovered or received by the guardian or conservator.⁹

SBH

7. *Id.* § 2613.

8. *Id.* § 2610(a).

9. *Id.* § 2613. After the discovery of new property, the same proceedings required of an original inventory must be initiated. *Id.*

