



## TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

### *SPOUSAL PROPERTY PETITIONS*

### **LEGISLATIVE PROPOSAL (T&E 2016-07)**

To: Office of Governmental Affairs

From: Vivian L. Thoreen and Jeff G. Carchidi, Members of the Executive Committee,  
Trusts and Estates Section

Date: November 1, 2014

Re: A proposal to amend Probate Code Sections 13651 and 13656 relating to spousal  
property petitions

### **SECTION ACTION AND CONTACTS**

Date of Approval by Section Executive Committee: November 1, 2014

Approval Vote: Yes 26, No 0, Abstain 1

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## **PURPOSE**

Probate Code Sections 13650 through 13660 authorize and govern a summary probate procedure for property passing from a deceased spouse or deceased domestic partner to a surviving spouse or surviving domestic partner.<sup>1</sup> In general, this procedure involves the filing by the surviving spouse of a petition pursuant to Probate Code Section 13651 for a determination of the property (a “spousal property petition”). By filing a spousal property petition, the surviving spouse may request that the court make an order under Probate Code § 13500 determining property passing from the deceased spouse to the surviving spouse, and may also request an order under Probate Code §§ 100 and 101 confirming the surviving spouse’s interest in community and quasi-community property.

In determining the property that passes to the surviving spouse, the court is expressly authorized to “issue any further orders which may be necessary to cause delivery of the property or its proceeds to a surviving spouse.” (See Probate Code § 13656(a) and (b)). However, the statutes are silent as to the court’s power to determine whether such property is the separate or community property of the decedent. As discussed more fully below, the Executive Committee of the Trusts and Estates Section (TEXCOM) believes the court’s authority to determine the character of property passing to a surviving spouse is a necessary part of the court’s power to issue an order on the spousal property petition itself and that this omission in the statutory language has created some confusion in the courts with regard to the court’s power to act on a spousal property petition.<sup>2</sup>

Under this proposal, amendments to Probate Code Sections 13651 and 13656 would clarify that the court may issue an order determining the separate or community character of the property when a request for such determination has been made by a petitioning or responding party to a spousal property petition.

## **PROPOSAL AND REASONS FOR PROPOSAL**

**Existing Law:** Currently, Division 8, Part 2, Chapter 5 of the Probate Code (Sections 13650-13660) establishes a right of a surviving spouse to petition the court for an order determining that the decedent’s interest in community property and/or interest in separate property passes to the surviving spouse by the terms of deceased spouse’s will or by the laws of intestacy, without formal probate. This summary administration procedure available to a surviving spouse reduces the time necessary to pass property to the surviving spouse and should in most cases alleviate the demand on judicial resources in probate matters.

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<sup>1</sup> Although only the terms “deceased spouse” and “surviving spouse” are used in the statutory language, the summary probate procedure applies to surviving domestic partners as defined under Probate Code § 37 (See Family Code § 297.5(c)). Indeed, the Judicial Council form on which the Probate Code § 13651 petition is prepared (Form DE-221) and the Order on such petition (Form DE-226) are titled “Spousal or Domestic Partner Property Petition” and “Spousal or Domestic Partner Property Order,” respectively. Therefore, our use of the terms “deceased spouse” and “surviving spouse” in this legislative proposal shall also include “deceased domestic partner” and “deceased surviving domestic partner.”

<sup>2</sup> In Orange County, for example, the court has issued examiners notes and has told counsel appearing on a spousal property petition that, without a separate Probate Code Section 850 petition requesting a determination of the character of the property, the court does not have jurisdiction under only a spousal property petition to both confirm property belonging to the surviving spouse and determine the property passing to the surviving spouse.

The Problem: Disputes can arise between the petitioning surviving spouse claiming the property is community and others who may claim that they have an interest in the property as decedent's separate property. Although Probate Code § 13656 gives the court the power to make further orders as necessary to facilitate delivery of the property to the surviving spouse, the current statute does not explicitly state that the court can determine whether the property passing to the surviving spouse is the deceased spouse's separate or community property. As a result, certain courts are requiring a separate proceeding be filed such as a Probate Code Section 850 petition in order to obtain an order determining the character of the property as community or separate. The commencement of such an additional proceeding unnecessarily complicates the summary administration procedure available to a surviving spouse by requiring the surviving spouse to commence multiple court proceedings in order to obtain the orders properly requested in a single spousal property petition. Authorizing the court to make a determination of the character of the deceased spouse's property passing to the surviving spouse directly in the context of a spousal property petition should in most cases expedite the resolution of the dispute and is consistent with the purposes of the summary procedure process. Of course, the surviving spouse, in the spousal property petition, must allege facts in support of his or her request for an order determining the character of the property sought to be passed from the deceased spouse to the surviving spouse. This is addressed in the proposed amendments to the statutory language, set forth below.

This Proposal: This proposal amends Probate Code Section 13651 (Contents of petition) and Probate Code Section 13656 (Order; determination of property passing to surviving spouse) to make it clear that if the requisite facts are alleged in the petition, the court is authorized to also make the determination of the character of the deceased spouse's property passing to the surviving spouse as either separate property or community property if there is a dispute or if that determination otherwise becomes pertinent to a proceeding brought under Section 13650; a separate proceeding for this determination (e.g. under Probate Code § 850) does not need to be initiated.

This proposal does not attempt to limit or otherwise affect the right of a party who files a response, opposition or objection to a spousal property petition to also file a separate Probate Code Section 850 petition where the ownership of certain property is in dispute. The purpose of this proposal is only to clarify that a surviving spouse may request, and the court may issue, an order determining the character of property passing to the surviving spouse directly in the spousal property petition.

Related Issue – Personal Service: The fact that some courts are requiring a Probate Code Section 850 petition to be filed in tandem with a spousal property petition raises the issue of personal service, since Probate Code Section 851 requires any petition filed under Section 850 to be “served in the manner provided in Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure on all of the following persons, where applicable:

- (1) The personal representative, conservator, guardian, or trustee as appropriate.
- (2) Each person claiming an interest in, or having title to or possession of, the property.” (Probate Code § 851(a)).

During discussion among TEXCOM members about a prior version of this proposal, some members of TEXCOM asked whether TEXCOM's Litigation Subcommittee had considered the procedural implications of the proposal. Specifically, if the aim of this proposal is to clarify that a separate Probate Code Section 850 proceeding is not necessary for the court to determine the character of property that is the subject of a spousal property petition, then the personal service requirement of Probate Code Section 851 must also be addressed.

The Litigation Subcommittee considered these comments and discussed whether further amendments to Section 13650 et seq. are necessary to ensure that the proposal does not alter the rights of parties and interested persons in a spousal property petition under existing law. In summary, the Litigation Subcommittee determined (and TEXCOM agreed) that no further changes to the proposal are necessary. In this regard, the following factors were considered:

(1) The spousal property petition (Judicial Council Form DE-221) allows the petitioner to check boxes 1.a. and 1.b. which, respectively, ask the court to determine the property passing to the surviving spouse and to confirm the property belonging to the surviving spouse. The court's authority to determine the character of such property is necessary to these determinations.

(2) Probate Code Section 13655 already sets forth the notice requirements for spousal property petitions. Section 13655 does not require personal service of a spousal property petition. This proposal does not recommend that any changes be made to Section 13655 and it is not the intent of this proposal to alter the established statutory notice requirements of spousal property petitions.

(3) This proposal would amend Sections 13651 and 13656 only to clarify that the courts have the authority, in ruling on a spousal property petition, to determine the character of the property sought to be passed to the surviving spouse and need not require the separate filing of a Probate Code Section 850 petition. It does not seek to prevent a court from requiring the filing of an 850 petition; however, it is hoped that probate examiners and judges reading Probate Code Sections 13651 and 13656, amended as proposed below, would view a separate 850 proceeding as unnecessary, especially where the spousal property petition is uncontested. As noted above, this proposal does not seek to limit or otherwise affect the right of a responding or objecting party to file an 850 petition.

## **HISTORY**

TEXCOM is not aware of any similar bill that has been introduced.

## **IMPACT ON PENDING LITIGATION**

None known.

## **LIKELY SUPPORT AND OPPOSITION**

Probate administration practitioners will likely support the proposal as it clarifies the law to maintain a streamlined process of summary probate proceedings. Probate litigators will likely support the proposal as well for the reason that any ambiguity under a statute is fertile ground for

litigation; clarification of the statutes facilitates resolution of potential conflict among heirs to a decedent's estate. TEXCOM is not aware of any opposition.

### **FISCAL IMPACT**

There is no anticipated fiscal impact.

### **GERMANENESS**

The members of TEXCOM have an interest in and expertise concerning these issues in that they represent surviving spouses in summary probate procedures.

### **DISCLAIMER**

This position is only that of the Trusts and Estates Section of the State Bar of California. This position has not been adopted by either the State Bar's Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California.

Membership in the Trusts and Estates Section is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

### **TEXT OF PROPOSAL**

SECTION 1. Section 13651 of the Probate Code is amended to read:

§ 13651. Contents of petition

(a) A petition filed pursuant to Section 13650 shall allege that administration of all or a part of the estate of the deceased spouse is not necessary for the reason that all or a part of the estate is property passing to the surviving spouse, and shall set forth all of the following information;

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

(2) A description of the property of the deceased spouse which the petitioner alleges is property passing to the surviving spouse, including the trade or business name of any property passing to the surviving spouse that consists of an unincorporated business or an interest in an unincorporated business which the deceased spouse was operating or managing at the time of death, subject to any written agreement between the deceased spouse and the surviving spouse providing for a non pro rata division of the aggregate value of the community property assets or quasi-community assets, or both.

(3) The facts upon which the petitioner bases the allegation that all or a part of the estate of the deceased spouse is property passing to the surviving spouse, including reference to any agreements between the deceased spouse and the surviving spouse affecting the character of property.

(4) A description of the property as either community or separate property.

~~(4)~~ (5) A description of any interest in the community property or quasi-community property, or both, which the petitioner requests the court to confirm to the surviving spouse as belonging to the surviving spouse pursuant to Section 100 or 101, subject to any written agreement between the deceased spouse and the surviving spouse providing for a non pro rata division of the aggregate value of the community property assets or quasi-community assets, or both.

~~(5)~~ (6) The name, age address, and relation to the deceased spouse of each heir and devisee of the deceased spouse, the names and addresses of all persons named as executors of the will of the deceased spouse, and the names and addresses of all persons appointed as personal representatives of the deceased spouse, which are known to the petitioner.

Disclosure of any written agreement between the deceased spouse and the surviving spouse providing for a non pro rata division of the aggregate value of the community property assets or quasi-community property assets, or both, or the affirmative statement that this agreement does not exist. If a dispute arises as to the division of the community property assets or quasi community property assets, or both, pursuant to the agreement, or pursuant to allegations contained in the petition as to the characterization of the property as community or separate, the court shall determine the division subject to terms and conditions or other remedies that appear equitable under the circumstances of the case, taking into account the rights of all interested persons.

(b) If the petitioner bases the allegation that all or part of the estate of the deceased spouse is property passing to the surviving spouse upon the will of the deceased spouse, a copy of the will shall be attached to the petition.

(c) If the petitioner bases the description of the property of the deceased spouse passing to the surviving spouse, or the property to be confirmed to the surviving spouse, both, upon a written agreement between the deceased spouse and the surviving spouse providing for a non pro rata division of the aggregate value of the community property assets or quasi-community assets, or both, a copy of the agreement shall be attached to the petition.

SEC. 2. Section 13656 of the Probate Code is amended to read:

§ 13656. Order; determination of property passing to surviving spouse

(a) If the court finds that all of the estate of the deceased spouse is property passing to the surviving spouse, the court shall issue an order describing the property, determining that the property is property passing to the surviving spouse, and determining that no administration is necessary. The court may issue any further orders which may be necessary to cause delivery of the property or its proceeds to the surviving spouse, including orders determining whether any property, or interest therein, of the deceased spouse's estate passing to the surviving spouse is separate property or community property.

(b) If the court finds that all or part of the estate of the deceased spouse is not property passing to the surviving spouse, the court shall issue an order (1) describing any property which is not property passing to the surviving spouse, determining that that property does not pass to the surviving spouse and determining that that property is subject to administration under this code and (2) describing the property, if any, which is property passing to the surviving spouse,

and determining that no administration of that property is necessary. If the court determines that property passes to the surviving spouse, the court may issue any further orders which may be necessary to cause delivery of that property or its proceeds to the surviving spouse, including orders determining whether any property, or interest therein, of the deceased spouse's estate passing to the surviving spouse is separate property or community property.

(c) If the petition filed under this chapter includes a description of the interest of the surviving spouse in the community or quasi-community property, or both, which belongs to the surviving spouse pursuant to Section 100 or 101 and the court finds that the interest belongs to the surviving spouse, the court shall issue an order describing the property and confirming the ownership of the surviving spouse and may issue any further orders which may be necessary to cause ownership of the property to be confirmed in the surviving spouse.