

## Memorandum 82-81

Subject: Study F-401 - Emancipated Minors

The Tentative Recommendation Relating to Emancipated Minors (copy attached) was distributed to approximately 67 interested persons for review and comment. We received only three comments.

Kenneth James Arnold, San Francisco lawyer, states that the tentative recommendation "in my opinion is well drafted and fills a legislative need."

Justice Robert Kingsley states:

I had, and still have, doubts about the wisdom of the Emancipation of Minors Act. However, given the philosophy of that Act, your suggested revisions seem sound, with one exception. I would limit the power to make a will to one designating a spouse as sole beneficiary, or a spouse and child. I see no reason, and your discussion suggests none, why a minor should be allowed to go beyond taking care of his/her dependents.

The staff does not believe that the suggested limitation is desirable. In the absence of capacity to make a will, the property goes by intestate succession. The capacity to make a will is less of a capacity than most other capacities given to the emancipated minor. The minor could create a trust having the same effect as a will or could make some other kind of nonprobate transfer that would have the same effect as a will. A special testamentary power of appointment might permit an appointment only to a limited class that does not include the spouse or child; the suggested limitation would preclude the emancipated minor from exercising the power of appointment. The suggested limitation would create a basic inconsistency in the statute.

The Hon. Justice Zelling, Law Reform Committee of South Australia, suggests that it should be made clear that an emancipated minor has the right to appear before boards and tribunals and is concerned that the right to "sue and be sued" might not be broad enough to cover California boards, tribunals, and other quasi-judicial bodies. He also suggests that an emancipated minor should have the right to vote.

The staff recommends that the tentative recommendation be approved for printing and submission to the Legislature as set out in the attached draft.

Respectfully submitted,

John H. DeMouly  
Executive Secretary

# RECOMMENDATION

*relating to*

## EMANCIPATED MINORS

### Introduction

The California Emancipation of Minors Act (Civil Code Sections 60-70) was enacted in 1978<sup>1</sup> to provide a clear statement defining emancipation and its consequences and to permit an emancipated minor to obtain a court declaration of his or her status.<sup>2</sup>

Civil Code Section 62 provides that a person under the age of 18 years is an emancipated minor if the minor has entered into a valid marriage,<sup>3</sup> is on active duty with the armed forces of the United States, or has received a court declaration of emancipation.<sup>4</sup> Civil Code Section 63 gives the emancipated minor important capacities and rights that otherwise are restricted to adults. It provides, for example, that an emancipated minor shall be considered as being over the age of majority for the purposes of entering into a binding contract, suing or being sued in his or her own name, buying or selling real property, and obtaining a work permit without the request of parents or guardian.

In the course of its study of probate law, the Commission has reviewed the Emancipation of Minors Act and related provisions. The Commission recommends that a provision be added to the Emancipation of Minors Act to provide expressly that an emancipated minor has the capacity to make or revoke a will. Provisions also should be added to that act to provide express authorization for an emancipated minor to take various actions necessary for estate planning or in connection with probate proceedings. Various other clarifications of the act also should be made.<sup>5</sup> The significant recommendations are discussed in more detail below.

<sup>1</sup> 1978 Cal. Stats., ch. 1059.

<sup>2</sup> See Civil Code § 61.

<sup>3</sup> The minor remains emancipated whether or not the marriage was terminated by dissolution. Civil Code § 62(a).

<sup>4</sup> Civil Code § 64 provides a procedure for obtaining a court declaration of emancipation. Civil Code § 61 provides in part: "This part is not intended to affect the status of minors who are now or may become emancipated under present decisional case law." Civil Code § 65 provides a court procedure for rescission of the declaration of emancipation, and Civil Code § 69 provides for a proceeding to void a declaration of emancipation obtained by fraud or by the withholding of material information.

<sup>5</sup> Existing law gives an emancipated minor the capacity to enter into a binding contract. Civil Code § 63(b). Section 10112 of the Insurance Code requires written consent of a parent or guardian for certain transactions with respect to life or disability insurance or annuity contracts involving a minor. A provision should be added to the

## Making and Revoking Wills

An emancipated minor should be given the capacity to make or revoke a will. An emancipated minor does not have this capacity under existing law.<sup>6</sup> Accordingly, unless an emancipated minor resorts to a permitted form of nonprobate transfer during his or her lifetime,<sup>7</sup> the minor's estate must pass by intestate succession.<sup>8</sup>

The existing rule precluding an emancipated minor from making a will is particularly undesirable in the usual case—where a minor becomes emancipated as a result of a valid marriage. In such a case, the minor may wish to leave his or her entire estate to his or her surviving spouse. But under existing law, the surviving spouse takes all of the decedent's separate property only if the decedent dies without leaving surviving issue, parent, brother, sister, or descendant of a deceased brother or sister.<sup>9</sup> In cases where the surviving spouse does not take all of the separate property, the share of the surviving spouse in the separate property of the decedent is one-half<sup>10</sup> or one-third,<sup>11</sup> depending upon the circumstances. For example, if the decedent is survived by a spouse and a nephew, the nephew takes as much of the separate property as the spouse. Although this result might be tolerated if it could be avoided by making a will,<sup>12</sup> it demonstrates the need for giving an emancipated minor the power to make a will.

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Emancipation of Minors Act to make clear that the written consent requirement of Section 10112 does not apply in the case of an emancipated minor.

A provision should be added to the Emancipation of Minors Act to make clear that an emancipated minor has the power to settle or compromise claims and actions by or against the minor. This power would appear to exist under the provisions of Civil Code Section 63 which give an emancipated minor the capacity to sue and be sued in his or her own name and to enter into binding contracts.

- <sup>6</sup> Prob. Code §§ 20 and 21 require that a person be over the age of 18 to dispose of property by will. Civil Code § 63, which lists the purposes for which an emancipated minor shall be considered as being over the age of majority, does not include in the list the making of a will.
- <sup>7</sup> An emancipated minor might use insurance, joint deposit accounts in financial institutions, joint tenancy in real property, or a trust to transfer property to a survivor upon the death of the emancipated minor. Provisions should be added to the Emancipation of Minors Act to make clear that these and various other nonprobate transfer devices may be utilized by an emancipated minor. See discussion, *infra*.
- <sup>8</sup> See Prob. Code §§ 200-230.
- <sup>9</sup> Prob. Code § 224.
- <sup>10</sup> The surviving spouse receives one-half of the intestate decedent's separate property if the decedent is survived by only one child or only the issue of one deceased child (Prob. Code § 221) or if the decedent dies without issue but is survived by one or both parents or the issue of one or both parents (Prob. Code § 223).
- <sup>11</sup> The surviving spouse receives one-third of the intestate decedent's separate property if the decedent is survived by two or more children, by one child and the issue of one or more deceased children, or by the issue of two or more deceased children. Prob. Code § 221.
- <sup>12</sup> The Commission has concluded that the existing California intestate succession rules need significant revisions and plans to submit a separate recommendation proposing such a revision.

To make a will one need only have sufficient mental capacity to understand the nature of the act, to understand and recollect the nature and situation of one's property, and to remember and understand one's relations to the persons who have claims on one's bounty and whose interests are affected by the will.<sup>13</sup> The inability to transact even ordinary business is not alone sufficient to establish lack of capacity to make a will.<sup>14</sup> Civil Code Section 63 gives an emancipated minor powers that require significantly greater capacities than the capacity that is required to make a will; the emancipated minor is given the capacity to engage in ordinary business activities, such as entering into binding contracts, buying and selling real property, suing and being sued in his or her own name, and obtaining employment. Accordingly, granting an emancipated minor the capacity to make a will not only would permit the minor to avoid the inflexibility of the intestate succession provisions but also would be consistent with the policy already expressed in the Emancipation of Minors Act.

#### **Estate Planning and Probate Proceedings**

An emancipated minor may wish to use various nonprobate transfer devices to transfer property in event of the minor's death. An emancipated minor may need to take various actions in connection with probate proceedings. A conservator of the estate can take such actions for an adult conservatee under the substituted judgment provisions of the Guardianship-Conservatorship Law.<sup>15</sup> But the substituted judgment provisions do not apply to a minor; a guardian of the estate has no general authority to engage in estate planning for the minor ward and only limited authority to take actions in connection with probate proceedings.

The Commission recommends that an emancipated minor be given the capacity to take the following actions

<sup>13</sup> See 7 B. Witkin, *Summary of California Law* (8th ed. 1974), Wills and Probate § 97, at 5614.

<sup>14</sup> *Estate of Sexton*, 199 Cal. 759, 768, 251 P. 778, 782 (1926) ("Ability to transact important business, or even ordinary business, is not the legal standard of testamentary capacity."). Although establishment of a conservatorship ordinarily deprives the conservatee of the capacity to contract and to manage and control estate property (see Prob. Code §§ 1870-1876), the establishment of a conservatorship does not affect the power of the conservatee to make a will (see subdivision (c) of Probate Code Section 1871). This is consistent with the holdings that a lesser capacity is required to make a will. See the Legislative Committee Comment to Probate Code § 1871 ("Appointment of a conservator is not a determination that the conservatee lacks testamentary capacity. Testamentary capacity is determined by a different standard, which depends upon soundness of mind.").

<sup>15</sup> See Prob. Code §§ 2580-2586.

which a conservator can be authorized to take under the doctrine of substituted judgment:<sup>16</sup>

(1) Make a gift, outright or in trust.<sup>17</sup>

(2) Convey or release contingent or expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy, and consent to a transfer, encumbrance, or gift of marital property.<sup>18</sup>

(3) Exercise or release his or her powers as donee of a power of appointment unless the creating instrument otherwise provides.<sup>19</sup>

(4) Create for his or her own benefit or for the benefit of others a revocable or irrevocable trust.<sup>20</sup>

(5) Revoke a revocable trust.<sup>21</sup>

<sup>16</sup> See Prob. Code § 2580. In addition, the emancipated minor, having the capacity to enter into a binding contract, would continue to have the capacity to give a power of attorney, including a durable power of attorney. See Civil Code § 2296 ("Any person having capacity to contract may appoint an agent, . . ."). See also Civil Code § 2356 (power of attorney terminated by the "incapacity of the principal to contract" unless the power of attorney is a durable power of attorney).

<sup>17</sup> Section 63 of the Civil Code already gives an emancipated minor the capacity to enter into a binding contract (which might involve only a nominal consideration) and the right to control his or her earnings. Expressly giving the emancipated minor the capacity to make a gift is consistent with these provisions and probably would be implied from existing Section 63.

<sup>18</sup> These powers would appear to be implied under existing law from the power to sue and be sued (such as a proceeding to dissolve a marriage) and the power to buy and sell real property. The recommended provision also makes clear that the emancipated minor can consent to a transfer, encumbrance, or gift of marital property. See, e.g., Civil Code §§ 5125, 5127.

<sup>19</sup> Subdivision (a) of Civil Code Section 1384.1 requires that a donee have the capacity to transfer the interest in property to which the power of appointment relates (probably granted by existing Section 63 of the Civil Code), but subdivision (b) of Civil Code Section 1384.1 precludes a minor donee from exercising a power of appointment during minority unless the creating instrument otherwise provides. It is unclear whether Section 63 authorizes an emancipated minor to exercise a power of appointment. Civil Code Section 1388.3 provides that a *release* of a power of appointment may be made on behalf of a minor donee by the guardian of the estate of the minor pursuant to a court order. No provision is made for the *exercise* of a power of appointment by an emancipated minor unless the creating instrument provides for such exercise. Giving the emancipated minor the capacity to exercise or release a power of appointment (unless the creating instrument otherwise provides) would be consistent with the other capacities of an emancipated minor, would clarify existing law, and would avoid the need to appoint a guardian to petition to court for authorization to release the power of appointment. Moreover, if an emancipated minor is given the capacity to make a will as recommended, it should be made clear that a power of appointment that is testamentary may be exercised by the minor's will.

<sup>20</sup> The capacity necessary to create a trust is the capacity to transfer property. See 7 B. Witkin, Summary of California Law (8th ed. 1974), Trusts, § 11, at 5375. Section 63 of the Civil Code gives an emancipated minor the capacity to enter into a binding contract and to buy and sell real property. These capacities probably would be held to be sufficient to permit an emancipated minor to establish a trust. Moreover, giving an emancipated minor the capacity to transfer real and personal property as recommended above would by itself be sufficient to give the minor the capacity to create a trust, but it is desirable to make the matter clear by an express provision giving an emancipated minor the capacity to create a trust.

<sup>21</sup> If an emancipated minor is given the capacity to create a revocable trust (see n.20, *supra*), it would necessarily follow that the minor should have the capacity to revoke the trust.

- (6) Elect to take under or against a will.<sup>22</sup>
- (7) Renounce or disclaim any interest acquired by testate or intestate succession or by inter vivos transfer, including the right to surrender the right to revoke a revocable trust.<sup>23</sup>
- (8) Make an election or an election and agreement referred to in Section 202 of the Probate Code.<sup>24</sup>

### Deposit Accounts

Provisions of the Financial Code permit a minor, whether or not emancipated, to make deposits and withdrawals from accounts in banks,<sup>25</sup> savings and loan associations,<sup>26</sup> federal savings and loan associations,<sup>27</sup> and with respect to industrial loan company investment certificates.<sup>28</sup> However, the provisions of the Financial Code governing credit unions require that a parent or guardian consent to the account if the minor is to have a right of withdrawal.<sup>29</sup> The provisions relating to credit unions should be conformed to those governing other types of financial institutions. This would give all minors, whether or not emancipated, the right to make deposits and withdrawals in accordance with the deposit contract.

### Proposed Legislation

The Commission's recommendation would be effectuated by enactment of the following measure:

- <sup>22</sup> This provision would make clear that an emancipated minor has the capacity to make this election. The matter is not covered by existing statutes.
- <sup>23</sup> Probate Code Section 190.2 provides that a disclaimer of a testamentary or other interest on behalf of a minor shall be made by the guardian of the estate of the minor. Whether an emancipated minor can disclaim or only his or her guardian can disclaim is unclear. Consistent with the other capacities that would be given emancipated minors, the power to renounce or disclaim should be included as a capacity of an emancipated minor. This would avoid the need to appoint a guardian of the estate in order to permit a disclaimer.
- <sup>24</sup> Section 202 of the Probate Code provides for an election of a surviving spouse to have all or part of the community property or quasi-community property administered in the estate of the deceased spouse. The section authorizes a guardian of the estate of the surviving spouse to make the election. It is not clear whether an emancipated minor has the capacity to make the election, although the capacity to sue and be sued in his or her own name could be construed to give an emancipated minor the capacity to make the election. Consistent with the other capacities that would be given to emancipated minors, the power to make the election should be included as a capacity of an emancipated minor. This would avoid the need to appoint a guardian of the estate in order to make the election.
- <sup>25</sup> See Fin. Code §§ 850, 851, 852.
- <sup>26</sup> See Fin. Code §§ 7600, 7601, 7602.
- <sup>27</sup> See Fin. Code §§ 11200, 11204.
- <sup>28</sup> See Fin. Code § 18318. See also Fin. Code § 18523 (types of industrial loan company accounts).
- <sup>29</sup> See Fin. Code §§ 14853, 14854.

An act to amend Section 63 of, and to add Sections 63.1 and 63.2 to, the Civil Code, and to amend Sections 14853 and 14854 of the Financial Code, relating to minors.

*The people of the State of California do enact as follows:*

**Civil Code § 63 (amended). Purposes for which emancipated minor considered over age of majority**

**SECTION 1.** Section 63 of the Civil Code is amended, to read:

63. An emancipated minor shall be considered as being over the age of majority for the following purposes:

(a) For the purpose of consenting to medical, dental, or psychiatric care, without parental consent, knowledge, or liability.

~~(b) For the purpose of his capacity to enter into a binding contract.~~

~~(c) For the purpose of his capacity to sue and be sued in his own name.~~

(b) For the purposes of the minor's capacity to:

(1) Enter into a binding contract.

(2) Buy, sell, lease, encumber, exchange, or transfer any interest in real or personal property, including but not limited to shares of stock in a domestic or foreign corporation or a membership in a nonprofit corporation.

(3) Sue or be sued in his or her own name.

(4) Compromise, settle, arbitrate, or otherwise adjust a claim, action, or proceeding by or against the minor.

(5) Make or revoke a will.

(6) Make a gift, outright or in trust.

(7) Convey or release contingent or expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy, and consent to a transfer, encumbrance, or gift of marital property.

(8) Exercise or release his or her powers as donee of a power of appointment unless the creating instrument otherwise provides.

(9) Create for his or her own benefit or for the benefit of others a revocable or irrevocable trust.

(10) Revoke a revocable trust.

(11) Elect to take under or against a will.

(12) Renounce or disclaim any interest acquired by testate or intestate succession or by inter vivos transfer, including exercising the right to surrender the right to revoke a revocable trust.

(13) Make an election or an election and agreement referred to in Section 202 of the Probate Code.

~~(d)~~ (c) For the purpose of his the minor's right to support by his or her parents.

~~(e)~~ (d) For purposes of the rights of ~~his~~ *the minor's* parents or guardian to ~~his~~ *the minor's* earnings, and to control ~~him~~ *the minor*.

~~(f)~~ (e) For the purpose of establishing his or her own residence.

~~(g)~~ For the purpose of buying or selling real property.

~~(h)~~ (f) For purposes of the application of Sections 300 and 601 of the Welfare and Institutions Code.

~~(i)~~ (g) For purposes of applying for a work permit pursuant to Section 49110 of the Education Code without the request of parents or guardian.

~~(j)~~ (h) For the purpose of ending all vicarious liability of the minor's parents or guardian for the minor's torts; provided, that nothing in this section shall affect any liability of a parent, guardian, spouse, or employer imposed by the Vehicle Code, or any vicarious liability which arises from an agency relationship.

~~(k)~~ (i) For the purpose of enrolling in any school or college.

**Comment.** Section 63 is amended to expand and clarify the purposes for which an emancipated minor is considered as being over the age of majority.

Paragraph (1) of subdivision (b) continues former subdivision (b). Paragraph (2) continues and expands former subdivision (g) which was limited to "buying or selling real property." However, this paragraph to a large extent makes clear capacities that were included in the capacity to enter into a binding contract. To the extent that paragraph (2) expands the capacity of an emancipated minor beyond that formerly provided, the paragraph is consistent with paragraphs (5)-(10) of subdivision (b). Paragraph (3) continues former subdivision (c). Paragraph (4) is new, but this paragraph probably merely makes clear a capacity that was included within the capacities to make a binding contract and to sue and be sued in his or her own name.

Paragraph (5), which gives a minor the capacity to make or revoke a will, is added because the power to make a will is important and is not a power that can be performed for a minor by a guardian. Moreover, the making of a will requires a lesser capacity than the capacity to enter into a binding contract (a capacity that is provided for in paragraph (1) and was included under Section 63 as it formerly read). See *Estate of Sexton*, 199 Cal. 759, 768, 251 P. 778, 782 (1926) ("Ability to transact important business, or even ordinary business, is not the legal standard of testamentary capacity"). Giving the emancipated minor the capacity to make or revoke a will permits the minor to avoid the inflexible rules that govern intestate succession and to leave his or her property as he or she desires. See *Recommendation Relating to Emancipated Minors*, 16 Cal. L. Rev. Comm'n. \_\_\_\_\_ (1982).



Paragraphs (6)-(13) make clear that an emancipated minor may take various actions that formerly might not have been embraced within the capacity to enter into a binding contract (a capacity that was included under Section 63 as it formerly read). These paragraphs are drawn from Probate Code Section 2580, a provision of the Guardianship-Conservatorship Law relating to substituted judgment. Probate Code Section 2580 applies only to the case of a conservatee; it does not apply to a minor since a conservator of the estate may be appointed only for an adult. Giving an emancipated minor the capacity to take actions a conservator could be authorized or required to take under Section 2580 permits the emancipated minor to take actions that in some cases could not be taken even if a guardian of the estate of the minor were appointed. For example, a guardian cannot exercise a power of appointment. Paragraphs (6)-(13) recognize that a married minor or other emancipated minor may need to utilize the estate planning devices and probate procedures provided for in those paragraphs. In those cases where a guardian of a minor could take an action listed in one of those paragraphs, giving the emancipated minor the capacity to take the action may avoid the need to establish a guardianship for the minor. See, e.g., Civil Code § 1388.3 (guardian of estate may *release* power of appointment on behalf of a minor donee pursuant to court order); Prob. Code §§ 190.2 (disclaimer of a testamentary or other interest on behalf of a minor by guardian of the estate of the minor), 202 (election by guardian under Probate Code Section 202).

**Civil Code § 63.1 (added). Insurance contracts**

SEC. 2. Section 63.1 is added to the Civil Code, to read:

63.1. An insurance contract entered into by an emancipated minor has the same effect as if it were entered into by an adult and, with respect to such contract, the minor has the same rights, duties, and liabilities as an adult.

**Comment.** Section 63.1 is a specific application of the general provision of Section 63 giving an emancipated minor the capacity to enter into a binding contract. Section 63.1 is included to make clear that the restrictions imposed by Section 10112 of the Insurance Code with respect to life or disability insurance or annuity contracts involving a minor do not apply where the minor is an emancipated minor.

**Civil Code § 63.2 (added). Voting and other rights in connection with stock and other property**

SEC. 3. Section 63.2 is added to the Civil Code, to read:

63.2. With respect to any shares of stock in a domestic or foreign corporation held by an emancipated minor, any membership in a nonprofit corporation held by an emancipated minor, or any other property held by an emancipated minor, the minor may do any or all of the following:

(a) Vote in person, and give proxies to exercise any voting rights, with respect to such shares or memberships or property.

(b) Waive notice of any meeting or give consent to the holding of any meeting.

(c) Authorize, ratify, approve, or confirm any action which could be taken by shareholders, members, or property owners.

**Comment.** Section 63.2 is drawn from Probate Code Section 2458 (powers of guardian or conservator). Section 63.2 applies only where the shares, memberships, or property are held by the emancipated minor.

**Financial Code § 14853 (amended). Minor's account in credit union**

**SEC. 4.** Section 14853 of the Financial Code is amended, to read:

**14853.** A credit union may issue shares or certificates for funds to a minor of any age or maintain any other account authorized for credit union members for a minor, and receive payments thereon by or for ~~such~~ *the* minor. ~~Such~~ *The* minor is entitled to withdraw, transfer, or pledge any shares or certificates or other moneys owned by him *or her* and to receive from the credit union all dividends, interest, or other money due thereon in the same manner and subject to the same conditions as an adult. The receipt or acquittance of a minor ~~whose parent or guardian has consented to the account, whether before or after any transaction therein,~~ constitutes a valid release and discharge of the credit union for the payment of dividends, interest, or other money due to ~~such minors~~ *the minor*.

**Comment.** Section 14853 is amended to delete the requirement that a "parent or guardian has consented to the account" as a condition for payment to the minor. The amendment makes Section 14853 read the same in substance as Section 7600 (savings and loan associations). The amendment is also consistent with the treatment given the account of a minor under Financial Code Sections 850 (banks), 11200 (federal savings and loan associations), and 18318 (investment or thrift certificates of industrial loan company).

**Financial Code § 14854 (amended). Joint tenancy account in credit union**

**SEC. 5.** Section 14854 of the Financial Code is amended, to read:

**14854.** Shares or certificates for funds owned in joint tenancy, *whether the joint tenants are minors or adults,* and all dividends and interest thereon may be paid to any of the joint tenants during their lifetime or to the survivor

or any one of the survivors of them after the death of one or more of the joint tenants. By written instructions of all joint tenants given to the credit union, the joint tenants may require the signatures of more than one of such persons during their lifetimes or of more than one of the survivors after the death of any one of them on any notice of withdrawal, request for withdrawal, check endorsement or receipt, in which case the credit union shall pay withdrawals, dividends and interest only in accordance with such instructions, but no such instructions shall limit the right of the sole survivor or of all of the survivors to receive withdrawal payments, dividends and interest. Payment as provided in this section and the receipt or acquittance by any joint tenant is a valid and sufficient release and discharge of the depository credit union for all payments made on account of shares or certificates for funds owned in joint tenancy prior to the receipt by such credit union of notice in writing from any one of them not to make payments in accordance with the terms of such shares or certificates for funds or of such written instructions. After receipt of such notice a credit union may refuse, without liability, to pay withdrawals, dividends, or interest pending a determination of the rights of the parties.

**Comment.** Section 14854 is amended to make clear that a minor may be a joint tenant and that payment may be made to a minor joint tenant unless otherwise provided in the instructions. The amendment is consistent with treatment given minors with respect to accounts in other types of financial institutions. See Sections 852 (banks), 7602 (savings and loan associations), 11204 (federal savings and loan associations).