

Memorandum 92-39

Subject: Study L-608 - Deposit of Estate Planning Documents With Attorney

Attached is a *Recommendation: Deposit of Estate Planning Documents With Attorney*. The Commission considered this in January, and referred it to Team 4 of the State Bar Probate Section to try to resolve problems of the State Bar central staff. Team 4 has worked hard and has made progress. The State Bar central staff is cooperating, and is still trying to estimate the fiscal impact. The State Bar central staff is likely to oppose this recommendation unless State Bar dues are increased. The dues increase bill -- AB 2296 (Eisenberg) -- has passed the Assembly and is set for hearing in the Senate Judiciary Committee on August 4.

Amendments Suggested by Team 4

Exhibit 1 is a letter from Don Green for Team 4. He would revise proposed Section 633 (formerly Section 733) to anticipate and address concerns of the State Bar Central staff. One suggestion makes obvious good sense: He would require the notice of transfer given to the State Bar to include the State Bar number of the transferring and receiving attorneys. The staff agrees, and recommends revising subdivision (a) of Section 633 as follows:

633. (a) An attorney transferring a document under Section 632 shall mail notice of the transfer to the State Bar of California. The notice shall contain the name of the depositor, the date of the transfer, a description of each document transferred, the name and address, and State Bar number of the transferring attorney, and the name and address of the attorney, trust company, or clerk of the superior court to which each document is transferred, and the State Bar number of any attorney to which a document is transferred.

His other suggestions appear to call for comment from the State Bar. The staff would defer these until the State Bar central staff is ready to discuss the details of this proposal:

(1) Mr. Green would require notice to the State Bar only when a document is transferred to an attorney or trust company, and not to a county clerk. But attorneys and trust companies will probably not want

obsolete documents where the owner cannot be found. Thus most documents will probably go to the county clerks in the last known county of residence of each depositor. Mr. Green says the State Bar can assign a number to trust companies to be included in the notice of transfer and in the State Bar's computer field. But why can't numbers similarly be assigned to the 58 California counties and be included in the notice of transfer and in the State Bar's computer field?

(2) Mr. Green would delete the requirement that the notice of transfer describe each document transferred. Apparently the State Bar will have a problem storing this much information. The staff has no problem deleting this requirement, if in fact the State Bar needs it.

(3) Mr. Green would delete the requirement that information in the notice of transfer be kept confidential until the depositor's death is established, and would allow any person to request and obtain the information before or after the depositor's death. Perhaps it would be burdensome for the State Bar to receive death certificates or other proof of the depositor's death. If so, the staff would have no problem deleting the confidentiality requirement. But if any person can obtain the information, this may increase the State Bar's workload, and thus the cost of the system.

Staff Recommendation

The staff recommends the Commission approve this recommendation with the one revision recommended above so we can get a bill ready for introduction in December. Three members of the Assembly Judiciary Committee want to move this proposal forward -- Assembly Members Lloyd Connelly, Phil Eisenberg, and Terry Friedman. After the bill is introduced, we can work with the State Bar central staff to resolve remaining problems.

We also face likely opposition from the County Clerks Association, because the TR makes the clerks the depository of last resort. We asked the County Clerks to suggest modifications to allay their concerns, but we have had no response.

Respectfully submitted,

Robert J. Murphy
Staff Counsel

ESTATE PLANNING, TRUST AND
PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA

File: _____
Key: _____

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March 9, 1992

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Palo Alto, CA 94303-4739

Re: L.R.C. Study L-608
Deposit of Estate Planning Documents
Revision of Proposed §733 re: Notice to State Bar

Dear Mr. Murphy:

Enclosed is a proposed revision to §733, regarding the notice to be given to the State Bar upon transfer of estate planning documents. Although this has not yet been approved by the Board of Governors, it is consistent with what we believe the State Bar can reasonably provide. Essentially, the State Bar would be simply allocating one field in the computer record for each attorney, to show to whom the documents were transferred. Under the proposal as drafted, if a trust company wished to be a repository for an attorney's former estate planning documents, they would request a registration number from the state bar which would be placed in that field when they receive an attorney's estate planning documents. The State Bar would be providing a valuable service to the public by making the general destination of an attorney's estate planning documents available.

If this draft is acceptable to the State Bar, some clarification in another section may be needed. The State Bar's computer would not be able to accept multiple entries for a transferring attorney. In other words, the computer could not record that some documents were transferred to an attorney and others were transferred to a trust company, so a limitation to a single transferee should perhaps be express.

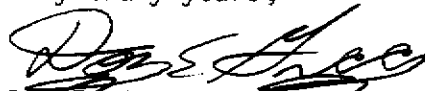
March 9, 1992

Although it would be nice to have a central agency as the repository, storing, indexing and keeping each document, the years of effort in that direction by the L.R.C. and the State Bar have proven that approach impracticable. No agency has the funds for the capital investment which such a system would require. Since the court clerks already are required to receive and index wills, we anticipate that they will not have to create a whole new operation to comply with the L.R.C. proposal. This would not be true of any other agency, such as the Registrar of Vital Statistics of the Department of Health Services. There is also a logic (which will facilitate public understanding) to having the wills lodged with the clerk of the court since the ultimate, intended destination of wills is the superior court, where probate proceedings are held.

The concern of the County Clerks Association about 58 county searches for decedent's wills seems unfounded. Under the current proposal, wills would be lodged with the clerk of the court in the testator's county of residence or, absent that information, in the county of the attorney's office. There appears no reason why a probate attorney would undertake to contact the clerks of all 58 counties. The same, theoretical risk of such shotgun searches exists under the current system, in which whoever is in possession of a decedent's will is required to lodge the will with the clerk of the court. There is now no effective control or centralized index as to the lodging of decedents' wills, so parties or attorneys might justify inquiries of all 58 counties for any will of the decedent. We believe such broad inquiries to be limited in number and that the current proposal would not result in any substantial increase. The fee proposed will further minimize such inquiries.

We feel that the obvious value of protecting these specially important documents, involving minimal public expense, would enable this proposal to be enacted despite the possibility of some opposition. We also believe it merits the effort.

Very truly yours,



Don E. Green, Esq.

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enclosure

cc: David Long; Calif. State Bar
Executive Committee; EP,T&P Section; State Bar
Larry Doyle

DEG:ss

February 28, 1992

REVISION OF §733 L.R.C. Study L-608 1st Supplement to Memo 92-6

§733 Notice to State Bar

733. (a) An attorney transferring documents to an attorney or trust company under Section 735 shall mail notice of the transfer to the State Bar of California. The notice shall contain the name of the depositor, the date of the transfer, a description of each document transferred, the name and address of the transferring attorney, the name and address of the attorney or trust company to which the documents are transferred, and the state bar number of the transferor and the transferee attorney (if any). If the attorney is required to give notice of cessation of law practice under Article 11 (commencing with Section 6180) of Chapter 4 of Division 3 of the Business and Professions Code, the notice of transfer may be included in the notice of cessation of law practice.

(b) Except as provided in subdivision (c), when filed with the State Bar, information in the notice of transfer relating to a depositor is not a public record, and is not open to inspection except by the public officers or employees who have the duty of receiving and storing the notice.

(c) On request by the depositor any person, the State Bar shall furnish the information relating to the notice of transfer. If the State Bar is furnished with a certified copy of the depositor's death certificate or other satisfactory proof of the depositor's death, the notice of transfer shall be a public record subject to the California Public Records Act, Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code.

#L-608

STATE OF CALIFORNIA

California Law Revision Commission

Staff Draft

RECOMMENDATION:

DEPOSIT OF ESTATE PLANNING DOCUMENTS WITH ATTORNEY

September 1992

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

September 10, 1992

To: The Honorable Pete Wilson
Governor of California, and
The Legislature of California

This recommendation clarifies rights and duties where an estate planning document has been deposited with an attorney for safekeeping. If the attorney is unable to return the document because the attorney cannot find the depositor, the attorney would be allowed to transfer the document to another attorney, a trust company, or the superior court clerk of the county of the depositor's last known residence. Notice of the transfer must be given to the State Bar.

Respectfully submitted,

Arthur K. Marshall
Chairperson

L-608

rm300
07/22/92

DEPOSIT OF ESTATE PLANNING DOCUMENTS WITH ATTORNEY

Wills and other estate planning documents are often left with the attorney who drafted them.¹ This creates a bailment.² A bailee ordinarily has no authority to transfer the property being held to someone else without consent of the bailor.³ Thus when an attorney accepts an estate planning document for safekeeping, the attorney must continue to hold the document indefinitely if the depositor cannot be found. This creates a serious problem for an estate planning attorney who wants to retire, resign, become inactive, or change to some other kind of practice.

The Commission recommends legislation to permit an attorney who is holding an estate planning document for safekeeping and cannot find the depositor to transfer the document to another attorney, trust company, or the clerk of the superior court of the county of the depositor's last known residence,⁴ and to require the attorney to give notice of the transfer to the State Bar.⁵ The recommended legislation has the following features:⁶

1. See California Will Drafting Practice § 2.25, at 62-63 (Cal. Cont. Ed. Bar 1982).
2. 8 Am. Jur. 2d *Bailments* § 4 (1980).
3. 8 Am. Jur. 2d *Bailments* § 97 (1980).
4. Under existing law, the superior court clerk receives and stores wills of deceased testators: The custodian of the will must deliver it to the clerk of the superior court of the county in which the decedent's estate may be administered. Prob. Code § 8200.
5. Under existing law, an attorney who intends to go out of practice must give notice of cessation of law practice to the State Bar. Bus. & Prof. Code §§ 6180, 6180.1.
6. The recommended legislation was developed from a proposal approved by the State Bar Conference of Delegates in 1988.

(1) The attorney must use ordinary care for preservation of the document, whether or not consideration is given, and must keep the document in a safe, vault, safe deposit box, or other secure place where it will be reasonably protected against loss or destruction.

(2) The attorney may give written notice to the depositor that the depositor must keep the attorney advised of any changes of address. If the depositor fails to do this and as a result the attorney cannot return a deposited document, the attorney, and any successor attorney or trust company who accepts a transfer of the document, need use only slight care for its preservation, the same as for a gratuitous depository under existing law.⁷

(3) The attorney is not liable for loss or destruction of the document if the depositor has actual notice of the loss or destruction and a reasonable opportunity to replace the document.

(4) The depositor need not compensate the attorney for holding the document unless so provided in a written agreement.

(5) The attorney has no lien on the document, even if provided by agreement.⁸

(6) A depositor may terminate a deposit on demand, and the attorney must deliver the document to the depositor.⁹

(7) The attorney may terminate a deposit by personal delivery of the document to the depositor or by the method agreed on by the depositor and the attorney.

(8) If the attorney is unable to deliver the document to the depositor and does not have actual notice that the depositor has died, the attorney may mail notice to reclaim the document to the depositor's last known address. If the depositor fails to reclaim the document

7. Civ. Code § 1846.

8. This is contrary to Civil Code Section 1856, which allows a lien for costs.

9. This is consistent with Civil Code Section 1822. The Commission's recommendation also would amend Section 2586 (substituted judgment) to provide that if the depositor has a conservator of the estate, the court may order that the depositor's estate planning documents be delivered to some other custodian for safekeeping.

within 90 days, the attorney may transfer the document to another attorney, to a trust company, or to the clerk of the superior court of the county of the depositor's last known residence, and must file a notice of the transfer with the State Bar.

(9) Before the depositor's death, only the depositor may get from the State Bar the name and address of the transferee. After the depositor's death, the name and address of the transferee is a public record.

(10) If a document is transferred to a superior court clerk, the clerk may microfilm the document and destroy the original.¹⁰ The clerk's fee for accepting a transfer of an estate planning document is \$14. The clerk's fee for searching for an estate planning document is \$1.75 for each year searched.

(11) A successor attorney who accepts a document for safekeeping is not liable for failure to verify the completeness or correctness of information or documents received from a predecessor depository.

(12) After the depositor's death, the attorney may terminate the deposit by delivering the document to the depositor's personal representative, or to the trustee in the case of a trust or court clerk in the case of a will.

10. The proposed legislation also authorizes the superior court clerk to microfilm wills delivered pursuant to Probate Code Section 8200 after the testator's death, and to destroy the original, if the clerk has held the will for at least ten years. Destruction of the original will does not prevent its admission to probate. See Prob. Code § 8223.

OUTLINE

NEW SECTIONS IN PROBATE CODE

PART 14. DEPOSIT OF ESTATE PLANNING DOCUMENTS WITH ATTORNEY

CHAPTER 1. DEFINITIONS

- § 600. Application of definitions
- § 601. Attorney
- § 602. Deposit
- § 603. Depositor
- § 604. Document

CHAPTER 2. DUTIES AND LIABILITIES OF ATTORNEY

- § 610. Attorney's duty of ordinary care
- § 611. Notice on loss or destruction of document
- § 612. Nonliability for loss or destruction of document
- § 613. No duty to verify contents of document or provide continuing legal services
- § 614. Payment of compensation and expenses; no lien on document
- § 615. Attorney's notice to client
- § 616. Reduced standard of care

CHAPTER 3. TERMINATION OF DEPOSIT

Article 1. Termination by Depositor

- § 620. Termination on demand

Article 2. Termination by Attorney

- § 630. Attorney may terminate deposit only as provided in this article
- § 631. Termination by delivery, mailing, or as agreed
- § 632. Termination by transferring document to another attorney, trust company, or superior court clerk
- § 633. Notice to State Bar
- § 634. Termination after death of depositor
- § 635. Deceased or incompetent attorney

CONFORMING REVISIONS

- Prob. Code § 2586 (amended). Production of conservatee's will and other relevant estate plan documents
- Gov't Code § 26810 (added). Microfilming estate planning documents; destruction of originals
- Gov't Code § 26827.6 (added). Fee for filing and searching estate planning document

RECOMMENDED LEGISLATION

Prob. Code §§ 600-635 (added). Deposit of estate planning documents with attorney

PART 14. DEPOSIT OF ESTATE PLANNING DOCUMENTS WITH ATTORNEY

Chapter 1. Definitions

§ 600. Application of definitions

600. Unless the provision or context otherwise requires, the definitions in this chapter govern the construction of this part.

Comment. Section 600 is new.

§ 601. Attorney

601. "Attorney" means an individual licensed to practice law in this state.

Comment. Section 601 is new. Although the depository is the individual attorney, liability for failing to maintain an adequate standard of care may be imposed on the attorney's law partnership or law corporation under traditional rules of vicarious liability. See 2 B. Witkin, *Summary of California Law Agency and Employment* § 115, at 109-111 (9th ed. 1987); 9 B. Witkin, *Summary of California Law Partnership* § 38, at 434-35 (9th ed. 1989).

§ 602. Deposit

602. "Deposit" means delivery of a document by a depositor to an attorney for safekeeping or authorization by a depositor for an attorney to retain a document for safekeeping.

Comment. Section 602 is new.

§ 603. Depositor

603. "Depositor" means a natural person who deposits the person's document with an attorney.

Comment. Section 603 is new. The definition of "depositor" in Section 603 does not preclude the person whose document is deposited from using an agent, such as an attorney-in-fact, to make the deposit.

§ 604. Document

604. "Document" means any of the following:

(a) A signed original will, declaration of trust, trust amendment, or other document modifying a will or trust.

(b) A signed original power of attorney.

(c) A signed original nomination of conservator.

(d) Any other signed original instrument that the attorney and depositor agree in writing to make subject to this part.

Comment. Section 604 is new. "Will" includes a codicil. Section 88.

Chapter 2. Duties and Liabilities of Attorney

§ 610. Attorney's duty of ordinary care

610. If a document is deposited with an attorney, the attorney, and a successor attorney or trust company that accepts transfer of the document, shall use ordinary care for preservation of the document on and after July 1, 1994, whether or not consideration is given, and shall hold the document in a safe, vault, safe deposit box, or other secure place where it will be reasonably protected against loss or destruction.

Comment. Section 610 is new. Under Section 610, an attorney must use ordinary care for preservation of the document deposited. This applies the rule of Civil Code Section 1852 (deposit for hire) to the attorney-depositary, whether or not consideration is given. This is a departure from Civil Code Section 1846, under which a gratuitous depositary need only use slight care for preservation of the property deposited.

The duty imposed by Section 610 to hold the document in a safe, vault, safe deposit box, or other secure place is a reasonable one, and allows reasonable periods for the document to be out of safekeeping for the purpose of examination or delivery in appropriate circumstances. At all times the document should be reasonably protected against loss or destruction, although what is reasonable may vary with the circumstances.

Although Section 610 applies to attorneys who are holding documents on July 1, 1994, an attorney is not liable for action taken before that date that was proper when the action was taken. Section 3.

For an exception to the standard of care provided in Section 610, see Section 616 (slight care after specified steps taken).

§ 611. Notice on loss or destruction of document

611. If a document deposited with the attorney is lost or destroyed, the attorney shall give notice of the loss or destruction to the depositor by one of the following methods:

- (a) By mailing the notice to the depositor's last known address.
- (b) By the method most likely to give the depositor actual notice.

Comment. Section 611 is new. Even though a will is lost or destroyed, it still may be proven and admitted to probate. See Section 8223.

§ 612. Nonliability for loss or destruction of document

612. Notwithstanding failure of the attorney to satisfy the standard of care required by Section 610 or 616, the attorney is not liable for loss or destruction of the document if the depositor has actual notice of the loss or destruction and a reasonable opportunity to replace the document.

Comment. Section 612 is new. Even though a will is lost or destroyed, it still may be proven and admitted to probate. See Section 8223.

§ 613. No duty to verify contents of document or provide continuing legal services

613. The acceptance by an attorney of a document for deposit imposes no duty on the attorney to do either of the following:

(a) Inquire into the content, validity, invalidity, or completeness of the document, or the correctness of any information in the document.

(b) Provide continuing legal services to the depositor or to any beneficiary under the document. This subdivision does not affect the duty, if any, of the drafter of the document to provide continuing legal services to any person.

Comment. Section 613 is new. Section 613 does not relieve the drafter of the document from the duty of drafting competently.

§ 614. Payment of compensation and expenses; no lien on document

614. (a) If so provided in a written agreement signed by the depositor, the attorney may charge the depositor for compensation and expenses incurred in safekeeping or delivery of a document deposited with the attorney.

(b) No lien arises for the benefit of an attorney on a document deposited with the attorney, whether before or after its transfer, even if provided by agreement.

Comment. Section 614 is new. Subdivision (b) is a departure from Civil Code Section 1856 (depository's lien).

§ 615. Attorney's notice to client

615. An attorney may give written notice to a depositor, and obtain written acknowledgment from the depositor, in the following form:

NOTICE AND ACKNOWLEDGMENT

To: _____
(Name of depositor)

(Address)

(City, state, and ZIP)

I have accepted your will or other estate planning document for safekeeping. I must use ordinary care for preservation of the document.

You must keep me advised of any change in your address shown above. If you do not and I cannot return this document to you when necessary, I will no longer be required to use ordinary care for preservation of the document, and I may transfer it to another depository and give notice of the transfer to the State Bar of California.

(Signature of attorney)

(Address of attorney)

(City, state, ZIP)

My address shown above is correct. I understand that I must keep you advised of any change in this address.

Dated: _____

(Signature of depositor)

Comment. Section 615 is new. By giving the notice and obtaining the acknowledgment provided by this section, the attorney's duty of care may reduced to slight care if the requirements of Section 616 are satisfied. See also Section 631 (mailing document to address shown in notice and acknowledgment).

§ 616. Reduced standard of care

616. Notwithstanding Section 610, if an attorney has given written notice to the depositor, and has obtained written acknowledgment from the depositor, in substantially the form provided in Section 615, and the requirements of subdivision (a) of Section 632 are satisfied, the attorney, and a successor attorney or trust company

that accepts transfer of a document, shall use slight care for preservation of a document deposited with the attorney.

Comment. Section 616 is new. The "slight care" standard of Section 616 is the same as the standard of care of a gratuitous depositary under Civil Code Section 1846.

Chapter 3. Termination of Deposit

Article 1. Termination by Depositor

§ 620. Termination on demand

620. A depositor may terminate the deposit on demand, in which case the attorney shall deliver the document to the depositor.

Comment. Section 620 is new, and is consistent with Civil Code Section 1822, except that under Section 614 no lien is permitted against the document deposited.

If the depositor has an attorney in fact acting under a statutory form power of attorney that confers general authority with respect to estate transactions, the attorney in fact may terminate the deposit. See Civ. Code § 2493.

If the depositor has a conservator of the estate, the court may order the attorney to deliver the document to the court for examination, and for good cause may order that the document be delivered to some other custodian for safekeeping. Section 2586.

Article 2. Termination by Attorney

§ 630. Attorney may terminate deposit only as provided in this article

630. An attorney with whom a document has been deposited, or to whom a document has been transferred pursuant to this article, may terminate the deposit only as provided in this article.

Comment. Section 630 is new. The methods by which an attorney may terminate a deposit under this article are provided in Sections 631 to 635.

§ 631. Termination by delivery, mailing, or as agreed

631. An attorney may terminate the deposit by one of the following methods:

(a) Personal delivery of the document to the depositor.

(b) Mailing the document to the depositor's last known address, by registered or certified mail with return receipt requested, and receiving a signed receipt.

(c) The method agreed on by the depositor and attorney.

Comment. Section 631 is new. The depositor's last known address may be shown in a notice and acknowledgment under Section 615, in the

depositor's advice of change of address to the attorney, or otherwise.

Section 631 provides some of the ways an attorney may terminate a deposit. An attorney may also terminate a deposit as provided in Section 632 or, if applicable, Section 634.

§ 632. Termination by transferring document to another attorney, trust company, or superior court clerk; reduced standard of care

632. (a) An attorney may terminate a deposit under this section if the attorney has mailed notice to reclaim the document to the depositor's last known address and the depositor has failed to reclaim the document within 90 days after the mailing.

(b) Subject to subdivision (e), an attorney may terminate a deposit under this section by transferring the document to any of the following persons:

(1) Another attorney.

(2) A trust company

(3) The clerk of the superior court of the county of the depositor's last known residence. The attorney shall advise the clerk that the document is being transferred pursuant to Probate Code Section 632.

(c) The attorney may not accept a fee or compensation from a transferee for transferring a document under this section.

(d) Transfer of a document by an attorney under this section is not a waiver or breach of any privilege or confidentiality associated with the document, and is not a violation of the rules of professional conduct. If the document is privileged under Article 3 (commencing with Section 950) of Chapter 4 of Division 8 of the Evidence Code, the document remains privileged after the transfer.

(e) If the document is a will and the attorney has actual notice that the depositor has died, the attorney may terminate a deposit only as provided in Section 634.

Comment. Section 632 is new. The depositor's last known address may be shown in a notice and acknowledgment under Section 615, in the depositor's advice of change of address to the attorney, or otherwise.

Section 632 provides one way an attorney may terminate a deposit. An attorney may also terminate a deposit as provided in Section 631 or, if applicable, Section 634.

By permitting an attorney to transfer a document to another depository, Section 632 departs from the common law of bailments under which a depository ordinarily has no authority to transfer the property to someone else. See 8 Am. Jur. 2d *Bailments* § 97 (1980).

The fee for transferring an estate planning document to the

superior court clerk under subdivision (b) is \$14. Gov't Code § 26827.6.

See also Sections 1215-1217 (mailing of notice).

§ 633. Notice to State Bar

633. (a) An attorney transferring a document under Section 632 shall mail notice of the transfer to the State Bar of California. The notice shall contain the name of the depositor, the date of the transfer, a description of each document transferred, the name and address of the transferring attorney, and the name and address of the attorney, trust company, or clerk of the superior court to which each document is transferred. If the attorney is required to give notice of cessation of law practice under Article 11 (commencing with Section 6180) of Chapter 4 of Division 3 of the Business and Professions Code, the notice of transfer may be included in the notice of cessation of law practice.

(b) Except as provided in subdivisions (c), (d), and (e), when filed with the State Bar, information in the notice of transfer relating to a depositor shall be confidential, is not a public record, and is not open to inspection except by the public officers or employees who have the duty of receiving and storing the notice.

(c) On request by the depositor, the State Bar shall furnish to the depositor the information relating to that depositor in the notice of transfer.

(d) On request by an attorney who gave a notice of transfer, the State Bar shall furnish to the attorney the information in the notice of transfer.

(e) If the State Bar is furnished with a certified copy of the depositor's death certificate or other satisfactory proof of the depositor's death, the notice of transfer shall be a public record subject to the California Public Records Act, Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code.

Comment. Section 633 is new.

§ 634. Termination after death of depositor

634. (a) In cases not governed by subdivision (b) or (c), after the death of the depositor an attorney may terminate a deposit by personal delivery of the document to the depositor's personal

representative.

(b) If the document is a will and the attorney has actual notice that the depositor has died but does not have actual notice that a personal representative has been appointed for the depositor, an attorney may terminate a deposit only as provided in Section 8200.

(c) If the document is a trust, after the death of the depositor an attorney may terminate a deposit by personal delivery of the document either to the depositor's personal representative or to the trustee named in the document.

Comment. Section 634 is new. Subdivisions (a) and (c) are permissive, but subdivision (b) is mandatory. If subdivision (b) does not apply, an attorney may terminate a deposit, for example, by the method agreed on by the depositor and attorney. Section 631.

As used in Section 634, "personal representative" includes a successor personal representative and a personal representative appointed in another state. Section 58. "Trustee" includes a successor trustee (Section 84), and "will" includes a codicil (Section 88).

§ 635. Deceased or incompetent attorney

635. (a) If the attorney is deceased or lacks legal capacity, a deposit may be terminated as provided in this article by the attorney's law partner, by a shareholder of the attorney's law corporation, or by a lawyer or nonlawyer employee of the attorney or the attorney's partnership or corporation.

(b) If the attorney lacks legal capacity and there is no person to act under subdivision (a), a deposit may be terminated by the conservator of the attorney's estate or by an attorney in fact acting under a durable power of attorney. A conservator of the attorney's estate may act without court approval.

(c) If the attorney is deceased and there is no person to act under subdivision (a), a deposit may be terminated by the attorney's personal representative.

(d) If a person authorized under this section terminates a deposit as provided in Section 632, the person shall give the notice required by Section 633.

Comment. Section 635 is new.

CONFORMING REVISIONS

Probate Code § 2586 (amended). Production of conservatee's will and other relevant estate plan documents

2586. (a) As used in this section, "estate plan of the conservatee" includes but is not limited to the conservatee's will, any trust of which the conservatee is the settlor or beneficiary, any power of appointment created by or exercisable by the conservatee, and any contract, transfer, or joint ownership arrangement with provisions for payment or transfer of benefits or interests at the conservatee's death to another or others which the conservatee may have originated.

(b) Notwithstanding Article 3 (commencing with Section 950) of Chapter 4 of Division 8 of the Evidence Code (lawyer-client privilege), the court, in its discretion, may order that any person having possession of any document constituting all or part of the estate plan of the conservatee shall deliver such document to the court for examination by the court, and, in the discretion of the court, by the attorneys for the persons who have appeared in the proceedings under this article, in connection with the petition filed under this article.

(c) Unless the court otherwise orders, no person who examines any document produced pursuant to an order under this section shall disclose the contents of the document to any other person. If such disclosure is made, the court may adjudge the person making the disclosure to be in contempt of court.

(d) For good cause, the court may order that a document constituting all or part of the estate plan of the conservatee, whether or not produced pursuant to an order under this section, shall be delivered for safekeeping to the custodian designated by the court. The court may impose such conditions as it determines are appropriate for holding and safeguarding the document. The court may authorize the conservator to do any acts a depositor could do under Part 14 (commencing with Section 600) of Division 2.

Comment. Section 2586 is amended to add subdivision (d) to permit the court to order that the conservatee's estate planning documents be delivered to some other custodian for safekeeping. Under subdivision (d), "good cause" for ordering a transfer to some other custodian might include, for example, the case where the previous custodian has not used ordinary care for preservation of the document. See Section 610. See generally Sections 600-635 (deposit of estate planning documents with attorney).

Gov't Code § 26810 (added). Microfilming estate planning documents; destruction of originals

26810. (a) The clerk of the superior court may cause the following documents to be microphotographed or otherwise reproduced on film and stored in that form:

(1) A document transferred to the clerk under Section 632 of the Probate Code.

(2) A will delivered to the clerk of the superior court under Section 8200 of the Probate Code if the clerk has held the will for at least ten years.

(b) All film used in the microphotography or other process shall comply with minimum standards of quality approved by the National Bureau of Standards.

(c) Section 26809 does not apply to a will or other document referred to in subdivision (a), or to the reproduction authorized by subdivision (a).

(d) Upon making the reproduction authorized by subdivision (a), the clerk of the superior court may destroy the original document.

Comment. Section 26810 is new and is drawn from other comparable provisions of state law. See Com. Code § 9407.1; Gov't Code §§ 27322.2, 27322.4, 71007, Health & Safety Code § 10036.

Gov't Code § 26827.6 (added). Fee for filing and searching estate planning document

26827.6. (a) The fee for receiving and storing a document transferred to the clerk of the superior court under Section 632 of the Probate Code is fourteen dollars (\$14).

(b) The fee for searching a document transferred to the clerk of the superior court under Section 632 of the Probate Code is the same as the fee under Section 26854 for searching records or files.

Comment. Section 26827.6 is new. The fee for filing is the same as the fee under Section 26827.4 for filing a subsequent paper in a probate proceeding. The fee for searching under Section 26854 is \$1.75 per year searched.