#L-601 9/20/82

Memorandum 82-83

Subject: Study L-601 - Nonprobate Transfers

A tentative recommendation relating to non-probate transfers (copy attached) was distributed to interested persons for review and comment. Only three comments were received from the approximately 70 persons and organizations to whom the tentative recommendation was sent. The Comments were favorable but some revisions were suggested.

We have not yet heard from the California Bankers Association (CBA). The view of CBA is particularly significant; CBA was responsible for the defeat of the Commission recommended bill on this subject in 1982. The new tentative recommendation is designed to meet the objections of CBA. We should know before the September meeting if CBA object to the new tentative recommendation. If CBA objects, the staff recommends that the Commission not submit a recommendation on this subject to the 1983 Legislature. Instead the portion of the tentative recommendation dealing with the rights between parties to deposit accounts should be included as a part of the legislation being drafted relating to joint tenancies generally.

Assuming that CBA will approve the tentative recommendation, the remainder of this memorandum considers the various matters raised by the persons who submitted comments on the tentative recommendation.

Probate Code § 6305. Presumption that sums on deposit are community property

Section 6305 establishes a presumption that sums on deposit are community property. The presumption may be rebutted by tracing the sums on deposit to separate property or by proof that:

> (2) The married persons made a written agreement, separate from the deposit agreement, which expressly provided that the sums on deposit, claimed not to be community property, were not to be community property.

The section further provides that a right of survivorship, a beneficiary designation in a Totten trust account, or a payable-on-death payee designation, cannot be changed by will.

The effect of this section is that if the account has a survivorship right (whether by joint tenancy, Totten trust, or P.O.D. designation),

upon the death of a party to the account, the funds in the account go by virtue of the survivorship right, and the survivorship right cannot be changed by a will. For this reason, the community property presumption is significant primarily in determining the rights of the parties during their lifetime (such as when their property is divided upon marriage dissolution). The presumption has no significance when one of the spouses dies if the account has a survivorship right since both spouses will be parties to the account and will have agreed to the survivorship right.

Justice Robert Kingsley (Exhibit 2) questions whether the written agreement that the account not be community property should be required to be in a separate document. He fears that the agreement may be "conveniently" lost or destroyed by the surviving spouse. However, as previously indicated, the presumption will be of significance in a case where one spouse has died only if the account does not have a survivorship right.

The issue is whether there is a significant danger that parties will check a box on a deposit card form without understanding the effect of checking a box that changes community property into something other than community property. Is this danger offset by the danger that a written agreement separate from the deposit agreement will be "conveniently" lost or destroyed by the surviving spouse? The staff believes that it is important to protect depositors against inadvertently changing their community property into some other type of property. We do not believe the danger that Justice Kingsley fears is a real danger. Accordingly, we recommend that no change be made in the provision of the tentative recommendation.

Undertaking if deposit account is levied upon

The Counsel for California First Bank (Exhibit 3) is concerned that it is not clear whether an undertaking is required when a Totten trust or account with a P.O.D. designation is levied upon. This is not a problem that is created by the Tentative Recommendation and, in fact, the enactment of the proposed legislation in the Tentative Recommendation would help to clarify the law. Nevertheless, the staff recommends that an amendment be included in the proposed legislation to make clear that an undertaking is not required when a creditor levies upon the interest

of the judgment debtor in a deposit account where the judgment debtor is the trustee of a Totten trust account or the depositor in the case of an account that has a P.O.D. designation. The relevant sections of AB 707 (enforcement of judgments)--Sections 700.140 and 700.160--are attached as Exhibit 4. The needed clarification is accomplished by the amendment shown in Exhibit 4 to Section 700.140.

Probate Code § 6303. Change in terms of account

The Counsel for the California First Bank (Exhibit 3) expresses concern that a change in the title of an account that changes the joint tenants may not be effective unless the account is closed and reopened upon different terms.

The comment refers only to paragraph (1) of subdivision (b) of Section 6303, which reads:

> (b) Once established, the terms of a multiple-party account can be changed only by any of the following methods:
> (1) Closing the account and reopening it under different terms.
> (2) Presenting to the financial institution a modification agreement in a form satisfacroty to the financial institution which is signed by all parties having a present right of withdrawal.
> (3) If the provisions of the terms of the account or deposit agreement provide a method of modification of the terms of the account, complying with those provisions.

It would appear that the financial institution can establish terms of an account that permit a change in title to take place and change the joint tenants who are parties to the account. This appears to deal adequately with the problem. To make the matter clear, however, the staff suggests that the following be added to the Comment to Section 6303:

> Paragraph (3) of subdivision (b) permits a change in the terms of a multiple-party account by complying with a method of modification provided in the terms of the account or deposit agreement. Accordingly, for example, if the terms of the account or deposit agreement permit a party to the account to change a P.O.D. beneficiary or to substitute a new party to a joint account for an original party to the account, the change would be effective to give the right of survivorship to the new beneficiary or new party to the joint account. The requirement of paragraph (1) that the account be closed and reopened under different terms would not apply where the modification is made under paragraph (2) or (3) of subdivision (b).

Probate Code § 6405. Payment as discharge

Exhibit 3 suggests that notice to a financial institution under Section 6045 be provided at the office where the deposit is carried. The Tentative Recommendation so requires. Subdivision (1) of Section 5101 (definitions) provides:

> (1) A financial institution "receives" an order or notice under this part when it is received by the particular office or branch office of the financial institution where the account is carried.

We will add a reference to the provision set out above in the Comment to Section 6405 and other sections where the provision is relevant.

Probate Code § 6406. Set-off

Exhibit 3 objects to this provision. See the discussion on page 6 of the Exhibit. The staff recommends that Section 6406 be deleted from the proposed legislation, thus leaving the matter of whether the financial institution may set-off the entire account or only one-half, or some other portion, uncertain. The provision is not essntial to the recommendation.

Probate Code § 6408. Payment to minor

Exhibit 3 questions whether funds can be paid over to a small child pursuant to Section 6408. If the child is a party to the account and is permitted to receive a payment pursuant to the deposit agreement, payment to the child discharges the financial institution. The staff believes that this is existing law and is a sound rule. A child should be able to open a deposit account and to make withdrawals from it.

Duty of Financial Institutions (Section 17 of proposed legislation)

Section 17 on page 39 of the proposed legislation was included to meet the objection that killed the prior proposal--that the proposal would place substantial costs upon financial institutions in explaining the law when enacted to depositors and perhaps even require a mailing containing information about the new law.

Exhibit 3 suggests that the scope of protection provided is too narrow--the provision only avoids the duty to inform "depositors"; the provision should also extend to informing P.O.D. payees and beneficiaries under a trust account. The staff recommends that Section 17 be revised to read:

SEC. 17. (a) A financial institution has no duty to inform any of the following of the enactment of this part:

(1) Any depositor holding an account on the operative date of Part 1 (commencing with Section 6100) of Division 5 of the Probate Code.

(2) Any beneficiary named in a trust account described in a paragraph (1).

(3) Any P.O.D. payee designated on a P.O.D. account described in paragraph (1).

(b) No liability shall be imposed on a financial institution for failing to inform any person described in subdivision (a) of the enactment of Part 1 (commencing with Section 6100) of Division 5 of the Probate Code.

Respectfully submitted,

John H. DeMoully
Executive Secretary

UNIVERSITY OF CALIFORNIA, DAVIS

BERKELEY • DAVIS • IRVINE • LOS ANGELES • RIVERSIDE • SAN DIEGO • SAN FRANCISCO SANTA BARBARA • SANTA CRUZ

SCHOOL OF LAW DAVIS, CALIFORNIA 95616

August 30, 1982

California Law Revision Commission
4000 Middlefield Road, Room D2
Palo Alto, California 94306

Ladies and Gentlemen:

I teach trusts, wills and estates at the above law school. I am writing to say I endorse the Commission's tentative recommendation relating to nonprobate transfers.

Sincerely,

Joel C. Dobris
Professor of Law

JCD:lbp

Memo 82-83 Exhibit 2

Study L-601

STATE OF CALIFORNIA
COURT OF APPEAL
SECOND DISTRICT—DIVISION FOUR
3580 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90010

ROBERT KINGSLEY
ASSOCIATE JUSTICE

July 8, 1982

California Law Revision Commission,
4000 Middlefield Road,
Room D-2,
Palo Alto, California 94306

Gentlemen:

This will acknowledge receipt of your Tentative Recommendations on Emancipated Minors and on Non-Probate Transfers.

(1) 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 obvious dependents.

(2) I comment only on one provision of the other recommendation. In your proposed Section 6305 of the Probate Code, in subdivision (b)(2), you require that an agreement between spouses that a joint account shall not be presumed community ~~to~~ be by a separate document. I see no reason why a clear and express clause to that effect may not be in the deposit agreement itself (if you wish, require it to be in bold type of some sort). The separate agreement (which need not be transmitted to anyone) will, too frequently, be "conveniently" lost or destroyed by the surviving spouse.

Sincerely,

Robert Kingsley

CALIFORNIA FIRST BANK

LEGAL DEPARTMENT, 350 CALIFORNIA STREET
P. O. BOX 3799, SAN FRANCISCO, CALIFORNIA 94119
(415) 445-0211

TED TERUO KITADA
Vice President and Counsel

July 12, 1982

California Law
Revision Commission
4000 Middlefield Road
Room D-2
Palo Alto, CA 94306

Re: Tentative Recommendation relating to Non-Probate Transfers, dated June 1, 1982

Gentlemen:

We have had an opportunity to review the Tentative Recommendation relating to Non-Probate Transfers, dated June 1, 1982. Based on this review, we offer the following comments with respect to the Recommendation:

1. Undertakings. Under §682a of the California Code of Civil Procedure, if a judgment creditor seeks to levy upon any bank account, or interest therein, not standing in the name of the judgment debtor or judgment debtors or standing in the name of such judgment debtor or judgment debtors and one or more other persons who are not judgment debtors, the judgment creditor must provide and concurrently with the levy the sheriff, constable, or marshall or registered process server must deliver to the bank a bond in an amount not less than twice the amount of the judgment or the twice the amount sought to be reached by such levy, if less than the amount of the judgment, indemnifying the

person or persons, other than the judgment debtor or judgment debtors whose interest is sought to be levied upon, against actual damages by reason of the taking of such account. Clearly, §682a is applicable to joint tenants of bank accounts who are not judgment debtors. However, we have had some difficulty in determining whether §682a is applicable in cases where the judgment debtor is a trustee or beneficiary under a "Totten" trust. Since a Totten trust is revocable at any time by the trustor/trustee, presumably the bank may pay in response to a levy without requiring a bond under §682a in cases where the trustee/trustor is the judgment debtor. However, since the phrase "standing in the name of such judgment debtor or judgment debtors and one or more other persons who are not judgment debtors" is unclear, it may be reasonable for the bank to request a bond under §682a in any event. In cases where the judgment debtor is a beneficiary of the Totten trust, the bank could take the position that the levy does not affect the bank account, with or without a bond under §682a, inasmuch as the judgment debtor merely has a contingent interest in the account. However, since §682a speaks in terms of "any bank account, or interest therein," we have taken the position that in such cases, it is possible for the judgment creditor to reach the interest of the judgment debtor/beneficiary in cases where a bond is tendered pursuant to §682a.

We understand that the Uniform Probate Code permits creditors to reach the ownership interest of the depositor prior to the death of the depositor. Presumably, therefore, the trustee of a trust account or the original owner of the POD account is subject to the claims of judgment creditors. However, under the UPC creditors of the POD payee may not reach funds in the POD account during the lifetime of the depositor. Likewise, creditors of the trust beneficiary may not reach funds in the trust account during the lifetime of the trustee. In the event of a levy against the ownership interest of the depositor prior to the death of the depositor, should a bank require a bond under §682a? Is the interest of a POD payee or beneficiary covered by the language of §682a?

Unfortunately, §700.160 as proposed by Assembly Bill No. 707 introduced in the California Legislature on March 2, 1981, fails to clarify this issue. Our concern is that by introducing additional legal types of accounts, the confusion may be compounded.

2. Changes in Title. Under §6303(b)(1) of the Probate Code as proposed by the Recommendation, once established, the terms of a multi-party account can be changed only by closing the account and reopening it under different terms. This language is ambiguous in light of the holding of the Brown v. Bowery Savings Bank, 415 N.E. 2d. 906 (N.Y. 1980). In Brown, the New York Court of Appeals, in a unanimous

decision, found the Bowery Savings Bank liable to Mrs. Cora Brown, a depositor whose name was removed without her permission from a joint savings account at the behest of her son, the other joint depositor.

Mrs. Brown, the plaintiff, and her son, Mr. William J. Brown, opened three joint savings accounts at the Bowery during the years 1966 through 1972. At issue was the last account opened. Since this account was a time deposit account, it paid a higher rate of interest and was subject to a penalty for early withdrawal. On March 29, 1974, Mr. Brown instructed the Bowery that he wished to change the account to one with himself and a Ms. Ruth McCullough as joint tenants. Apparently to avoid the substantial penalty for early withdrawal, Mr. Brown merely struck out the name of Mrs. Brown and substituted that of Ms. McCullough. Mr. Brown died on June 25, 1974. Subsequent to the death, Mrs. McCullough withdrew all the funds from the time deposit account. Mrs. Brown commenced an action against the Bowery for the funds released to Ms. McCullough. As a defense, the Bowery used §675 of the New York Banking Law. Section 675 normally serves to immunize banks for withdrawals made by joint depositor and is substantially similar to §852 of the California Financial Code. In holding the Bowery liable to Mrs. Brown, the court concluded that §675 could not be used to shield a bank from liability in cases where a mere

change in title to an account takes place and where there was neither "payment" nor "delivery" under that statute. Given the language of §6303(b)(1), it may be that a mere change in title to an account does not constitute the closing of the account and reopening it under different terms. We are of the opinion that a change in title to a joint account is tantamount to a closing of the account and reopening it under different terms. However, perhaps the language in §6303 can be amended to reflect the concerns we have.

In connection with the foregoing, perhaps in addition the definition of the terms "payment" and "withdrawal" set forth in §6101 of the Probate Code, as set forth in the Recommendation, could be expanded to include changes in title to an account.

3. Payment as Discharge. Under §6045 of the Probate Code, as set forth under the Recommendation, payment made by a bank pursuant to various sections of the Probate Code discharges the financial institution from all claims for amounts so paid unless the bank receives written notice from any party that withdrawals in accordance with the terms of the account should not be permitted. We strongly recommend that this written notice be provided at the office where the deposit is carried. Many banks and other financial institutions do not have centralized files of deposits and depositors, and a substantial burden may be involved in

trying to locate the office involved. Please see §952 of the California Financial Code and §488.040 of the Code of Civil Procedure for similar provisions on notice to an officer or branch of a financial institution.

4. Setoff. Under §6406 of the Probate Code, as proposed under the Recommendation, the amount of an account subject to setoff by a financial institution is that proportion to which the debtor is, or was immediately before his or her death, beneficially entitled, and in the absence of proof of net contributions, is an equal share with all parties having present rights of withdrawal. Although §6406 purports to incorporate existing law with respect to setoff, many financial institutions take the position that with respect to joint accounts, the entire balance in the account may be subject to setoff if any of the joint account holders is a debtor. Section 6406 undercuts this right and, furthermore, raises the spectre of factual questions with the reference to the proof of net contributions.

5. Payment to Minor. Under §6408 of the Probate Code, as proposed under the Recommendation, if a minor is a party to a multiple-party account, payment may be made to the minor or to the minor's order by the financial institution, and payment so made is a valid release and discharge of the financial institution. Presumably, §6408 is applicable in cases where a minor is a joint tenant to an account.

However, given the legislative policy as set forth in §§3400 through 3413 of the current Probate Code, we have some concerns about paying over funds to a small child pursuant to §6408. It can be argued that §§850 and 853 of the California Financial Code merely address the issue of the vesting of title to minors' accounts, and that the proper manner in disposing of any bank account by a financial institution must be pursuant to §3400 through 3413 of the current Probate Code. Perhaps you can give this further thought in light of this comment.

6. Duty of Financial Institutions. Under §17 of the proposed legislation, at page 39 of the Recommendation, a financial institution has no duty to inform depositors holding accounts of the enactment of the proposal set forth therein, and no liability shall be imposed if the financial institution fails to inform such depositors of the enactment of the new proposal. The term "depositors" is too narrow, since it probably applies only to the original depositor and not to POD payees or beneficiaries under a trust account. Perhaps such additional parties may be included so that financial institutions will be relieved of liability as to such additional persons.

If you have any questions, please call.

Very truly yours,

Ted Terao Kitada

TTK/re

cc: Donald R. Meyer, Esq. George R. Cook, Esq. Ann Parode, Esq.
Elaine Lindenmayer, Esq.

EXHIBIT 4

Code of Civil Procedure § 700.140 (amended)

700.140. (a) To levy upon a deposit account, the levying officer shall personally serve a copy of the writ of execution and a notice of levy on the financial institution with which the deposit account is maintained.

(b) At the time of levy or promptly thereafter, the levying officer shall serve a copy of the writ of execution and a notice of levy on any third person in whose name the deposit account stands. Service shall be made personally or by mail.

(c) Subject to Section 700.160, during the time the execution lien is in effect, the financial institution shall not honor a check or other order for the payment of money drawn against, and shall not pay a withdrawal from, the deposit account that would reduce the deposit account to an amount less than the amount levied upon. For the purposes of this subdivision, in determining the amount of the deposit account, the financial institution shall not include the amount of items deposited to the credit of the deposit account that are in the process of being collected.

(d) During the time the execution lien is in effect, the financial institution is not liable to any person for any of the following:

(1) Performance of the duties of a garnishee under the levy.

(2) Nonpayment of a check or other order for the payment of money drawn or presented against the deposit account where such nonpayment is pursuant to the requirements of subdivision (c).

(3) Refusal to pay a withdrawal from the deposit account where such refusal is pursuant to the requirements of subdivision (c).

(e) When the amount levied upon pursuant to this section is paid to the levying officer, the execution lien on the deposit account levied upon terminates.

(f) For the purposes of this section and Section 700.160, neither of the following is a third person in whose name the deposit account stands:

(1) A person who is only a person named as the beneficiary of Totten trust account.

(2) A person who is only a payee designated in a pay-on-death provision in an account pursuant to Section 852.5, 7604.5, 11203.5, 14854.5, or 18318.5 of the Financial Code or other similar provision.

Code of Civil Procedure § 700.160 (NO CHANGE-INCLUDED FOR INFORMATION ONLY)

700.160. (a) The provisions of this section apply in addition to the provisions of Sections 700.140 and 700.150 if any of the following property is levied upon:

(1) A deposit account standing in the name of a third person or in the names of both the judgment debtor and a third person.

(2) Property in a safe deposit box standing in the name of a third person or in the names of both the judgment debtor and a third person.

(b) The judgment creditor shall provide, and the levying officer shall deliver to the financial institution at the time of levy, an undertaking given by a corporate surety authorized to execute the undertaking by Section 1056. The undertaking shall be for not less than twice the amount of the judgment or, if a lesser amount in a deposit account is sought to be levied upon, not less than twice the lesser amount. The undertaking shall indemnify any third person rightfully entitled to the property against actual damage by reason of the levy on the property and shall assure to the third person the return of the property, upon proof of the person's right thereto. The undertaking need not name the third person specifically but may refer to the third person generally in the same manner as in this subdivision. If the provisions of this subdivision are not satisfied, the levy is ineffective and the financial institution shall not comply with the requirements of this section or with the levy.

(c) Upon delivery of the undertaking to the financial institution, the financial institution shall immediately mail or deliver a notice of the delivery of the undertaking to the third person in whose name the deposit account or safe deposit box stands. If mailed, the notice shall be sent by registered or certified mail addressed to the person's last address known to the financial institution. The financial institution shall deliver the undertaking as directed by the third person.

(d) Notwithstanding Article 5 (commencing with Section 701.010), from the time of levy and the delivery of the undertaking to the financial institution until 15 days after the notice is mailed or delivered under subdivision (c) if no objection to the undertaking is made

or, if such objection is made, until the court determines that the undertaking is sufficient, the financial institution shall not do any of the following:

(1) Honor a check or other order for the payment of money drawn against, or pay a withdrawal from, the deposit account that would reduce the deposit account to less than the amount levied upon. For the purposes of this paragraph, in determining the amount of the deposit account, the financial institution shall not include the amount of items deposited to the credit of the deposit account that are in the process of being collected.

(2) Permit the removal of any of the contents of the safe deposit box except pursuant to the writ.

(e) The financial institution is not liable to any person for any of the following during the period prescribed in subdivision (d):

(1) Nonpayment of a check or other order for the payment of money drawn or presented against the deposit account where such nonpayment is pursuant to the requirements of subdivision (d).

(2) Refusal to pay a withdrawal from the deposit account where such refusal is pursuant to the requirements of subdivision (d).

(3) Refusal to permit access to the safe deposit box by the person in whose name it stands.

(4) Removal of any of the contents of the safe deposit box pursuant to the levy.

(f) An objection to the undertaking may be made by any person claiming to be rightfully entitled to the property levied upon. The objection shall be made in the manner provided by Chapter 7 (commencing with Section 720.710) of Division 4.

(g) Upon the expiration of the period prescribed in subdivision (d), the financial institution shall comply with the levy and Sections 700.140 and 700.150 apply.