

Memorandum 89-32

Subject: 1989 Legislative Program (Will Depositary Proposal)

Attached to this memorandum is a letter from the Assembly Judiciary Committee asking that the Commission include in one of its 1989 probate bills a State Bar Conference of Delegates proposal relating to will depositaries.

The staff has not had time to analyze the proposal carefully, nor has the Commission had a chance to review it, so it could not be adopted as a Commission recommendation. The Commission's bill would simply be a vehicle for carrying along an additional probate matter.

The Commission should be aware that the legislative climate is greatly altered this session. Most legislators are reluctant to carry bills. The bills they do agree to carry they want to get maximum mileage out of.

As this relates to the Commission's probate bills, this means that the legislators want to consolidate as many probate matters as possible into as few bills as possible. For example, the Commission originally had Assemblyman Harris introduce two separate urgency bills--one noncontroversial cleanup bill for last session's legislation (AB 156) and one more substantive bill on notice to creditors addressing due process problems (AB 155). Assemblyman Harris has decided to consolidate both these bills into one (AB 156), and to save the other bill for other purposes.

The same process will occur with the Commission's other nonurgency probate recommendations, which will all be consolidated in one bill (AB 158). This is the bill that would have the will depositary material added to it.

There is one other factor the Commission should be aware of. Assemblyman Harris has stepped down as chairman of the Assembly Judiciary Committee, and does not wish to be as involved with the Commission's legislation as he has been in the past. Members of the

Judiciary Committee have discussed the situation and plan to make the probate bills "committee bills". Assemblyman Harris would remain as a co-author but another committee member, Assemblyman Friedman, would take over as lead author.

While this seems like a reasonable way to do things, as a practical matter the Commission may have less control over its bills than it has had in the past. In fact while they are nominally the "Commission's bills", for practical purposes they are really the Committee's bills. In this sense, the request that the Commission incorporate the depositary proposal may be more in the nature of a courtesy notice.

Given this state of affairs, the staff recommends that the Commission agree to include in its probate bill the will depositary material without review and not as a Commission recommendation.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary



FEB 03 1989

RECEIVED

Phillip Isenberg

ASSEMBLYMAN, TENTH DISTRICT

ASSISTANT SPEAKER PRO TEM

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COMMITTEES:

HEALTH
JUDICIARY
RULES
WATER, PARKS & WILDLIFE
WAYS & MEANS

January 30, 1989

John DeMouilly
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

RE: Will Depository Legislative Proposal

Dear John:

Enclosed is a copy of a will depository proposal. Assemblyman Phil Isenberg, Chair of Assembly Judiciary Committee, and Assemblyman Terry Friedman have both recommended that this proposal be incorporated into one of the probate bills.

Perhaps the Commission can approve this proposal (or your staff's draft of how the proposal should read) for inclusion in one of the probate bills. Please let me know how you would like to proceed with this proposal.

Assemblyman Terry Friedman has agreed to be the lead author on AB 156 and AB 158. Assemblyman Harris will continue as a coauthor. We are anticipating that AB 156 will be set for February 8, 1989. We received the amendments from Legislative Counsel today and will place them across the desk. A copy is enclosed for your review.

Sincerely,

Deborah M. DeBow
Senior Counsel
Assembly Committee on Judiciary
(916) 445-4560

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encls.

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January 9, 1989

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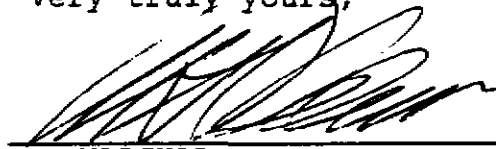
TO: Debra Debow
Assembly Judiciary Committee
State Capitol, Room 6005
P.O. Box 94249
Sacramento, CA 94249-0001

RE: Will Depository Legislation

ENCLOSED PLEASE FIND: copy of proposed resolution regarding
Deposit of Wills, Declarations of Trust, and Other Documents.

- [x] FOR YOUR INFORMATION
- [] PLEASE SIGN, DATE AND RETURN
- [] PLEASE TELEPHONE ME
- [] IN ACCORDANCE WITH YOUR REQUEST
- [] PLEASE COMMENT
- [] PLEASE HANDLE
- [] PLEASE ADVISE ME HOW TO REPLY
- [] FOR YOUR FILES
- [] WHICH IS SELF-EXPLANATORY
- []

Very truly yours,



MARSHAL A. OLDMAN

encls.

Deposit of Wills, Declarations of Trust, and Other Documents

RESOLVED that the conference of Delegates recommends that legislation be sponsored to add §§6360-6366 to the California Probate Code to read as follows:

§6360

(a) "Deposit" means the delivery of possession of a document by a depositor to a depository for safekeeping with or without payment.

(b) "Depositor" means a natural person who delivers possession of a document to a depository.

(c) "Depository" means a person (and the person's personal representatives, successors and assigns) who in the ordinary course of business regularly receives wills, declarations of trust, or other documents for the purpose of safekeeping.

(d) "Document" means a signed original of the depositor's will, declaration of trust, codicil, trust amendment, or other document modifying a will or trust; signed original power of attorney; signed original nomination of conservator; and all other signed original documents for which the depository issues a receipt which expressly provides that such receipt is being issued under this Article.

§6361

Except as otherwise provided in this Article, a depository who receives from a depositor a document for safekeeping is bound to return that document to the depositor personally. The depository may return the deposited document by personal delivery to the depositor at the depositor's residence or place of business, as may be most convenient for the depository.

§6362

The liability of a depository of a document is that of a depository for hire, with or without payment or other consideration, and such depository must use ordinary care for the preservation of the document deposited; provided, however, that in no case shall liability be imposed for the loss or destruction of a document if the depositor is notified of the loss or destruction and has a reasonable opportunity to replace the document. The depository shall hold the document in a safe, vault, safekeeping deposit box, or other secure place where it will be reasonably protected against loss or damage by fire, theft, vandalism, or accident.

§6363

A depositor of a document shall not be required to compensate the depository or pay the depository's expenses incurred in safekeeping or delivery of the document unless expressly required to do so in a written agreement signed by the depositor. No lien shall arise for the benefit of any depository in a document deposited with the depository even if provided for by agreement.

§6364

Except as otherwise provided by agreement between the depositor and depository, the deposit may be terminated as follows:

(a) By the depositor by demanding and receiving the document

52 from the depositary.

53 (b) By the duly appointed conservator of the person or estate of
54 the depositor by demanding and receiving the document from the
55 depositary pursuant to an order of court expressly authorizing
56 such demand. The depositary shall not have any duty to seek
57 information as to whether a conservatorship has been created for
58 a depositor.

59 (c) By the depositary by personally delivering the document to
60 the depositor with or without demand by the depositor and whether
61 or not the deposit was made for a specified time or not.

62 (d) By the depositary by mailing the document by registered
63 mail, with a return receipt requested, or certified mail, with a
64 return receipt requested, to the depositor, provided that
65 immediately prior to such mailing, the depositary has communi-
66 cated with and obtained written permission from the depositor to
67 send the document by registered mail with a return receipt
68 requested, or certified mail with a return receipt requested.

69 (e) Consistent with the provisions of §320, by the depositary
70 following the death of the depositor, by personally delivering to
71 the personal representative or successor personal representative
72 the will or codicil in which the representative is named and to
73 the trustees or successor trustees the declaration of trust or
74 trust amendment in which the trustee is named or, in the alter-
75 native, to the clerk of the superior court that then has juris-
76 isdiction of the estate of the deceased depositor or of the trust
77 created by or referenced by the document on deposit.

78
79 §6365

80 In all cases termination of the deposit shall, if possible, be by
81 delivery of the document personally to the depositor, by delivery
82 as otherwise previously authorized by the depositor or by
83 delivery as prescribed hereinabove. Absent such means and
84 specific information concerning the present address of the
85 depositor, or any conservatorship possibly created for the
86 depositor's benefit, the depositary shall write to the last-known
87 address of the depositor and wait at least 30 days for a
88 response. If the depositor is no longer at that address and if a
89 forwarding address is provided by the post office, the current
90 resident at such address, or any other person, the depositary
91 shall write to the depositor at the forwarding address and wait
92 at least 30 days for a response. The depositary shall write to
93 the depositor at each successive forwarding address and wait each
94 time at least 30 days for a response. If such efforts fail to
95 produce a person to whom the depositary may deliver the document
96 and terminate the deposit, the depositary may terminate the
97 deposit in any one of the following ways:

100 (a) By the depositary transferring the document to the
101 Secretary of State,

102 (1) If the depositary and all predecessor depositaries have
103 held the document for more than twenty (20) years without
104 any communication from the depositor, or

105 (2) If the depositor would at such time be at least one
106 hundred (100) years of age.

107 (3) If the depositor has abandoned a safe deposit box,
108 leaving a document therein.

109 (b) If the depositary is competent but has ceased to act as
110 a depositary, or if the depositary is incompetent or

111 deceased, by the depositary or his representative
112 transferring the document on deposit to another depositary
113 governed by this Article and by notifying the Secretary of
114 State of such transfer. A successor depositary shall not be
115 responsible for any acts of a prior depositary, or be liable
116 for failing to verify the completeness or correctness of
117 information or documents received from a prior depositary.

118
119 §6366

120 The Transfers described in this Article shall not constitute
121 or be deemed a waiver of any privilege or confidentiality
122 associated with the document and neither shall such trans-
123 fers constitute any breach of any privilege or confidentialia-
124 lity associated with the document. If the depositary is an
125 attorney or law firm, such transfers shall not constitute
126 any breach of the rules of professional conduct.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: San Fernando Valley Bar Association

STATEMENT OF REASONS

The general bailment law is inadequate to govern custodianship of wills and their disposition. Because of the highly confidential nature of wills, great care is required in their disposition. Present law provides guidance of their disposition under only the most limited circumstances.

Over a period of years circumstances between a testator and the custodian may change. Either party may move or die without the other being made aware of it. Although a testator may die testate, for lack of information as to the will's location his estate may be handled as an intestate matter. Loss of contact between a custodian and the testator does not justify the custodian's destruction of a will. Attorneys, serving as custodians, may retire from the practice of law and wish to know what procedure to follow in the disposition of wills. The proposed law provides a method of disposing of original wills.

Existing statutes relating to wills are very limited in their scope and do not address the foregoing problems, e.g. (1) If a conservatorship is created, the court may order the production of a will of the conservatee. §2586 Pr. Code.

(2) If the testator dies, the custodian must produce the will. §320 Pr. C. (3) If the testator has executed a will under the Uniform International Wills Act (§§6380 et seq. Pr. C.), information regarding the intended place of deposit is registered with the Secretary of State. An interested party may secure such information upon production of a death certificate. (4) If an attorney dies, resigns, becomes inactive or is disbarred, an interested person may seek issuance of an order to show cause why the court should not assume jurisdiction over the law practice of said attorney and arrange for the surrender of the client's papers, §§6180 et seq. B. & P. C. (5) Notwithstanding any other provision of law relating to the destruction of court records, the

county clerk may cause to be destroyed any will delivered to him pursuant to §320 of the Probate Code, if a period of eight years has elapsed since the delivery of the will. §69503 California Government Code.

If the proposed law were to be adopted, it may be assumed that the Secretary of State's office may seek a filing fee for each document placed in the custody of the Secretary of State's office. At present there is no fee for registering a will under the California Uniform International Will Act. Probate attorneys will probably be required by the courts to contact the Secretary of State's office to locate possibly a more recent will before filing a probate of (1) a will more than twenty years old, (2) a will of a decedent who died at the age of 100 or more and (3) a will made by someone known to have abandoned a safe deposit box. Other than the above, the proposed law will have no impact on existing law.

AUTHORS AND/OR PERMANENT CONTACTS Dickinson Thatcher, 14540 Haynes St., Suite 109, Van Nuys, CA 91411, (818)786-6500 and Michael R. Whalen, 555 S. Flower St., Los Angeles, CA 90071, (213)485-1234.

RESPONSIBLE DELEGATE: K. W. KAMPE, III