

Memorandum 89-72

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

At the last meeting, the Commission considered a proposal from the State Bar Conference of Delegates concerning disposition by attorneys and financial institutions of wills and other estate planning documents when the depositor cannot be found. The Commission thought the proposal to make the California Secretary of State the depository of last resort was not feasible because of its fiscal impact.

The Commission asked the staff to consider a more limited proposal to permit an attorney who intends to go out of practice to turn over estate planning documents to another depository. A staff draft to do this is attached.

The staff draft applies to attorneys, financial institutions, and others who receive estate planning documents for safekeeping. It provides a standard of care ("ordinary care") and rules for terminating a deposit. It permits an attorney who intends to retire, resign, or become inactive, and who does not have actual notice that the depositor has died, to transfer estate planning documents to another depository if the depositor fails to reclaim the document after reasonable notice. In keeping with the Commission's desire to have a more narrowly drawn statute, the authority to transfer documents to another depository applies only to attorneys. It does not apply to financial institutions, which ordinarily have perpetual existence. (A corporate buyout is covered, because "depository" includes a successor corporation. See proposed Section 703.)

The staff has some misgivings about allowing an attorney to transfer estate planning documents to another depository. It may be better to discourage or prohibit attorneys from accepting such documents in the first place. State Bar Team 4 has written that

attorneys should not retain original estate planning documents. Attorneys who do not retain original estate planning documents tend to reduce the risk of malpractice. Team 4 is uncertain whether legislation should be enacted, although Team 4 does suggest that appropriate rules of professional conduct be enacted.

Exhibit 3 to July 1989 Minutes.

On the other hand, many testators apparently believe that the safest place for the document is with the attorney who drafted it, and urge the attorney to keep it. If so, we may expect attorneys to continue to keep original estate planning documents, suggesting that we do need statutory authority for transfer of the documents if the attorney goes out of practice.

Respectfully submitted,

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Staff Draft

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

Prob. Code §§ 700-734 (added). Deposit of estate planning documents

SEC. 2. Part 14 (commencing with Section 700) is added to Division 2 of the Probate Code, to read:

PART 14. DEPOSIT OF ESTATE PLANNING DOCUMENTS

Chapter 1. Definitions

§ 700. Application of definitions

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

Comment. Section 700 is new.

§ 701. Deposit

701. "Deposit" means delivery of a document by a depositor to a depository, or authorization by a depositor for a depository to keep a document, for safekeeping.

Comment. Section 701 is new.

§ 702. Depository

702. (a) "Depository" means any of the following:

(1) An attorney who receives a document for safekeeping.

(2) A trust company that receives a document for safekeeping. For this purpose, a trust company does not "receive" a document when the document is placed by a customer in a safe deposit box rented to the customer by the trust company.

(3) A person who in the ordinary course of business regularly receives documents for the purpose of safekeeping.

(b) "Depository" includes a personal representative, successor, or transferee of a person described in subdivision (a).

Comment. Section 702 is new. Paragraph (3) of subdivision (a) is drawn from Civil Code Section 1858(b). Under paragraph (3), "person" includes a corporation. Section 56. See also Section 84 ("trust company" defined); Section 710 (attorney may accept document for deposit only on specific unsolicited request).

§ 703. Depositor

703. "Depositor" means a natural person who delivers the person's document to a depository.

Comment. Section 703 is new and is drawn from Civil Code Section 1858(a).

§ 704. Document

704. "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 for which the depository issues a receipt that expressly provides that the receipt is being issued under this part.

Comment. Section 704 is new. "Will" includes a codicil. Section 88.

Chapter 2. When Attorney May Accept Document for Deposit

§ 710. When attorney may accept document for deposit

710. (a) An attorney may accept a document for deposit from a depositor with whom the attorney has no family relationship only if the depositor has made a specific request, not solicited by the attorney, for the attorney to do so.

(b) With the approval of the Supreme Court, the Board of Governors of the State Bar may provide by rule for the sanction for violation of this section.

Comment. Section 710 is new, and is consistent with Rule 1-400(C) (solicitation) of the Rules of Professional Conduct of the State Bar of California. Subdivision (b) is drawn from Section 6076 of the Business and Professions Code.

Section 710 applies only to original documents, not to copies. See Section 704 ("document" defined).

Chapter 3. Duties and Liability of Depository

§ 720. Protecting document against loss or destruction

720. The depository 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 720 is new. Although Section 720 applies to depositaries who are holding documents on the operative date, a depositary is not liable for any action taken before the operative date that was proper at the time the action was taken. Section 3.

§ 721. Depositary's standard of care

721. (a) Subject to subdivision (b), a depositary shall use ordinary care for the preservation of the document, whether or not consideration is paid.

(b) The depositary is not liable for 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.

Comment. Section 721 is new. Under Section 721, a depositary must use ordinary care for the preservation of the document deposited, whether or not consideration is paid. This is a departure from Civil Code Sections 1846 and 1852, under which a gratuitous depositary need only use slight care for the preservation of the property deposited.

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

Although Section 721 applies to depositaries who are holding documents on the operative date, a depositary is not liable for any action taken before the operative date that was proper at the time the action was taken. Section 3.

§ 722. Successor depositary not liable for failure to verify document

722. A successor depositary is not liable for failure to verify the completeness or correctness of information or documents received from a predecessor depositary.

Comment. Section 722 is new.

§ 723. Payment of compensation and expenses of depositary

723. A depositor is not required to compensate the depositary or pay the depositary's expenses incurred in safekeeping or delivery of the document unless expressly required to do so in a written agreement signed by the depositor.

Comment. Section 723 is new.

§ 724. No lien on document

724. No lien arises for the benefit of a depositary in a document deposited with the depositary even if provided by agreement.

Comment. Section 724 is new, and is a departure from Civil Code Section 1856 (depositary's lien).

Chapter 4. Termination of Deposit

§ 730. Termination by depositor on demand

730. A depositor may terminate a deposit on demand, in which case the depositary shall deliver the document to the depositor.

Comment. Section 730 is new, and is consistent with Civil Code Section 1822, except that under Section 724 no lien is permitted against the document deposited. If the depositor has a conservator of the estate, the court may order the depositary to deliver the document to the court for examination. See Section 2586.

§ 731. Depositary may terminate deposit only as provided in this chapter

731. A depositary may terminate a deposit only as provided in this chapter.

Comment. Section 731 is new.

§ 732. Termination by depositary by delivery or as agreed

732. A depositary may terminate a deposit by personal delivery of the document to the depositor, or by the method agreed on by the depositor and depositary.

Comment. Section 732 is new.

§ 733. Termination by attorney transferring document to another depositary

733. (a) A deposit may be terminated as provided in this section if all of the following requirements are satisfied:

(1) The depositary is an attorney.

(2) The depositary does not have actual notice that the depositor has died.

(3) The depositary has given reasonable notice to the depositor to reclaim the document and the depositor has failed to do so within a reasonable time.

(b) If the depositary intends to retire, resign, or become inactive, the depositary may terminate a deposit by transferring the document to another depositary and giving notice to the depositor of the transfer.

(c) If the depositary has died, the depositary's partner or personal representative may terminate the deposit as provided in subdivision (b).

(d) Transfer of a document 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.

Comment. Section 733 is new. By permitting an attorney to transfer a document to another depositary, Section 733 departs from the common law of bailments under which a depositary ordinarily has no authority to transfer the property to someone else. See 8 Am. Jur.2d *Bailments* § 97 (1980).

§ 734. Termination by depositary after death of depositor

734. (a) Subject to subdivision (b), after the death of the depositor a depositary may terminate a deposit by personal delivery of the document to the depositor's personal representative, or, if the document is a trust, by personal delivery of the document either (1) to the clerk of the superior court in the proper county for commencement of a proceeding under Division 9 (commencing with Section 15000), or (2) to the trustee named in the document.

(b) If the document is a will and the depositary has actual notice of the death of the depositor, a depositary may terminate a deposit only as provided in Section 8200.

Comment. Section 734 is new. Subdivision (a) permits delivery of a trust document to the clerk of the superior court of the proper county for commencement of a proceeding under Division 9 (trust law). The proper county is specified in Section 17005. As used in subdivision (a), "personal representative" includes a successor personal representative (Section 58) and "trustee" includes a successor trustee (Section 84).

As used in subdivision (b), "will" includes a codicil. Section 88.