

Memorandum 89-100

Subject: Study L - Recommendation Proposing New Probate Code

At the meeting, the Commission must approve for printing the Recommendation Proposing New Probate Code. This Recommendation will consist of the following:

- (1) Letter of Transmittal (copy attached).
- (2) Acknowledgments (list of persons and organizations that attended meetings or provided comments on drafts or served as consultants). This list is now being prepared.
- (3) Preliminary Portion (pointing out changes new code would make in existing law) (copy attached). THIS PORTION LISTS THE CHANGES THAT WOULD BE MADE BY AB 759 (AS IT WILL BE AMENDED IN JANUARY 1990) IN EXISTING LAW. Some of the matters discussed in this portion concern matters that were included in Tentative Recommendations distributed to interested persons for review and comment. At the meeting, we will consider the comments sent to us concerning these matters (to be covered in separate memorandums). We will revise the preliminary portion to reflect the actions taken at the meeting on these matters.
- (4) The Comments to the provisions of the new Probate Code. We are now reproducing these and they will be sent to you as an attachment to Memorandum 89-102. The Comments will be printed as a part of the Recommendation Proposing New Probate Code. We do not plan to print the text of the new Probate Code in our Recommendation. As the recommendation points out, the recommended text of the new Probate Code is to be found in Assembly Bill 759 as that bill will be amended early in January 1990. The bill has already been amended once. The amendments we plan to make in January 1990 are attached to Memorandum 89-101. We will revise the amendments and the attached recommendation to reflect any actions taken by the Commission at the meeting.
- (5) The Comments for Sections of the Existing Probate Code that are not continued in the New Probate Code. These will be attached to Memorandum 89-102.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

jd969

10/30/89

STATE OF CALIFORNIA

California Law Revision Commission

RECOMMENDATION

proposing

NEW PROBATE CODE

December 1989

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

December 1, 1989

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

This recommendation proposes the enactment of a new Probate Code to replace the existing Probate Code. The new code will continue the sections of the existing Probate Code, without changing section numbers, but will make numerous technical, clarifying, conforming, and noncontroversial substantive revisions in the existing provisions.

Assembly Bill 759 was introduced at the 1989 legislative session by Assembly Member Friedman to effectuate this recommendation. The bill was amended in the Assembly May 30, 1989, and the Commission has prepared a second set of amendments to the bill to be made early in 1990. This recommendation explains the bill as it will exist after the second set of amendments is made.

This recommendation explains the significant revisions the new code makes in the existing Probate Code. The text of the new Probate Code is not set out in this publication; the text of the new code as recommended by the Commission is set out in Assembly Bill 759 as it will be amended early in 1990.

This publication contains a Comment to each section of the new Probate Code. The Comment gives the source of the section and indicates whether the section continues the existing code section without change. If a substantive change is made by the new code section, the Comment describes the change. The Comment may also explain the purpose of the section, its relation to other sections, and potential problems in its meaning or application. To a large extent, the Comments merely continue the substance of Comments to the existing Probate Code. The terminology used in the Comments is discussed in the Comment to Section 2 of the new code.

The Comments are written as if the new code were enacted since their primary purpose is to explain the new code to those who use it after it is in effect. The Comments are entitled to substantial weight in construing the new code. See, e.g., *Milligan v. City of Laguna Beach*, 34 Cal. 3d 829, 831-32, 670 P.2d 1121, 1122, 196 Cal. Rptr. 38, 39 (1983). Commission Comments are published by both Bancroft-Whitney and West Publishing Company in their editions of the annotated codes.

The Comments assume that the Commission-recommended legislation relating to the compensation of the probate estate attorney and personal representative will be enacted in 1990. That recommendation will be the subject of a separate bill to be acted upon by the Legislature in 1990. Assembly Bill 759, proposing the new code, will be

amended to conform to the separate legislation as enacted in 1990. The Comments also will be conformed to the separately enacted legislation. Accordingly, any policy issues concerning probate estate attorney fees will be presented by separate legislation, not by Assembly Bill 759.

The Commission also plans to submit separate bills to the 1990 legislative session proposing significant substantive revisions in probate law. These bills will be drafted so that they make revisions in the new Probate Code.

This recommendation is submitted pursuant to Resolution Chapter 37 of the Statutes of 1980.

The Commission devoted substantially all of its time and resources to the probate law study for a number of years. Persons and organizations that assisted in the study are noted in the Acknowledgments which follow. Some of these persons attended Commission meetings. Others commented on tentative drafts of various recommendations relating to probate law.

Respectfully submitted,

EDWIN K. MARZEC
Chairperson

ACKNOWLEDGMENTS

[The Acknowledgments are now being compiled.]

INTRODUCTION

In 1980, the Legislature directed the Law Revision Commission to make a study to determine whether "the California Probate Code should be revised, including but not limited to, whether California should adopt, in whole or in part, the Uniform Probate Code."¹ In response to this directive, the Commission undertook a systematic review of the entire Probate Code. The Commission has completed this review and has submitted recommendations for revision of each portion of the Probate Code.² As a result of these recommendations, the entire Probate Code has been revised except for the portion relating to compensation of the probate estate attorney and the personal representative.³ The recommended legislation on this remaining portion of the code will be acted upon by the Legislature in 1990.⁴

THE NEW PROBATE CODE

This recommendation proposes the enactment of a new Probate Code to replace the existing Probate Code.⁵ The new code will continue the

1. 1980 Cal. Stat. res. ch. 37.

2. The previously submitted Commission recommendations that remain relevant to each portion of the new Probate Code are listed in the Comment to that portion of the new code. In some cases, a previously submitted recommendation is relevant to a particular section and will be listed in the Comment to that section. For the Comments to the new code, see this publication, *infra*.

3. See Recommendations Relating to Probate Law (Hiring and Paying Attorneys, Advisors, and Others; Compensation of Personal Representative), 20 Cal. L. Revision Comm'n Reports 31 (1990).

4. See discussion, *infra*, under "Matters That Concern More Than One Division of the Code."

5. Assembly Bill 759 was introduced at the 1989 legislative session by Assembly Member Friedman to effectuate this recommendation. The bill was amended in the Assembly May 30, 1989, and the Commission has prepared a second set of amendments to the bill to be made early in 1990. This recommendation explains the bill as it will exist after the second set of amendments is made.

The Commission also plans to submit additional recommendations relating to probate law to deal with matters not previously studied or to deal with any problems disclosed by the experience under provisions enacted upon Commission recommendation.

sections of the existing code, without changing section numbers, but will omit obsolete material and make numerous technical, clarifying, conforming, and minor substantive revisions in the existing provisions.

Like the existing code, the new code is divided into 11 divisions. In the following discussion, consideration is first given to matters that concern more than one division of the code. Then follows a discussion of the significant revisions the new code would make in each division of the existing code. Minor and technical revisions are not noted here; for information concerning these revisions, reference should be made to the Comments set out in this publication.

Matters That Concern More Than One Division of the Code Compensation of Personal Representative and Estate Attorney

The new code does not continue the existing provisions relating to the compensation of the probate estate attorney and personal representative (Sections 900-911). Commission-recommended provisions on this matter will be presented for legislative consideration in 1990 in a bill separate from the bill proposing the enactment of the new code. The Comments set out in this publication are written on the assumption that those provisions will be enacted. However, the bill proposing enactment of the new code will be amended to conform to the compensation legislation actually enacted in 1990. The Comments set out in this publication also will be revised to conform to the compensation legislation enacted in 1990.⁶ Accordingly, any policy

6. The separate bill to effectuate the Commission's recommendations concerning compensation of the probate estate attorney and personal representative also contains conforming revisions of numerous sections scattered throughout the code. The bill proposing the new code includes these revisions. The bill and the Comments will be revised to conform to the substance of the attorney and personal representative compensation provisions as enacted.

issues concerning compensation will be presented by separate legislation, not by the bill proposing the enactment of the new code.

General Definitions Made Applicable to Entire Code

The new code makes the general definitions (Sections 20-88) apply to the entire code. Under the existing code, the general definitions do not apply to Division 4 (commencing with Section 1400) (guardianships and conservatorships).⁷

General Notice Provisions

The new code makes the general notice provisions (Sections 1200-1265) apply to the entire code unless otherwise provided.⁸ Under the existing code, the general provisions do not apply to Division 4 (commencing with Section 1400) (guardianships and conservatorships) or Division 9 (commencing with Section 15000) (Trust Law), except that some specifically listed provisions do have general application under the existing code.⁹ This revision permits the omission from the new code of a number of provisions in Divisions 4 and 9 of the existing code that duplicated general notice provisions.

Protection of Third Persons Acting in Good Faith

Various provisions of the existing code apply inconsistent standard to the protection of third persons who rely on ostensible authority or title in good faith and for valuable consideration. While a number of provisions broadly protect a third person who acts in good faith,¹⁰ other statutes are limited to a good faith "purchaser,"¹¹ or

7. See Prob. Code § 20.

8. See Section 1200 of the new code. See also Section 17100 (Trust Law) of the new code.

9. See Prob. Code § 1200.

10. Prob. Code §§ 2545 (guardianship and conservatorship sales), 8272 (revocation of probate), 18100-18102 (third persons dealing with trustee).

11. Prob. Code §§ 11750 (distribution of property), 18103 (effect on purchaser of omission of trust from grant of real property).

to a good faith "encumbrancer"¹² or "lessee,"¹³ or to a miscellaneous combination of persons acting in good faith and for value.¹⁴

There is no occasion to distinguish among the various persons protected under most of these statutes. Many of them are unduly narrow in their coverage, and the variances in wording may, by implication, cause them to be construed more narrowly still.¹⁵ The existing references to a "third person acting in good faith and for valuable consideration" are both better and more prevalent in the code than the other references, and the new code uses this standard throughout.¹⁶

Personal Liability of Fiduciary Who Signs Instrument or Contract

Section 18000 of the existing code provides that a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administration of the trust unless the trustee fails to reveal the trustee's representative capacity or identify the trust in the contract.¹⁷ The new code adds comparable

12. Prob. Code §§ 1875 (legal capacity of conservatee), 3074 (management or disposition of community property where spouse lacks legal capacity), 18104 (effect on real property transactions where beneficiary undisclosed).

13. Prob. Code § 13106.5.

14. Prob. Code §§ 13106.5 (affidavit procedure for collection or transfer of personal property of estate of small value), 13203 (affidavit procedure for real property of estate of small value).

15. It is not clear, for example, whether protection of an "encumbrancer" extends to a lessee. Civil Code Section 1114 defines "incumbrances" to include taxes, assessments, and all liens on real property. Cases have applied the term "encumbrance" to covenants, restrictions, reservations of right-of-way, easements, leases, and deeds of trust, among other interests. 1 A. Bowman, Ogden's Revised California Real Property Law §§ 3.4, 11.20 (1974).

16. See Sections 1875, 3074, 11750, 13106.5, 13203, 18103, 18104 of the new code.

17. This rule applies unless otherwise provided in the contract or in the Trust Law. See Prob. Code § 18000.

general provisions for personal representatives¹⁸ and guardians and conservators.¹⁹

Immunity of County Recorder

Section 2901(d)(2) of the existing code gives the county recorder immunity for recording a written certification of the public guardian, and Section 7603(d)(2) of the existing code gives a similar immunity in the case of a certification of the public administrator. The county recorder is not as a general principle subject to liability for recording any instrument authorized or required by law to be recorded. Rather, the opposite is true: the county recorder is liable for failing to record as required.²⁰ The new code omits the county recorder immunity provision from Sections 2901 and 7603. Not only is the provision unnecessary, but it may create an implication that the county recorder may be liable for recording another type of instrument absent an express provision for immunity.

Division 1. Preliminary Provisions and Definitions

The new code continues Division 1 of the existing code without substantive change. However, the general definitions are made applicable to the entire code. See discussion, *supra*.

Division 2. General Provisions

Distribution Among Heirs or Beneficiaries

The new code expands the scope of the provisions relating to distribution among heirs or beneficiaries (Sections 240-247) to include not only distribution under wills and trusts but also distribution under other instruments. This expansion to cover "other instruments" makes clear, for example, that the distribution provisions apply to an instrument exercising a power of appointment. The addition gives the

18. See Section 9606 of the new code. The new provision generalizes a provision found in Section 9805(b) of the existing code.

19. See Section 2110 of the new code. The new provision generalizes a provision found in Section 2551(d) of the existing code.

20. See, e.g., Gov't Code §§ 27201, 27203.

person drafting the "other instrument" the option of selecting among the distribution systems available under Sections 240-247.

Effect of Felonious and Intentional Killing

Under existing law, the person who feloniously and intentionally kills the testator and who is nominated in the testator's will as executor, trustee, or guardian is treated as if he or she had predeceased the testator.²¹ The new code extends this provision to include nomination of a conservator.

Division 3. General Provisions of a Procedural Nature

The new code makes clear that the court may, for good cause, make an order dispensing with notice to a person who has requested special notice in a proceeding for the administration of a decedent's estate.²²

Division 4. Guardianship, Conservatorship, and Other Protective Proceedings

Powers of Nominated Guardian

Unless the court for good cause determines otherwise, a guardian nominated by will is granted the powers specified in the will.²³ The new code extends this provision to cover any instrument by which a nomination may be made.

Power of Attorney for Health Care

A provision is added in the new code to make clear that the provisions of the code relating to health care of a conservatee are subject to a valid and effective power of attorney for health care.²⁴

Investments Authorized Without Need to Obtain Court Order

The new code expands the types of investments that may be made without court order to include direct obligations of the State of

21. Prob. Code § 250(b)(3).

22. See Section 1220(b) of the new code.

23. See Prob. Code § 2108.

24. See Section 2356(e)(2) of the new code. A comparable provision is added to Section 3211 of the new code, a section that relates to authorization of medical treatment for an adult without a conservator.

California, maturing not later than five years from the date of making the investment.²⁵

Disposition of Small Estate upon Death of Ward or Conservatee

If a ward or conservatee dies while the guardianship or conservatorship proceeding is pending, the guardian or conservator may pay debts and expenses and, if the estate value does not exceed \$10,000, may petition for an order authorizing the guardian or conservator to liquidate the estate.²⁶ If the order is granted, the guardian or conservator, after paying expenses, may distribute the estate to those entitled to it without the need to probate the estate.²⁷

Probate Code Section 13100, a recently enacted general provision, authorizes collection or transfer of a decedent's estate without the need for probate if the estate value does not exceed \$60,000.²⁸ In

25. See Section 2574(a)(1) of the new code. Section 2574 is consistent with the scheme of Section 2544 which permits sale of listed securities and certain over-the-counter securities without court authorization, but departs from comparable provisions relating to probate estates which require a court order for sale of securities (Section 10200).

26. Prob. Code § 2631. The guardian or conservator may petition for the order even though there is a will of the decedent in existence if the will does not appoint an executor or if the named executor refuses to act. If the order is made, the guardian or conservator may withdraw money on deposit in financial institutions, collect insurance and other property of the ward or conservatee, and sell personal property of the ward or conservatee, and the person having possession or control must pay or deliver the money or property to the guardian or conservator. Id.

27. Prob. Code § 2631. The property remaining after payment of expenses may be transferred, without the need for probate, to the successors of the decedent pursuant to the general provisions permitting disposition without administration (Probate Code Sections 13000-13660).

28. Section 13100 is the limit for use of the affidavit procedure for collection or transfer of personal property. For a similar limitation, see Prob. Code § 13154 (court order determining succession to real property). See also Prob. Code § 13050 (property excluded in determining property or estate of decedent or its value).

the provision relating to the disposition of the estate assets by the guardian or conservator upon the death of the ward or conservatee, the new code substitutes a reference to Section 13100 for the \$10,000 limit found in the existing code.²⁹

Conforming the Provisions Applicable to Guardians and Conservators to The Provisions Applicable to Decedents' Estates

The new code makes a number of revisions to conform the provisions applicable to guardians and conservators to those applicable to decedents' estates. These conforming revisions include the following:

(1) Provisions are added to the new code to specify the measure of the liability for damages and interest of a guardian or conservator who breaches a fiduciary duty.³⁰

(2) The new code increases the dollar amount of priority wage claims, making a total of \$2,000 that is given priority.³¹

29. See Section 2631 of the new code. A similar revision was made in 1987 in the provision authorizing the public administrator, with approval of the court, to dispose of the estate of a decedent without administration. See former Prob. Code § 1143 (as amended by Cal. Stat. 1987 ch. 53 § 1) (a reference to Section 13100 was substituted in place of a \$20,000, with certain exclusions, limit). Former Prob. Code § 1143 was repealed by 1988 Cal. Stat. ch. 1199 § 57.5, the section being superseded by existing Prob. Code §§ 7660 et seq..

30. See Sections 2401.3, 2401.5, and 2401.7 of the new code. Section 2401.3 is comparable to Sections 9601 (decedents' estates) and 16440 (trusts). Section 2401.5 is comparable to Sections 9602 (decedents' estates) and 16441 (trusts). Section 2401.7 is comparable to Sections 9603 (decedents' estates) and 16442 (trusts).

31. See Section 2431 of the new code. This increase from a total of \$1,200 to a total of \$2,000 conforms the amount of the priority wage claims for work or services rendered for a ward or conservatee (Section 2431) to the amount given priority as a wage claim for decedents' estates. See Sections 11402, 11420, 11421 (decedents' estates). The balance of the wage claim not given priority is payable with other debts. See Section 2430(a)(1).

(3) The new code adds a provision that permits a trust company to maintain a noninterest bearing checking account in a department of the corporation or association of which the trust company is a party.³²

(4) The new code limits the authority of a guardian or conservator to accept a deed to property which is subject to a mortgage or deed of trust in lieu of foreclosure of the mortgage or sale under the deed of trust. The new code permits the court to authorize the transaction only if the advantage to the estate of accepting the deed is shown by clear and convincing evidence.³³

(5) The new code adds a requirement that court approval must be obtained for (i) a compromise or settlement of a claim by the ward or conservatee against the attorney for the guardian or conservator or (ii) an extension, renewal, or modification of the terms of a debt or similar obligation of the attorney for the guardian or conservator owing to or running in favor of the ward or conservatee of the estate.³⁴

(6) The new code makes clear that, unless another person is appointed for that purpose, the guardian or conservator may defend an action or proceeding brought against the guardian or conservator.³⁵

(7) The new code adds to the section relating to borrowing money to refinance or improve or repair property a new provision that no

32. See Section 2453.5(b) of the new code, which is comparable to Section 9705(b) (decedents' estates). Cf. Section 16225(e) (trusts).

33. See Section 2464(c) of the new code, which is comparable to Section 9850(c) (decedents' estates).

34. See Section 2503 of the new code. The extension to cover transactions with the attorney for the guardian or conservator makes the coverage of Section 2503 consistent with the coverage of Section 9834 (decedents' estates).

35. See Section 2462(b) of the new code. This revision makes Section 2462 consistent with Section 9820, the comparable provision relating to decedents' estates.

omission, error, or irregularity in the proceedings shall impair or invalidate the proceedings.³⁶

(8) The existing code provision relating to examination concerning assets of an estate has been restated in the new code using language drawn from the comparable provision relating to decedents' estates.³⁷

(9) The new code restates the existing code provision relating to the account of a dead, incapacitated, or absconding guardian or conservator using language drawn from the comparable existing code provision relating to personal representatives.³⁸

(10) The new code adds a provision that a guardian or conservator may be removed from office if found in contempt for disobeying an order of the court.³⁹

(11) The new code expands the types of securities that may be sold without court order to include over-the-counter national market system securities.⁴⁰

(12) The new code adds a provision for compelling an account by a guardian or conservator.⁴¹

36. See Section 2552(c) of the new code. This addition is drawn from subdivision (c) of Section 9806, the comparable provision relating to decedents' estates.

37. See Section 2616 of the new code, which draws on the language used in Section 8870 (decedents' estates).

38. See Section 2632 of the new code, which uses language drawn from Section 10953 (decedents' estates).

39. See Section 2655 of the new code, a provision drawn from Section 8505 (decedents' estates).

40. See Section 2544(a)(2) of the new code. In addition, Section 2544 of the new code does not continue the requirement that securities be sold on an established stock or bond exchange "in the United States" in order to avoid the need for a court order authorizing the sale. Compare Section 10200(e)(2),(3) (decedents' estates).

41. See Section 2629 of the new code, which is drawn from Sections 11050-11052 (decedents' estates).

(13) The new code permits a request for special notice of any petition filed in the guardianship or conservatorship proceeding.⁴² This replaces the detailed list in the existing code of the various petitions of which special notice may be requested.⁴³

(14) The new code restates the procedure for complying with a request for special notice.⁴⁴ The new code makes clear that the court may, for good cause, make an order dispensing with notice to a person who has requested special notice.⁴⁵

Transitional Provisions for Guardianship-Conservatorship Law of 1981

The Guardianship-Conservatorship Law became operative on January 1, 1981.⁴⁶ Because the new law made significant substantive and procedural changes, elaborate transitional provisions were also provided.⁴⁷ Most of the transitional provisions no longer serve a function and are not continued in the new code. The general transitional provisions for the entire Probate Code cover the transitional problems created by the enactment of the new code.⁴⁸

Notice in Proceeding for Particular Community Property Transaction

The existing code includes a procedure that permits a competent spouse to obtain court authorization of a proposed community property transaction.⁴⁹ Notice of the time and place of hearing and a copy of the petition must be sent to adult relatives within the second degree

42. See Section 2700 of the new code. This revision makes Section 2700 consistent with Section 1250 (decedents' estates).

43. See Prob. Code § 2700.

44. See Section 2702 of the new code, which uses language drawn from Section 1252, the comparable provision relating to decedents' estates.

45. See Section 1460(e) of the new code, which is comparable to Section 1220(b) of the new code (general notice provision).

46. 1979 Cal. Stat. ch. 726, § 4.

47. Prob. Code §§ 1480-1491.

48. See Prob. Code §§ 2, 3.

49. Prob. Code §§ 3100-3154.

of the spouse who lacks legal capacity.⁵⁰ The petition must set forth the terms and conditions of the proposed transaction and a description and estimated value of the property.⁵¹

The new code eliminates the requirement that a copy of the petition be sent with the notice of hearing.⁵² This is consistent with the general practice in probate proceedings not to serve a copy of the petition with the notice of hearing on the petition.⁵³ Not sending a copy of the petition to all of the adult relatives within the second degree preserves the privacy of the family.⁵⁴ The new code continues the existing requirement that notice be given of the time and place of hearing, including a description of the general nature of the matter to be heard.⁵⁵ A family member who wants the details of the transaction may refer to the petition in the court file.⁵⁶

50. Prob. Code §§ 3121, 3131.

51. Prob. Code § 3121.

52. See Section 3131 of the new code.

53. Prob. Code § 1220. A requirement that a copy of the petition be served with the notice of hearing in case of a petition by a surviving spouse for a court order determining or confirming community property was eliminated by legislation enacted in 1986. See Prob. Code § 13655 (added by 1986 Cal. Stat. ch. 783, § 24), superseding former Prob. Code § 653 (repealed by 1986 Cal. Stat. ch. 783, § 9).

54. The competent spouse often objects to being required to send a copy of the petition to his or her in-laws, thus divulging the details of family finances and property. See letter from Catherine L. Hughes, Legal Center for the Elderly and Disabled (Sacramento), to John H. DeMouilly (February 1, 1989) on file in office of California Law Revision Commission.

55. See Prob. Code § 1211.

56. See Notice of Hearing (Probate) Form Approved by the Judicial Council of California DE-120 (Rev. July 1, 1989). This form includes the following statement: "You may refer to the filed documents for further particulars. (All of the case documents filed with the court are available for examination in the case file kept by the court.) [Emphasis in original]."

Division 5. ~~Nonprobate~~ Transfers

Section 160 (nonprobate transfer provisions in written instruments) of the existing code is renumbered as Section 5000 of the new code and is continued in Division 5 of the new code with some clarifying, nonsubstantive revisions.

Division 6. Wills and Intestate Succession

Petition to Set Apart Probate Homestead

The new code adds a requirement that notice of the hearing on a petition to select and set apart a probate homestead be given to each known heir or devisee whose interest in the estate would be affected by the petition.⁵⁷

California Statutory Will

The new code adds to Sections 6243, 6245, and 6246 language that provides for the distribution of the residuary estate according to the laws relating to intestate succession "of property not acquired from a predeceased spouse."⁵⁸

Class Gift to "Heirs," "Next of Kin," "Relatives," or the Like

The new code adds language to Section 6151 that a class gift described in that section is to take effect according to the California statutes of intestate succession "of property not acquired from a predeceased spouse." This excludes the application of the in-law inheritance statute (Section 6402.5) to a devise covered by Section 6151.

57. See Section 6525 of the new code.

58. This addition restores the substance of the language found in the provisions when they were originally enacted in 1982. Sections 6243, 6245, and 6246 were originally enacted as Probate Code Sections 56.10, 56.12, and 56.13 (enacted by 1982 Cal. Stat. ch. 1401, § 1; repealed by 1983 Cal. Stat. ch. 842). The restored language was deleted as a conforming revision to a Commission recommendation proposing the repeal of another provision (Section 6402.5) that wasn't enacted. See Tentative Recommendation Relating to Wills and Intestate Succession, 16 Cal. L. Revision Comm'n Reports 2301, 2335-38 (1982). To preserve the prior law, the new code restores the deleted language in the sections carried over into the new code.

Parent-Child Relationship in Intestate Succession

Sections 6408 and 6408.5 of the existing code specify when an adopted person inherits from or through the person's natural parents, and vice versa. These sections are complicated and their interrelationship is somewhat confusing.⁵⁹ The new code consolidates the two sections into one longer section, without changing the substance of the law. This will make the law clearer and easier to use.

Division 7. Administration of Estates of Decedents

Statement of Duties and Liabilities of Personal Representative

The new code makes two revisions in the requirement of the existing code that the personal representative (other than a trust company) file an acknowledgment of receipt of a statement of the duties and liabilities of the office:⁶⁰

(1) The new code exempts the public administrator from the requirement of filing an acknowledgment of receipt of the statement of duties and liabilities. Trust companies are already exempted from this requirement because of their expertise as personal representatives. Public administrators have similar expertise, and to require them to file the acknowledgment of receipt of the statement merely creates unnecessary paperwork.

(2) The new code omits the statutory statement of the content of the statement because the statutory statement has been superseded by a form adopted by the Judicial Council.⁶¹

59. Section 6408 appears to be a complete statement of the law, while Section 6408.5 modifies the application of Section 6408 by a "notwithstanding" clause.

60. See Section 8404 of the new code.

61. See Duties and Liabilities of Personal Representative Form Approved by the Judicial Council of California DE-147 (New July 1, 1989).

Waiver of Bond for Special Administrator

The new code adds a provision that permits all the beneficiaries to waive the bond of a special administrator.⁶²

Claim Period

The new code adds a provision that makes clear that a reference in another statute to the time for filing claims means a time that expires four months after the date letters are first issued to a general personal representative.⁶³

Proceeding for Conveyance or Transfer of Property Claimed to Belong to Decedent or Another Person

The new code adds a provision that the court cannot shorten the 30-day notice of hearing on a petition in a proceeding for conveyance or transfer of property claimed to belong to the decedent or another person.⁶⁴

Cotenant's Consent to Sale or Partition

The new code adds a provision to cover the situation where property in the estate to be sold is an undivided interest in a cotenancy. The new provision permits cotenants to file in the estate proceeding written consent to have their interests sold in the estate sale.⁶⁵

62. See Section 8543(b) of the new code. This addition conforms Section 8543 to Section 8481 (waiver of bond of personal representative). Notwithstanding waiver of bond in the will or by all the beneficiaries, the court, on petition of an interested person or on its own motion, may for good cause require that a bond be given, either before or after issuance of letters. See Section 8481(b). The new code makes a conforming revision in Section 8545(b).

63. See Section 9100(b) of the new code.

64. See Section 9861(c) of the new code.

65. See Section 10006 of the new code. The new provision is designed to facilitate estate sales of the decedent's interest in a tenancy in common. The provision is consistent with existing practice. See 1 California Decedent Estate Practice § 6.19 (Cal. Cont. Ed. Bar rev. ed. Feb. 1989) (probate court may by stipulation consider any matter in connection with and in aid of proceeding). Subdivision (b) of Section 2543 of the new code will make the new provision apply to sales by guardians or conservators.

Broker's Commission on Sale of Estate Property

The new code adds a provision to deal with the situation where the personal representative makes an exclusive listing contract with a broker (Broker A) to sell estate property, but the contract provides that no commission is payable to Broker A if sale is confirmed to a particular purchaser (or purchasers) named in the contract.⁶⁶ Guidance is needed in this not uncommon situation so that the parties to sales of estate property can plan their conduct rationally and disputes that may arise concerning entitlement to compensation may be resolved.

Where a sale is made to a bidder named in the contract between the personal representative and the exclusive listing broker, the new code provides that the commissions due any brokers involved are to be computed under the normal rules,⁶⁷ except that the commission that would be payable to the broker holding the contract is not paid. Thus, the estate gets the benefit of the provision excluding compensation to the listing broker where a sale is made to the purchaser named in the contract.⁶⁸

Under the new code, if the sale is made to the person named in the contract (Bidder X), the rules governing situations where no broker has an exclusive listing contract are applicable. Consequently, the broker with the limited exclusive listing contract (Broker A) is not entitled to any commission, and the commissions of any other brokers involved in the sale are determined as if Broker A were not involved in the sale. If the sale is not made to Bidder X, the rules governing situations where a broker has an exclusive listing contract are applicable. Consequently, the limitation in the exclusive listing contract is ignored and the normal rules applicable where a broker has an exclusive listing contract are used to determine the compensation of Broker A and any other brokers involved in the sale.

66. See Section 10162.6 of the new code.

67. See Prob. Code §§ 10160-10167.

68. The application of this rule in a variety of situations to which it would apply is illustrated in the examples set out in the Comment to proposed Probate Code Section 10162.6.

Appraisal of Property Subject to Option

Section 9962 of the existing code requires that an option to sell real property in the estate must be for at least 90 percent of the appraised value of the property, based on a probate referee's appraisal. The section fails to recognize that appraisal by a probate referee may have been waived under Section 8903 and the property appraised by another person. This situation is recognized in Section 10309(c), the general provision requiring estate sales to be at 90 percent of appraised value. The new code conforms Section 9962 to Section 10309(c).

Statutory Form For Waiver of Notice of Proposed Action

The new code omits the statutory form for waiver of notice of proposed action.⁶⁹ Instead, the new code requires use of the Judicial Council Statutory Waiver of Notice of Proposed Action Form.⁷⁰

Informal Distribution

Section 12250 of the existing code provides for discharge of the personal representative after compliance with the terms of the order for final distribution. While the section does not preclude discharge where distribution is made before entry of an order for distribution, it does not expressly recognize this practice.⁷¹ The new code adds a provision to Section 12250 to recognize the practice of making informal distribution.

Division 8. Disposition of Estate Without Administration

Authority of Trustee or Attorney-in-Fact

The new code⁷² makes clear that, for the purpose of the disposition without administration provisions:

69. Prob. Code § 10600.

70. See Section 10583(b) of the new code.

71. By way of contrast, the provision governing payment of debts states that the personal representative is not required to pay a debt until the court has ordered payment, but that "[n]othing in this section precludes settlement of an account of a personal representative for payment of a debt made without prior court authorization." Prob. Code § 11422(d).

72. See Section 13051 of the new code.

(1) A trustee may act without court approval, even though the trust is subject to the continuing jurisdiction of the court.

(2) An attorney in fact authorized under a durable power of attorney may act on behalf of the beneficiary giving the power of attorney.

Affidavit Procedure for Real Property of Small Value

Section 13205 provides a statute of limitations for an action by a person having a superior right where the affidavit procedure for real property of small value has been used.⁷³ The new code conforms the statute of limitations under this section to the statute of limitations under subdivision (c) of Section 13110 (affidavit procedure for collection or transfer of personal property of small estate) and subdivision (f) of Section 13206 (affidavit procedure for real property of small value).⁷⁴

Restitution if Estate Proceeding Commenced

The new code adds a provision to make the rule clear in the situation where (1) property has been delivered or transferred to a person pursuant to the disposition without administration provisions, (2) the person encumbered the property after it was delivered or transferred to the person, and (3) the person is required to restore property delivered or transferred to the estate after an estate proceeding has been commenced. In this situation, the new code

73. Section 13205 of the existing code provides:

"(c) An action to impose liability under this section is forever barred five years after the certified copy of the affidavit is issued under Section 13202. This five-year period allowed for commencing the action is tolled during the minority of the person having the superior right, but is not tolled for any other reason."

74. The new statute of limitations under Section 13205 is:

"(c) An action to impose liability under this section is forever barred three years after the certified copy of the affidavit is issued under Section 13202 or three years after the discovery of the fraud, whichever is later. The three-year period specified in this subdivision is not tolled for any reason."

provides that the person is liable for the amount necessary to satisfy the balance of the encumbrance made after the property was delivered or transferred to the person as of the date the property is restored to the estate.⁷⁵

Division 9. Trust Law

The new code continues the existing code provision relating to holding securities in the name of a nominee but, for consistency with Section 9736 (decedent's estate management), omits the reference to the liability of the trustee for an act of the nominee.⁷⁶ This matter is governed by general provisions on liability of a trustee.⁷⁷

Division 10. Proration of Taxes

The new code continues this division of the existing code without substantive change.

Division 11. Construction of Wills, Trusts, and Other Instruments

The new code adds a provision specifying the manner of giving notice of the hearing on an application for a determination whether a particular motion, petition, or other act by the beneficiary would be a contest within the terms of a no contest clause.⁷⁸

75. See Sections 13111(a)(1) and 13206(a)(1) of the new code. This amount is in addition to the property and the net income the person received from the property.

76. See Section 16238 of the new code.

77. See, e.g., Prob. Code § 16401.

78. See Section 21305 of the new code.