

Memorandum 91-43

Subject: 1991 Legislative Program

STATUS OF BILLS

Attached to this memorandum is a status report on the Commission's 1991 legislative program. Despite our difficulty in finding authors for our proposals this session, we have nonetheless managed to include 15 recommendations in 5 bills. Three of the bills have been enacted, one is awaiting action on the floor of the second house, and one is ready for hearing by the fiscal committee in the second house.

COMMISSION REPORTS ON BILLS

Also attached to this memorandum is a staff draft of the Commission's report on each of the bills, containing new and revised comments to reflect amendments made during the legislative session. We plan to print the Commission reports in our annual report for the year, and will send copies to the law publishers for inclusion in their annotated codes.

AMENDMENTS TO SENATE BILL 271 (KOPP)--OMNIBUS PROBATE BILL

The Commission should review the status of the omnibus probate bill--Senate Bill 271--authored by Senator Kopp, which is pending in the fiscal committee in the Assembly. Problems have arisen concerning the recommendations on (i) access to the decedent's safe deposit box and (ii) motor vehicle transfer on death registration.

Access to Decedent's Safe Deposit Box

Because of possible opposition from the California Bankers Association, Senator Kopp agreed to amend the bill as follows to satisfy the banks:

331. (a) This section applies only to a safe deposit box in a financial institution held by the decedent in the decedent's sole name, or held by the decedent and others where all are deceased. Nothing in this section affects the rights of a surviving coholder.

(b) A person who has a key to the safe deposit box may, before letters have been issued, obtain access to the safe deposit box only for the purpose specified in this section by providing the financial institution with both of the following:

(1) Proof of the decedent's death. Proof shall be provided by a certified copy of the decedent's death certificate or by a written statement of death from the coroner, treating physician, or hospital or institution where the decedent died.

(2) Reasonable proof of the identity of the person seeking access. Reasonable proof of identity is provided for the purpose of this paragraph if the requirements of Section 13104 are satisfied.

(c) The financial institution has no duty to inquire into the truth of any statement, declaration, certificate, affidavit, or document offered as proof of the decedent's death or proof of identity of the person seeking access.

(d) When the person seeking access has satisfied the requirements of subdivision (b), the financial institution shall do all of the following:

(1) Keep a record of the identity of the person.

(2) Permit the person to open the safe deposit box under the supervision of an officer or employee of the financial institution, and to make an inventory of its contents.

(3) Make a photocopy of all wills and trust instruments removed from the safe deposit box, and keep the photocopy on file ~~for a period of five years~~ in the safe deposit box until the contents of the box are removed by the personal representative of the estate or other legally authorized person. The financial institution may charge the person given access a reasonable fee for photocopying.

(4) Permit the person given access to remove instructions for the disposition of the decedent's remains, and, after a photocopy is made, to remove the wills and trust instruments.

(e) The person given access shall deliver all wills found in the safe deposit box to the clerk of the superior court and mail or deliver a copy to the person named in the will as executor or beneficiary as provided in Section 8200.

(f) Except as provided in subdivision (d), the person given access shall not remove any of the contents of the decedent's safe deposit box.

Senator Kopp made this amendment with the understanding that, if it is not acceptable to the Commission, he will delete Section 331 from the bill. This amendment is acceptable to the staff. It satisfies the record-keeping concerns of the banks, ensures that a copy of any estate planning document removed from the safe deposit box remains available, and offers no significantly greater opportunity for secret destruction of the document than exists under present law.

TOD Beneficiary Designation for Vehicles and Certain Other State-Registered Property

Senate Bill 271 also was amended to deal with concerns of the California Trial Lawyers Association, Department of Motor Vehicles, and Department of Housing and Community Development, and to remove their opposition to the bill. These amendments were the following:

(1) Language in the bill had provided that a surviving TOD beneficiary would incur no vicarious liability as owner until record ownership is transferred to the beneficiary. This language was deleted. It originally had been requested by the State Bar and Los Angeles County Bar probate sections. The language codified case law. See *Bunch v. Kin*, 2 Cal. App. 2d 81, 85, 37 P.2d 744 (1934). The deletion does not change the law, and was politically necessary in light of the combined opposition of the trial lawyers, DMV, and HCD.

(2) The authority of DMV and HCD to charge a fee "not to exceed" a specified amount was revised to provide a flat fee of \$10 for DMV and \$25 for HCD. The difference in amount is attributable to the difference in the state of computerization of the two departments.

(3) The operative date of the provisions that apply to the Department of Housing and Community Development (manufactured homes, mobilehomes, commercial coaches, truck campers, and floating homes) was delayed an additional year to January 1, 1994. The operative date of the provisions that apply to the Department of Motor Vehicles (vehicles and undocumented vessels) remains January 1, 1993. This difference likewise is computer-related.

Respectfully submitted,

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1991 LEGISLATIVE PROGRAM
CALIFORNIA LAW REVISION COMMISSION

ENACTED

ASSEMBLY BILL 1577 (ASSEMBLY MEMBER SHER) - Uniform Statutory Rule Against Perpetuities; Application of Marketable Title Statute to Executory Interests
1991 Cal. Stats. Ch. 156 (July 22).

SENATE BILL 256 (SENATOR BEVERLY) - Commercial Real Property Leases; Remedies for Breach of Assignment or Sublease Covenant; Use Restrictions
1991 Cal. Stats. Ch. 67 (June 20).

SENATE BILL 896 (SENATOR MELLO) - Urgency Probate Bill
1991 Cal. Stats. Ch. 82 (June 30, operative July 1, 1991).

SENATE CONCURRENT RESOLUTION 4 (SENATOR LOCKYER) - Continues Authority of California Law Revision Commission to Study Topics Previously Authorized for Study
1991 Cal. Res. Ch. 33 (May 10).

PASSED POLICY COMMITTEE IN SECOND HOUSE

ASSEMBLY BILL 793 (ASSEMBLY MEMBER POLANCO) - Elimination of 7-Year Limit for Durable Power of Attorney for Health Care
Approved by Senate Judiciary Committee on July 2.

SENATE BILL 271 (SENATOR KOPP) - Omnibus Probate Bill
This bill includes several State Bar probate proposals, as well as the following Law Revision Commission proposals:

TOD-Beneficiary Designation for Vehicles and Certain Other
State-Registered Property
Debts That Are Contingent, Disputed, or Not Due
Remedies of Creditor Where PR Fails to Give Notice
Repeal of Civil Code Section 704 (U. S. Bonds)
Disposition of Small Estate Without Probate
Gifts in View of Impending Death
Access to Decedent's Safe Deposit Box
Technical and Minor Substantive Revisions
Right of Surviving Spouse to Dispose of Community Property

If any of the general probate recommendations proves to be controversial and cannot be simply resolved, it will be dropped from the bill so as not to jeopardize enactment of the rest of the bill. Approved by Assembly Judiciary Committee on July 17, with amendments to address problems of banks, DMV, and Dept. Housing & Community Development.

LEFT OVER FOR NEXT SESSION

(1) Litigation Involving Decedents

This bill would have gone into the omnibus probate bill, but Legislative Counsel determined that it had too many diverse subjects to fit with the rest of the bill.

(2) Compensation in Guardianship and Conservatorship Proceedings

This bill would have gone into the omnibus probate bill, but Legislative Counsel determined that it went beyond the scope of the omnibus bill, which deals with disposition of property at death.

(3) Form for Certificate of Acknowledgment of Power of Attorney

This was approved too late to incorporate in other bills this session. It relates to the Civil Code Section 2476 revision of the certificate of acknowledgment of a notary public in a statutory form power of attorney; it will be incorporated in comprehensive legislation on powers of attorney.

(4) Powers of Fiduciaries

Recognition of Trustee's Powers

Recognition of Agent's Authority Under Statutory Form Power of Attorney

We are working to eliminate banking and title insurance industry opposition.

(5) Repeal of In-Law Inheritance

This proposal is now supported by the Estate Planning, Trust and Probate Law Section of the State Bar, the Probate and Trust Law Section of the Los Angeles County Bar Association, the Probate, Trust & Estate Planning Section of the Beverly Hills Bar Association, the California Association of Public Administrators, Public Guardians, and Public Conservators, and a number of individual lawyers.

(6) Relocation of Powers of Appointment from Civil Code to Probate Code

This proposal was approved too late to incorporate in legislation this session. Assembly Member Horcher has agreed to include it in AB 1722, a two-year bill, and is requesting the Commission to include in its recommendation a review of the power of appointment problem addressed by AB 1722.

REPORT OF THE CALIFORNIA LAW REVISION COMMISSION
ON CHAPTER 67 OF THE STATUTES OF 1991
(SENATE BILL 256)

Chapter 67 of the Statutes of 1991 was introduced as Senate Bill 256 by Senator Robert G. Beverly on recommendation of the California Law Revision Commission. Comments to the sections in Chapter 67 are set out in the Commission's *Recommendations Relating to Commercial Real Property Leases*, 20 Cal. L. Revision Comm'n Reports 2401 (1990). These Comments remain applicable to Chapter 67, except to the extent they are replaced or supplemented by the revised and new Comments set out below which reflect amendments to the bill made during the legislative process.

§ 1995.300. REMEDIES SUBJECT TO EXPRESS PROVISION IN LEASE AND APPLICABLE DEFENSES

Comment. Subdivision (a) of Section 1995.300 codifies the general rule that the parties to a contract may negotiate the remedies to be applied in case of a breach of the contract. This rule is of course subject to general principles limiting freedom of contract. See, e.g., 1 B. Witkin, *Summary of California Law Contracts* §§ 23-36 (9th ed. 1987) (adhesion and unconscionable contract doctrines).

Subdivision (b) codifies the general rule that a party may waive the party's remedies for breach either expressly or by conduct.

§ 1995.320. LANDLORD'S REMEDIES FOR TENANT'S BREACH

Comment. Section 1995.320 treats a restriction on transfer as a covenant, violation of which is a breach of the lease. A transfer in violation of the restriction is voidable, not void, and the landlord may waive the landlord's remedies for breach either expressly or by conduct. Section 1995.300 (remedies subject to express provisions in lease and applicable defenses). This principle applies to a sublease as well as an assignment. Section 1995.020(e) ("transfer" defined).

Section 1995.320 makes clear the landlord may seek contract damages caused by the wrongful transfer in addition to termination of the lease. This is a specific application of Section 1951.2 (damages in connection with lease termination).

Section 1995.320 also permits the landlord to waive the termination remedy and still collect contract damages for wrongful transfer. This resolves a matter that was unclear under prior law, consistent with the general principle that a landlord may leave a lease in effect and recover damages for breach of a covenant. See Coskran, Assignment and Sublease Restrictions: The Tribulations of Leasehold Transfers, 22 Loy. L.A.L. Rev. 405, 495-98 (1989).

Other remedies available to the landlord for the tenant's breach include unlawful detainer, declaratory relief, and injunctive relief. For remedies against the assignee or subtenant under a wrongful transfer, see Section 1995.330 (application of remedies to assignee or subtenant).

REPORT OF THE CALIFORNIA LAW REVISION COMMISSION
ON CHAPTER 82 OF THE STATUTES OF 1991
(SENATE BILL 896)

Chapter 82 of the Statutes of 1991 was introduced as Senate Bill 896 by Senator Henry Mello on recommendation of the California Law Revision Commission. Comments to the sections in Chapter 82 are set out in the Commission's *Recommendations Relating to Probate Law*, 20 Cal. L. Revision Comm'n Reports 2701, 2909-14 (1990). These Comments remain applicable to Chapter 82, except to the extent they are replaced or supplemented by the revised and new Comments set out below which reflect amendments to the bill made during the legislative process.

PROB. CODE § 1203 (TECHNICAL AMENDMENT). ORDER SHORTENING TIME

Comment. Subdivision (a) of Section 1203 is amended to make clear that the general rule permitting shortening of time applies unless the general rule is made inapplicable by a provision to that effect in a particular statute. This is a technical, nonsubstantive change.

PROB. CODE § 2629 (TECHNICAL AMENDMENT). COMPELLING FILING OF ACCOUNT

Comment. Subdivision (c) of Section 2629 is amended to correct a drafting error by changing "personal representative" to "guardian or conservator."

PROB. CODE § 7622 (AMENDED). MANNER OF ADMINISTRATION; COMPENSATION OF PUBLIC ADMINISTRATOR

Comment. Section 7622 is amended to add the second sentence to subdivision (b). This restores the substance of a portion of the first sentence of subdivision (b) of former Section 7622 of the repealed Probate Code.

The reference in subdivision (b) to the "same compensation" as is granted by this division to personal representatives generally, and attorneys for personal representatives generally, includes allowances of compensation. See Part 7 (commencing with Section 10800) (compensation of personal representative and estate attorney), particularly Chapter 2 (commencing with Section 10830) (allowance of compensation by court).

PROB. CODE § 8547 (UNCHANGED). COMPENSATION OF SPECIAL ADMINISTRATOR AND ATTORNEY FOR SPECIAL ADMINISTRATOR

Comment. Section 8547 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 22. The section as amended continues Section 8547 of the repealed Probate Code without substantive change.

Under subdivision (d), compensation of an attorney for extraordinary services to a special administrator is made on the same basis as compensation for extraordinary services to a general personal

representative. This includes services by a paralegal performing the extraordinary services under the direction and supervision of an attorney. See Section 10811 (additional compensation for extraordinary services).

PROB. CODE § 10811 (ADDED). ADDITIONAL COMPENSATION FOR EXTRAORDINARY SERVICES

Comment. Section 10811 is new. It continues the substance of the last portion of the first sentence, and all of the second and third sentences, of former Section 910 of the repealed Probate Code.

PROB. CODE § 11623 (AMENDED). DISTRIBUTION UNDER INDEPENDENT ADMINISTRATION OF ESTATES ACT

Comment. Section 11623 is amended to replace the former language "[n]otwithstanding any other provision of this chapter" with the language "[n]otwithstanding Section 11601". This makes clear that the provisions of Section 11623 allowing reduced notice (notice under Section 1220 instead of Section 11601) control over the notice provisions of Section 11601. Other provisions of this chapter do apply to proceedings under this section, including those relating to opposing the petition (Section 11602), contents of court order (Section 11603), requirements for distribution to a person other than an estate beneficiary (Section 11604), binding effect of order (Section 11605), time for petition (Section 11620), requirement of bond (Section 11622), and payment of costs (Section 11624).

REPORT OF THE CALIFORNIA LAW REVISION COMMISSION
ON CHAPTER 156 OF THE STATUTES OF 1991
(ASSEMBLY BILL 1577)

Chapter 156 of the Statutes of 1991 was introduced as Assembly Bill 1577 by Assembly Member Byron Sher on recommendation of the California Law Revision Commission. Comments to the sections in Chapter 156 are set out in the Commission's *Recommendation Relating to Uniform Statutory Rule Against Perpetuities*, 20 Cal. L. Revision Comm'n Reports 2501 (1990). These Comments remain applicable to Chapter 156, except for the revised Comment set out below which reflects an amendment to the bill made in the Assembly.

Prob. Code § 21209 (added). Construction of "later of" language in perpetuity saving clause

Comment. Subdivision (a) of Section 21209 is the same in substance as Section 1(e) of the Uniform Statutory Rule Against Perpetuities. This section is intended to invalidate a two-pronged perpetuity saving clause to the extent that it attempts to employ a period of time extending beyond the traditional perpetuities period of lives in being plus 21 years. The effect of this rule is that there is no advantage to be gained by inserting such a "later of" clause in an instrument. A standard perpetuity saving clause in use before enactment of USRAP continues to be appropriate. Consequently, instruments should not be redrafted in an attempt to apply a "later of" 90 years or lives-in-being-plus-21-years test. This section also prevents the loss of grandfathered status under the federal generation-skipping transfer tax involving exercise of a nongeneral power of appointment under a pre-1986 irrevocable trust. See Temp. Treas. Reg. § 26.2601-1(b)(1)(v)(B)(2) (1988) (as amended).

Subdivision (b) makes clear that subdivision (a) applies only prospectively.

REPORT OF THE CALIFORNIA LAW REVISION COMMISSION
ON CHAPTER _____ OF THE STATUTES OF 1991
(SENATE BILL 271)

Chapter _____ of the Statutes of 1991 was introduced as Senate Bill 271 by Senator Quentin L. Kopp on recommendation of the California Law Revision Commission. Comments to the sections in Chapter _____ are set out in the following portions of the Commission's *Recommendations Relating to Probate Law*, 20 Cal. L. Revision Comm'n Reports 2701 (1990):

- Debts That Are Contingent, Disputed, or Not Due (pp. 2707-18)
- Remedies of Creditor Where Personal Representative Fails to Give Notice (pp. 2719-27)
- Repeal of Civil Code Section 704 (Passage of Ownership of U. S. Bonds on Death) (pp. 2729-35)
- Disposition of Small Estate Without Probate (pp. 2737-67)
- Right of Surviving Spouse to Dispose of Community Property (pp. 2769-84)
- Access to Decedent's Safe Deposit Box (pp. 2859-67)
- Gifts in View of Impending Death (pp. 2869-82)
- TOD Beneficiary Designation for Vehicles and Certain Other State-Registered Property (pp. 2883-2906)
- Comments to Other Provisions of 1991 General Probate Bill (pp. 2907-08)

These Comments remain applicable to Chapter _____, except to the extent they are replaced by the revised comments set out below which reflect amendments to the bill made during the legislative process.

HEALTH & SAFETY CODE § 18080.2 (ADDED). OWNERSHIP OF MANUFACTURED HOME, MOBILEHOME, COMMERCIAL COACH, TRUCK CAMPER, OR FLOATING HOME IN BENEFICIARY FORM

Comment. Section 18080.2 is new. Subdivisions (a), (b), and (c) are drawn from Missouri law. See Mo. Ann. Stat. § 301.681 (Vernon Supp. 1990). The language of Section 18080.2 is conformed to the usage in this article. See, e.g., Health & Safety Code § 18080. See also Health & Safety Code § 18102.2; Veh. Code §§ 4150.7, 5910.5, 9852.7, 9916.5.

HEALTH & SAFETY CODE § 18102.2 (ADDED). TRANSFER OF MANUFACTURED HOME, MOBILEHOME, COMMERCIAL COACH, TRUCK CAMPER, OR FLOATING HOME OWNED IN BENEFICIARY FORM

Comment. Section 18102.2 is new. Subdivisions (a) through (d) are drawn from Missouri law. See Mo. Ann. Stat. § 301.681 (Vernon Supp. 1990). Subdivision (e) is drawn from Health and Safety Code Section 18102(b) and Vehicle Code Sections 5910(b) and 9916(b). Subdivision (f) is drawn from Health and Safety Code Section

18100.5(a)(4). Subdivision (g) is drawn from Probate Code Section 5304. Subdivision (h) is comparable to Probate Code Section 5705 (gift in view of impending death), and Vehicle Code Sections 5910.5(h) and 9916.5(h). Subdivision (j) is drawn from Vehicle Code Section 5910(c). See also Health & Safety Code § 18080.2; Veh. Code §§ 4150.7, 5910.5, 9852.7, 9916.5.

PROB. CODE § 331 (ADDED). ACCESS TO DECEDENT'S SAFE DEPOSIT BOX

Comment. Section 331 is new. It permits a person who has a key to a decedent's safe deposit box to gain immediate access in order to remove the decedent's wills, trust instruments, and instructions for disposition of the decedent's remains, and to inventory the contents of the box. If no other directions have been given by the decedent, the right to control the disposition of the decedent's remains devolves, in order, on the surviving spouse, children, parents, other kindred, and the public administrator. Health & Safety Code § 7100.

If the person seeking access does not have a key to the safe deposit box and is not the public administrator, the person must obtain letters from the court to gain access to the box. Concerning the authority of the public administrator, see Section 7603.

Subdivision (e) requires the person given access to deliver the wills to the clerk of the superior court and mail or deliver a copy to the person named in the will as executor or beneficiary "as provided in Section 8200." Section 8200 requires the custodian to deliver the will to the clerk of the superior court in the county in which the estate of the decedent may be administered, and to mail a copy of the will to the person named in the will as executor, if the person's whereabouts is known to the custodian, or if not, to a person named in the will as beneficiary, if the person's whereabouts is known to the custodian. For the county in which the estate of the decedent may be administered, see Sections 7051 (for California domiciliary, county of domicile), 7052 (nondomiciliary). See also Sections 40 ("financial institution" defined), 52 ("letters" defined), 58 ("personal representative" defined), 88 ("will" includes a codicil).

VEH. CODE § 4150.7 (ADDED). OWNERSHIP OF VEHICLE IN BENEFICIARY FORM

Comment. Section 4150.7 is new. Subdivisions (a), (b), and (c) are drawn from Missouri law. See Mo. Ann. Stat. § 301.681 (Vernon Supp. 1990). See also Health & Safety Code §§ 18080.2, 18102.2; Veh. Code §§ 5910.5, 9852.7, 9916.5

VEH. CODE § 5910.5 (ADDED). TRANSFER OF VEHICLE OWNED IN BENEFICIARY FORM

Comment. Section 5910.5 is new. Subdivisions (a) through (d) are drawn from Missouri law. See Mo. Ann. Stat. § 301.681 (Vernon Supp. 1990). Subdivision (e) is drawn from Health and Safety Code Section 18102(b) and Vehicle Code Sections 5910(b) and 9916(b). Subdivision (g) is drawn from Probate Code Section 5304. Subdivision (h) is comparable to Health and Safety Code Section 18102.2(h), Probate Code Section 5705 (gift in view of impending death), and Vehicle Code Section 9916.5(h). Subdivision (j) is drawn from Vehicle Code Section 5910(c). See also Health & Safety Code §§ 18080.2, 18102.2; Veh. Code §§ 4150.7, 9852.7, 9916.5.

VEH. CODE § 9852.7 (ADDED). OWNERSHIP OF VESSEL IN BENEFICIARY FORM

Comment. Section 9852.7 is new. Subdivisions (a), (b), and (c) are drawn from Missouri law. See Mo. Ann. Stat. § 301.681 (Vernon Supp. 1990). See also Health & Safety Code §§ 18080.2, 18102.2; Veh. Code §§ 4150.7, 5910.5, 9916.5

VEH. CODE § 9916.5 (ADDED). TRANSFER OF VESSEL OWNED IN BENEFICIARY FORM

Comment. Section 9916.5 is new. Subdivisions (a) through (d) are drawn from Missouri law. See Mo. Ann. Stat. § 301.681 (Vernon Supp. 1990). Subdivision (e) is drawn from Health and Safety Code Section 18102(b) and Vehicle Code Sections 5910(b) and 9916(b). Subdivision (g) is drawn from Probate Code Section 5304. Subdivision (h) is comparable to Health and Safety Code Section 18102.2(h), Probate Code Section 5705 (gift in view of impending death), and Vehicle Code Section 5910.5(h). Subdivision (j) is drawn from Vehicle Code Section 5910(c). See also Health & Safety Code §§ 18080.2, 18102.2; Veh. Code §§ 4150.7, 5910.5, 9852.7, 9916.5.

Note. This report reflects SB 271 as last amended in the Assembly on July 17, 1991.