

Memorandum 92-6

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

Attached is the *Revised Tentative Recommendation: Deposit of Estate Planning Documents With Attorney*. We circulated it for comment, and received four letters:

- Exhibit 1: Don Swanson, County Clerks Association
- Exhibit 2: Kathryn Ballsun, Team 4, State Bar Probate Section
- Exhibit 3: Raymond J. Staton of Los Angeles
- Exhibit 4: Charles G. Schulz of Palo Alto

OPPOSITION OF COUNTY CLERKS ASSOCIATION

The County Clerks Association (Exhibit 1) opposes the *Tentative Recommendation*. The staff wrote back to point out that their main objection, that to find a deposited document one must search all 58 counties, is obviated by the provision for notice of transfer to be sent to the State Bar. We also told the County Clerks that the State Registrar of Vital Statistics has declined to accept estate planning documents for filing. We asked the County Clerks if they would withdraw their opposition if (1) the State Bar accepts the notice provision, and (2) we increase the filing fee to the \$25 figure suggested in their letter.

If the County Clerks continue to oppose this proposal, we may expect political problems with it in the Legislature. Although there has been considerable legislative interest in this proposal, its fiscal implications may doom it in these times of austere budgets.

CHANGES RECOMMENDED BY STAFF

Deleting "At Least" From Standard of Care

Team 4 supports the revised TR with one revision. Section 710 requires a depository to use "at least" ordinary care for preservation of the document. Section 716 says that if the depositor has agreed to keep the attorney advised of address changes, does not, and the document cannot be returned, the standard is reduced to "at least" slight care. The form notice to client in Section 715 also refers to "at least" ordinary care.

Team 4 would delete "at least." The staff agrees. The statutory

standard of care is a minimum standard. Nothing prevents a depository from using a higher standard. Other comparable statutes do not say "at least." See, e.g., Prob. Code §§ 2401 (guardian or conservator: "ordinary care and diligence"), 9600 (personal representative: "ordinary care and diligence"), 16040 (trustee: "prudent person"). The words "at least" came from general agency law requiring a gratuitous depository to "use, at least, slight care." Civ. Code § 1846. This is Field Code language dating from 1872, and seems archaic. The staff would delete "at least" from Sections 710, 715, and 716.

§ 711. Notice on loss or destruction of document

If a document is lost or destroyed, Section 711 requires the attorney to mail notice to the depositor's last known address. Mr. Staton (Exhibit 3) would instead require the attorney to "use his or her best efforts" to give notice. He says that if the document is destroyed, other records, including the depositor's address, may also be destroyed.

The significance of Section 711 is that an attorney is not liable "if the depositor has actual notice of the loss or destruction and a reasonable opportunity to replace the document." Section 712. How the depositor gets actual notice is immaterial. Accordingly, the staff recommends we revise Section 711 to read:

711. If a document deposited with the attorney is lost or destroyed, the attorney shall mail give notice of the loss or destruction to the depositor by one of the following methods:

(a) By mailing the notice of the loss or destruction to the depositor's last known address.

(b) By the method most likely to give the depositor actual notice.

§§ 730-735. Termination by attorney

Sections 730-735 provide the exclusive means for an attorney to terminate a deposit. An attorney may use either Section 731 (delivery, mailing, or as agreed), 732 (transfer to another attorney, trust company, or superior court clerk), or, if applicable, 734 (termination after death of depositor). The Comments to Sections 731 and 732 say these sections are "permissive," and that an attorney may also terminate a deposit as provided in the other two sections.

Mr. Staton (Exhibit 3) says it is misleading to say these sections

are "permissive," since one of the three of them must be used. The staff would revise the Comments to Sections 731 and 732 as follows:

Section 731 ~~is-permissive~~ provides some of the ways an attorney may terminate a deposit. An attorney may also terminate a deposit as provided in Section 732 or, if applicable, Section 734.

Section 732 ~~is-permissive~~ provides one way an attorney may terminate a deposit. An attorney may also terminate a deposit as provided in Section 731 or, if applicable, Section 734.

§ 731. Termination by delivery, mailing, or as agreed

Section 731 permits an attorney to terminate a deposit by mailing the document to the depositor by registered or certified mail with return receipt requested, and receiving the signed receipt "of the depositor." Two commentators objected to requiring the signed receipt of the depositor. Mr. Staton (Exhibit 3) says the Post Office will not ensure the addressee signs the receipt. Mr. Schulz (Exhibit 4) says return receipts are often signed by someone other than the addressee. The staff would revise Section 731 to read:

731. An attorney may terminate the deposit by one of the following methods:

- (a) Personal delivery of the document to the depositor.
- (b) Mailing the document to the depositor's last known address, by registered or certified mail with return receipt requested, and receiving the a signed receipt ~~of--the depositor.~~
- (c) The method agreed on by the depositor and attorney.

§ 732. Termination by transferring document to another attorney, trust company, or superior court clerk; reduced standard of care

If the attorney does not have an address for the depositor, Section 732 permits the attorney to transfer a document after notice to "any person named in the document as beneficiary, executor, or trustee." It was thought this might result in actual notice to the depositor. The beneficiary has no right to receive the document unless the attorney and depositor have so agreed. See Section 731.

Mr. Schulz (Exhibit 4) is concerned this may make the beneficiary believe he or she has a right to the document. The staff thinks this is a good point. It would be better for the attorney to contact a person named in the document and inquire as to the depositor's whereabouts, rather than to give that person a "notice to reclaim the

document." Accordingly, the staff recommends revising subdivision (a) of Section 732 as follows:

732. (a) An attorney may terminate a deposit under this section if ~~both of the following requirements are satisfied:~~

~~(1) The the attorney has mailed notice to reclaim the document to the depositor's last known address, or, if the attorney does not have an address for the depositor, to any person named in the document as beneficiary, executor, or trustee.~~

~~(2) The and the depositor has failed to reclaim the document within 90 days after the mailing.~~

§ 733. Notice to State Bar

When an attorney transfers a document to another attorney, trust company, or superior court clerk, Section 733 requires notice of the transfer be sent to the State Bar. The notice is confidential while the depositor is living, except that the depositor may obtain information in the notice relating to the depositor.

Mr. Staton (Exhibit 3) would expand this to allow the attorney who filed the notice to obtain information in it. He says this is needed as a backup in case the attorney's records are lost or destroyed. The staff thinks this is a good suggestion, and would revise subdivisions (b) and (c) of Section 733 to read:

(b) Except as provided in ~~subdivision~~ subdivisions (c), (d), and (e), when filed with the State Bar, information in the notice of transfer relating to a depositor shall be confidential, is not a public record, and is not open to inspection except by the public officers or employees who have the duty of receiving and storing the notice.

(c) On request by the depositor, the State Bar shall furnish to the depositor the information relating to that depositor in the notice of transfer.

(d) On request by an attorney who gave a notice of transfer, the State Bar shall furnish to the attorney the information in that notice of transfer.

(e) If the State Bar is furnished with a certified copy of the depositor's death certificate or other satisfactory proof of the depositor's death, the notice of transfer shall be a public record subject to the California Public Records Act, Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code.

§ 735. Deceased or incompetent attorney

If an attorney is deceased or lacks legal capacity, a deposit may be terminated by an employee of the attorney's "firm, partnership, or corporation." Mr. Schulz (Exhibit 4) thinks "firm" is too vague. He

would also make clear that an employee of the deceased or incompetent attorney, such as a secretary, may act for the attorney. The staff agrees, and would revise subdivision (a) of Section 735 to read:

735. (a) If the attorney is deceased or lacks legal capacity, a deposit may be terminated as provided in this article by the attorney's law partner, by a shareholder of the attorney's law corporation, or by a lawyer or nonlawyer employee of the attorney or the attorney's ~~firm, partnership,~~ partnership or corporation.

Numbering of Sections

The proposed new sections are numbered in the 700 series of the Probate Code. The staff plans to renumber them in the 600 series to allow more room for future expansion between the end of Division 2 and the beginning of Division 3 (commencing with Section 1000).

CHANGES NOT RECOMMENDED BY STAFF

§ 712. Nonliability for loss or destruction of document

Mr. Staton (Exhibit 3) says Section 712, relieving the attorney from liability for loss or destruction if the depositor has actual notice and an opportunity to replace the document, is not helpful if the depositor is deceased. The staff is satisfied with this provision. If the depositor cannot mitigate damages because he or she is deceased or for any other reason, the attorney should not be relieved of liability for failure to use the required degree of care.

§ 715. Attorney's notice to client

Section 715 provides a form notice that the client must advise the attorney of changes in the client's address. The notice advises that if the client fails to do that, the attorney's standard of care is reduced, and the attorney may transfer the document to another depository. Mr. Schulz (Exhibit 4) wants the notice to say the attorney may charge a fee under Section 714. If the purpose of this is to keep the attorney from overlooking the fee provision, the staff is opposed. To put collateral matters in the notice tends to obscure its purpose. An attorney who reads the statute should know a fee may be charged.

If the purpose is to prevent the attorney from unlawfully charging a fee without the client's agreement, it seems to address a remote contingency. Perhaps the client should be advised of all rights under

the statute -- e.g., the right to receive notice of loss or destruction of the document, that the attorney need not inquire into the validity or completeness of the document, and that the attorney has no lien on the document. However, the staff thinks the notice should be limited to its intended purpose of encouraging the client to keep the attorney advised of the client's whereabouts.

Section 715 says the attorney "may give written notice" in the form provided in the section. Section 716 says that if the attorney gives notice in "substantially" the form provided in Section 715, the standard of care is reduced. Mr. Schulz thinks Section 715 should be made consistent with Section 716 by saying in Section 715 that the attorney may give notice in "substantially" the form there provided. But section 715 is permissive -- a safe harbor on which the attorney may rely. Consistent with our usual drafting practice, we have put the substantial compliance provision in the substantive section, viz., the section that prescribes the legal consequence of giving the notice. The staff thinks Section 715 is satisfactory.

§ 732. Termination by transferring document to another attorney, trust company, or superior court clerk; reduced standard of care

Mr. Staton (Exhibit 3) is concerned about permitting transfer to a trust company, since a trust company is not regulated by the proposed statute. This point was also made two years ago by attorney Luther Avery (Memo 91-47). Mr. Avery did not want to permit transfer to a trust company unless authorized in writing by the depositor. He said a trust company is not subject to the same rules of professional conduct as an attorney, has no ethical restraints, and cannot be relied on to keep the document safe. He cited the sale by Bank of America of its trust department to another bank as an example.

The staff said then it did not think trust companies are less ethical than attorneys, and, in any event, trust companies are subject to government regulation. The staff saw no problem with permitting transfer to a trust company. This is still the staff's view.

Section 732 permits transfer of the document after the attorney mails a notice to reclaim the document to the depositor's last known address, even if that address is known to be insufficient. Mr. Staton objects to sending notice to an insufficient address. The staff thinks it is better to send notice to an insufficient address than to transfer

a document with no notice, particularly since mailing is so cheap and easy, to avoid a factual issue as to whether the last known address is or is not sufficient.

Mr. Schulz is concerned that for many old documents, the attorney may have no address at all for the depositor. In this case, the attorney may not transfer the document under Section 732. We have previously declined to permit publication of notice, because publication normally does not give actual notice. Should we reconsider this, and permit an attorney to use Section 732 without notice to the depositor if the attorney has no address for the depositor?

Proposal Generally

Mr. Schulz (Exhibit 4) says that, because the proposal applies to old documents as well as new ones, it "is more of a burden than a blessing." But it does afford a method, however burdensome, of getting rid of old estate planning documents that is not available under existing law. Under existing law, a bailee ordinarily may not transfer property being held to someone else without consent of the bailor. 8 Am. Jur.2d *Bailments* § 97 (1980). Thus when an attorney accepts an estate planning document for safekeeping, the attorney must hold the document indefinitely if the depositor cannot be found.

It is the existence of tens of thousands of old documents that creates the need for this proposal. For new documents, the staff thinks it would be better practice for attorneys not to accept them for deposit at all. Team 4 of the State Bar Probate Section has taken this view. The practice of attorneys accepting estate planning documents for deposit has been widely criticized. Mr. Schulz' view that the proposed new law should not apply to old documents, and the view that attorneys should not accept estate planning documents for deposit, raise questions about the desirability of this proposal as a whole.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

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SACRAMENTO COUNTY

December 18, 1991

California Law Revision Commission
 4000 Middlefield Road, Suite D-2
 Palo Alto, CA 94303-4739
 Attn: Robert J. Murphy III

Dear Mr. Murphy:

On December 6, 1991, the County Clerks Association held its annual New Law Conference in Sacramento, and the matter of the deposit of estate planning documents was discussed.

The Legislative Committee of that Association has decided to oppose this measure as it is proposed. The reason is simple.

What we feel is really needed is a central record depository so citizens won't have to contact each of the 58 County Clerks to find out if such records are stored there.

Rather than deposit the papers locally, it is suggested that the papers be deposited at a central registry in Sacramento. One viable depository could be the Registrar of Vital Statistics of the California Department of Health Services. That department is already mandated to provide a state-wide central depository of records of birth, marriage, and death. It thus looks like the logical place for these records. We suggest that an appropriate fee (possibly \$25) be imposed so that their services would be covered by the fee.

We believe that this suggestion is the best solution to this problem

Sincerely,

Don Swanson, Chair, Legislative Committee

cc: Committee members

OCT 21 1991

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PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA**

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REPLY TO:

703\001\059.13

November 18, 1991

Robert Murphy
California Law Revision Commission
4000 Middlefield Road #D-2
Palo Alto, California 94306

Re: Memorandum 91-68, Deposit of Estate Planning Documents With
Attorney (Revised Tentative Recommendation)

Dear Bob:

On Tuesday, October 22, 1991, the members of Team 4 (Sandy Rae, Bill Schmidt, Harley Spitler, Clark Byam, Don Green, Nancy Powers and Kathryn A. Ballsun) discussed Memorandum 91-68, Study L-608 - Deposit of Estate Planning Documents With Attorney (Revised Tentative Recommendation).

The following are a summary of Team 4' conclusions:

1. Team 4 supports the basic approach of the staff draft of Memorandum 91-68, particularly the suggestion that the county clerks act as public depositories. Of the three alternative public depositories listed, the county clerks appear to be the most logical choice because of their geographical accessibility and familiarity with testamentary and other such documents.

Team 4 believes that the approach outlined in the staff draft reflects both the flexibility and fiscal

conscientiousness that will facilitate a solution to a pressing problem for California attorneys.

2. Team 4 was concerned that the public's perception of the slight care standard would be that the proposed standard was simply a device to protect attorneys at the expense of the public. However, in view of the required notice that must be sent prior to the slight care standard becoming effective and the fact that the standard can be over-ridden by an agreement in writing, Team 4 believes that the slight care duty is satisfactory. Team 4 suggests that the words "at least" be deleted from Sections 715 and 716.
3. Team 4 believes that the notice of transfer filed with the State Bar is an integral part of resolving the depository issue. However, Team 4 cannot speak for the State Bar nor its staff in this matter and therefore, urges the staff to seek the approval and concurrence of the State Bar with respect to the notice of transfer.

If you have any questions, please do not hesitate to contact me. Thank you for your consideration.

Cordially,

Kathryn A. Ballsun

KATHRYN A. BALLSUN
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California Law Review Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739Re: Proposed Law Governing Deposit
of Estate Planning Documents

Dear Sirs:

The provisions of Section 711 appear to be mandatory and requiring the attorney to mail notice of loss or destruction of a deposited document to the depositor's last known address. That section should be changed to require the attorney to use his or her best efforts or reasonable efforts to accomplish that task. If the deposited document is destroyed, it is likely that the cause of the destruction will be so drastic that all other records, including the depositor's last known address, would also be destroyed. The provisions of Section 712 relieving the attorney for liability if the depositor has actual notice of the loss or destruction may not be helpful when the issue arises after the depositor is deceased.

The comment to Section 731 indicates that that section is permissive. However, Section 730 states that the attorney "may terminate the deposit only as provided in this article." The addition of the word "only" appears to restrict the attorney to terminating the deposit to the methods allowed in Section 731 and Section 732, thus making those sections mandatory rather than permissive.

Section 731(b) allows the attorney to terminate the deposit by mailing the document to the depositor's last known address by certified mail with return receipt requested and receiving the signed receipt of the depositor." The U. S. Post

California Law Review Commission
November 26, 1991
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Office does not take any steps to ensure that the addressee signs the certified mail receipt. Therefore requiring the attorney to receive the signed receipt of the depositor virtually guarantees that certified mail cannot be used as the method of delivery.

Section 732 allows an attorney to terminate a deposit by transferring the document to a trust company. There does not appear to be any provision in this proposed legislation that would govern the activities of the trust company once it had gained control of the document. Would the trust company be able to use the documents to promote business and then discard any documents that did not produce business?

Section 733(b) provides that the information in the notice of transfer is confidential and not open to inspection except by public officers or employees who have the duty of receiving and storing the notice. It would be helpful to give to attorneys who have transferred documents and given notice to the State Bar the right of access to the notices. It is conceivable that the attorney could make a transfer and thereafter be contacted by the heirs of a deceased testator at a time when the attorney's other records pertaining to that client had been destroyed. If that were the case, the attorney could check the State Bar's records to determine where the documents had been transferred. Since the State Bar will have to maintain a data base of the information in the notices, it should not be that difficult to simply add a field for the name and bar number of the attorney giving notice for purposes of future access.

There should be a provision added for wills where there is no last known address. At this point in time, because there is no existing law such as this, there is an accumulation of old documents. For example, I believe that we have documents going back to the early 1950's, and perhaps earlier, that were prepared by former attorneys with this firm who are now deceased. We have made efforts to locate the original depositors but have been unable to do so. Sending a notice to the last address in our records would be meaningless since we have already established that that last known address is no longer valid.

Cordially,

Raymond J. Staton
of NOSSAMAN, GUTHNER, KNOX & ELLIOTT

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January 6, 1992

California Law Revision Commission
4000 Middlefield Rd., Suite D-2
Palo Alto, CA 94303-4739

Re: Revised Tentative Recommendation: Deposit of Estate
Planning Documents with Attorney (November 1991)

Ladies and Gentlemen:

I am currently working on a project with the State Bar Estate Planning, Trust and Probate Section to develop guidelines and perhaps recommend statutory changes, to deal with the practice of an attorney who dies, becomes disabled, or disappears. The focus of the CLRC Tentative Recommendation is on the estate planning documents in the possession of an attorney who retires, becomes incapacitated, or dies. Although I am looking at the Tentative Recommendation as it applies to estate planning documents, I am also considering its implications for dealing with client papers in general.

Here are some specific comments on the Tentative Recommendation.

1. The Attorney's notice to client, § 715, should make reference to the fact that a written agreement for compensation and expenses in safekeeping or delivery is permitted under § 714. This would alert both parties to that aspect of document retention.

2. Section 715 implies that its form of Notice and Acknowledgment is the only appropriate language, but § 716 uses the words "in substantially the form provided in Section 715". I think the concept of a substantially similar form should be incorporated in § 715.

3. Termination by delivery, mailing, or as agreed (§ 731). It is not uncommon for return receipts to be signed by someone other than the addressee. In such cases, the document will be in the possession of the addressee (or agent), and the attorney may not be able to recover the document to follow an alternate procedure. I suggest broadening the signed receipt concept to "the signed receipt returned by the postal authorities".

4. Termination by transferring document to another attorney, trust company, or superior court clerk; reduced

January 6, 1992

standard of care (§ 732). If the attorney gives notice to a beneficiary (§ 732(a)(1)), because the depositor has not responded or the attorney does not have the depositor's address, what is the attorney's obligation if the beneficiary requests delivery of the document? Does such notification have much significance if the attorney's obligation is to transfer only to the depositor, the depositor's attorney in fact with proper powers, another attorney, a trust company, or the clerk of the court? Beneficiary notification may produce information about the depositor, but it also creates an expectation that the contents of the document, or the document itself, will become available to the beneficiary.

5. Deceased or incompetent attorney (§ 735).

a. Section 735(a) uses the concept "the attorney's firm". This is not defined. Does a solo practitioner have a "firm"? Is an office association a "firm"?

b. Should the procedure be expanded to allow action by an employee, or former employee, of the attorney or an employee of a legal representative or authorized attorney in fact? In most cases, when an attorney dies, the secretary or some other staff member continues for a period of time winding up office affairs. The orderly return of documents to depositors (or other appropriate disposition) should be facilitated; the documents ought to get where they belong without unnecessary delay or expense.

c. I am puzzled about the clause "lacks legal capacity". The standard for a durable power is that the power of attorney will continue to be effective even though the principal has become incapacitated. This includes physical as well as mental incapacity. The implication of the word "incompetent" is that there has been some determination of "competency", but even in conservatorships there is not a finding of competency. It is true that § 735(b) allows a deposit to be terminated by "an attorney in fact acting under a durable power of attorney". However, because subsection (b) requires that the attorney lack legal capacity and that there be no person available to act under subdivision (a), I think this alternative procedure is of limited use.

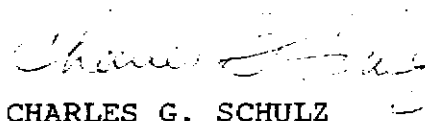
Underlying the issue of deposited estate planning documents is the larger problem of who is authorized to look at client documents when the attorney is unavailable -- whether on vacation, in the hospital, out of the area on business, unable to

January 6, 1992

function because of accident or illness, or dead. In the real world, staff members continue to conduct office affairs because, among other things, they realize the importance of maintaining the integrity of the practice and the security of documents which may have been tendered by a client many years previously or perhaps only the day before. I believe the subjects of file maintenance, the items to which a client is entitled (in contrast to the attorney's work product), and the orderly delivery of appropriate items to the correct party are larger than the bailment of estate planning documents addressed by this Tentative Recommendation. Whether the county clerk's office will be able to accommodate the procedure for estate planning documents remains to be seen. If other types of documents are proffered, because the procedure is convenient or perhaps mandated, the county clerk ultimately becomes a public storage facility.

I also see a problem in subjecting all estate planning documents in an attorney's possession, as of whatever date the law becomes effective, to the provisions of the new Part 14. There are estate planning documents in my safe for which it will be extremely difficult to follow the proposed standards of notification and acknowledgment. Some of them were accepted by my predecessor in practice, more than thirty years ago. In a mobile society, some people assume that the attorney's office is more permanent, secure, and neutral than the client's residence, for example, when considering where to leave original documents. Clients -- and attorneys -- forget to keep people informed about changes of address. Some alternate provision should be made for old (e. g., executed more than five or ten years earlier) documents in custody by the operative date of the statute, to relieve the attorney/custodian of unreasonable burdens connected with disposing of those documents. I do not have a specific suggestion, and I concede that this leads to two categories of documents, as well as different procedures. Still, I think that applying one rather specific set of procedures to all estate planning documents in the possession of an attorney, regardless of when that custody began, is more of a burden than a blessing.

Sincerely,


CHARLES G. SCHULZ

CGS:bh

#L-608

STATE OF CALIFORNIA

California Law Revision Commission

TENTATIVE RECOMMENDATION:

DEPOSIT OF ESTATE PLANNING DOCUMENTS WITH ATTORNEY

November 1991

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN January 15, 1992.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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

L-608

rml75
11/1/91

SUMMARY

This tentative recommendation on deposit of an estate planning document with an attorney is a revised version of a tentative recommendation on the same subject circulated for comment in 1990.

The revised tentative recommendation clarifies rights and duties where an estate planning document has been deposited with an attorney for safekeeping. If the attorney is unable to return the document because the attorney cannot find the depositor, the attorney would be allowed to transfer the document to another attorney, a trust company, or the superior court clerk of the county of the depositor's last known residence. Notice of the transfer must be given to the State Bar.

Comments on the revised tentative recommendation are requested by January 15, 1992.

L-608

rm175
11/1/91

REVISED TENTATIVE RECOMMENDATION:

DEPOSIT OF ESTATE PLANNING DOCUMENTS WITH ATTORNEY

Wills and other estate planning documents are often left with the attorney who drafted them.¹ This creates a bailment.² A bailee ordinarily has no authority to transfer the property being held to someone else without consent of the bailor.³ Thus when an attorney accepts an estate planning document for safekeeping, the attorney must continue to hold the document indefinitely if the depositor cannot be found. This creates a serious problem for an estate planning attorney who wants to retire, resign, become inactive, or change to some other kind of practice.

The Commission recommends legislation to permit an attorney who is holding an estate planning document for safekeeping and cannot find the depositor to transfer the document to another attorney, trust company, or the clerk of the superior court of the county of the depositor's last known residence,⁴ and to require the attorney to give notice of

1. See California Will Drafting Practice § 2.25, at 62-63 (Cal. Cont. Ed. Bar 1982).

2. 8 Am. Jur. 2d *Bailments* § 4 (1980).

3. 8 Am. Jur. 2d *Bailments* § 97 (1980).

4. Under existing law, the superior court clerk receives and stores wills of deceased testators: The custodian of the will must deliver it to the clerk of the superior court of the county in which the decedent's estate may be administered. Prob. Code § 8200.

the transfer to the State Bar.⁵ The recommended legislation has the following features:⁶

(1) The attorney must use ordinary care for preservation of the document, whether or not consideration is given, and must keep the document in a safe, vault, safe deposit box, or other secure place where it will be reasonably protected against loss or destruction.

(2) The attorney may give written notice to the depositor that the depositor must keep the attorney advised of any changes of address. If the depositor fails to do this and as a result the attorney cannot return a deposited document, the attorney, and any successor attorney or trust company who accepts a transfer of the document, need use only slight care for its preservation, the same as for a gratuitous depository under existing law.⁷

(3) The attorney is not liable for loss or destruction of the document if the depositor has actual notice of the loss or destruction and a reasonable opportunity to replace the document.

(4) The depositor need not compensate the attorney for holding the document unless so provided in a written agreement.

(5) The attorney has no lien on the document, even if provided by agreement.⁸

(6) A depositor may terminate a deposit on demand, and the attorney must deliver the document to the depositor.⁹

5. Under existing law, an attorney who intends to go out of practice must give notice of cessation of law practice to the State Bar. Bus. & Prof. Code §§ 6180, 6180.1.

6. The recommended legislation was developed from a proposal approved by the State Bar Conference of Delegates in 1988.

7. Civ. Code § 1846.

8. This is contrary to Civil Code Section 1856, which allows a lien for costs.

9. This is consistent with Civil Code Section 1822. The Commission's recommendation also would amend Section 2586 (substituted judgment) to provide that if the depositor has a conservator of the estate, the court may order that the depositor's estate planning documents be delivered to some other custodian for safekeeping.

(7) The attorney may terminate a deposit by personal delivery of the document to the depositor or by the method agreed on by the depositor and the attorney.

(8) If the attorney is unable to deliver the document to the depositor and does not have actual notice that the depositor has died, the attorney may mail notice to reclaim the document to the depositor's last known address. If the depositor fails to reclaim the document within 90 days, the attorney may transfer the document to another attorney, to a trust company, or to the clerk of the superior court of the county of the depositor's last known residence, and must file a notice of the transfer with the State Bar.

(9) Before the depositor's death, only the depositor may get from the State Bar the name and address of the transferee. After the depositor's death, the name and address of the transferee is a public record.

(10) If a document is transferred to a superior court clerk, the clerk may microfilm the document and destroy the original.¹⁰ The clerk's fee for accepting a transfer of an estate planning document is \$14. The clerk's fee for searching for an estate planning document is \$1.75 for each year.

(11) A successor attorney who accepts a document for safekeeping is not liable for failure to verify the completeness or correctness of information or documents received from a predecessor depository.

(12) After the depositor's death, the attorney may terminate the deposit by delivering the document to the depositor's personal representative, or to the trustee in the case of a trust or court clerk in the case of a will.

10. The proposed legislation also authorizes the superior court clerk to microfilm wills delivered pursuant to Probate Code Section 8200 after the testator's death, and to destroy the original, if the clerk has held the will for at least ten years. Destruction of the original will does not prevent its admission to probate. See Prob. Code § 8223.

OUTLINE

NEW SECTIONS IN PROBATE CODE

PART 14. DEPOSIT OF ESTATE PLANNING DOCUMENTS WITH ATTORNEY

CHAPTER 1. DEFINITIONS

- § 700. Application of definitions
- § 701. Attorney
- § 702. Deposit
- § 703. Depositor
- § 704. Document

CHAPTER 2. DUTIES AND LIABILITIES OF ATTORNEY

- § 710. Attorney's duty of ordinary care
- § 711. Notice on loss or destruction of document
- § 712. Nonliability for loss or destruction of document
- § 713. No duty to verify contents of document or provide continuing legal services
- § 714. Payment of compensation and expenses; no lien on document
- § 715. Attorney's notice to client
- § 716. Reduced standard of care

CHAPTER 3. TERMINATION OF DEPOSIT

Article 1. Termination by Depositor

- § 720. Termination on demand

Article 2. Termination by Attorney

- § 730. Attorney may terminate deposit only as provided in this article
- § 731. Termination by delivery, mailing, or as agreed
- § 732. Termination by transferring document to another attorney, trust company, or superior court clerk
- § 733. Notice to State Bar
- § 734. Termination after death of depositor
- § 735. Deceased or incompetent attorney

CONFORMING REVISIONS

- Prob. Code § 2586 (amended). Production of conservatee's will and other relevant estate plan documents
- Gov't Code § 26810 (added). Microfilming estate planning documents; destruction of originals
- Gov't Code § 26827.6 (added). Fee for filing and searching estate planning document

RECOMMENDED LEGISLATION

Prob. Code §§ 700-735 (added). Deposit of estate planning documents with attorney

PART 14. DEPOSIT OF ESTATE PLANNING DOCUMENTS WITH ATTORNEY

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. Attorney

701. "Attorney" means an individual licensed to practice law in this state.

Comment. Section 701 is new. Although the depositary is the individual attorney, liability for failing to maintain an adequate standard of care may be imposed on the attorney's law partnership or law corporation under traditional rules of vicarious liability. See 2 B. Witkin, *Summary of California Law Agency and Employment* § 115, at 109-111 (9th ed. 1987); 9 B. Witkin, *Summary of California Law Partnership* § 38, at 434-35 (9th ed. 1989).

§ 702. Deposit

702. "Deposit" means delivery of a document by a depositor to an attorney for safekeeping or authorization by a depositor for an attorney to retain a document for safekeeping.

Comment. Section 702 is new.

§ 703. Depositor

703. "Depositor" means a natural person who deposits the person's document with an attorney.

Comment. Section 703 is new. The definition of "depositor" in Section 703 does not preclude the person whose document is deposited from using an agent, such as an attorney-in-fact, to make the deposit.

§ 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 that the attorney and depositor agree in writing to make subject to this part.

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

Chapter 2. Duties and Liabilities of Attorney

§ 710. Attorney's duty of ordinary care

710. If a document is deposited with an attorney, the attorney, and a successor attorney or trust company that accepts transfer of the document, shall use at least ordinary care for preservation of the document on and after July 1, 1993, whether or not consideration is given, and 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 710 is new. Under Section 710, an attorney must use at least ordinary care for preservation of the document deposited. This applies the rule of Civil Code Section 1852 (deposit for hire) to the attorney-depositary, whether or not consideration is given. This is a departure from Civil Code Section 1846, under which a gratuitous depositary need only use slight care for preservation of the property deposited.

The duty imposed by Section 710 to hold the document in a safe, vault, safe deposit box, or other secure place is a reasonable one, and allows reasonable periods for the document to be out of safekeeping for the purpose of examination or delivery in appropriate circumstances. At all times the document should be reasonably protected against loss or destruction, although what is reasonable may vary with the circumstances.

Although Section 710 applies to attorneys who are holding documents on July 1, 1993, an attorney is not liable for action taken before that date that was proper when the action was taken. Section 3.

For an exception to the standard of care provided in Section 710, see Section 716 (slight care after specified steps taken).

§ 711. Notice on loss or destruction of document

711. If a document deposited with the attorney is lost or destroyed, the attorney shall mail notice of the loss or destruction to the depositor's last known address.

Comment. Section 711 is new. Even though a will is lost or destroyed, it still may be proven and admitted to probate. See Section 8223.

§ 712. Nonliability for loss or destruction of document

712. Notwithstanding failure of the attorney to satisfy the standard of care required by Section 710 or 716, the attorney is not

liable for loss or destruction of the document if the depositor has actual notice of the loss or destruction and a reasonable opportunity to replace the document.

Comment. Section 712 is new. Even though a will is lost or destroyed, it still may be proven and admitted to probate. See Section 8223.

§ 713. No duty to verify contents of document or provide continuing legal services

713. The acceptance by an attorney of a document for deposit imposes no duty on the attorney to do either of the following:

(a) Inquire into the content, validity, invalidity, or completeness of the document, or the correctness of any information in the document.

(b) Provide continuing legal services to the depositor or to any beneficiary under the document. This subdivision does not affect the duty, if any, of the drafter of the document to provide continuing legal services to any person.

Comment. Section 713 is new. Section 713 does not relieve the drafter of the document from the duty of drafting competently.

§ 714. Payment of compensation and expenses; no lien on document

714. (a) If so provided in a written agreement signed by the depositor, the attorney may charge the depositor for compensation and expenses incurred in safekeeping or delivery of a document deposited with the attorney.

(b) No lien arises for the benefit of an attorney on a document deposited with the attorney, whether before or after its transfer, even if provided by agreement.

Comment. Section 714 is new. Subdivision (b) is a departure from Civil Code Section 1856 (depository's lien).

§ 715. Attorney's notice to client

715. An attorney may give written notice to a depositor, and obtain written acknowledgment from the depositor, in the following form:

NOTICE AND ACKNOWLEDGMENT

To: _____
(Name of depositor)

(Address)

(City, state, and ZIP)

I have accepted your will or other estate planning document for safekeeping. I must use at least ordinary care for preservation of the document.

You must keep me advised of any change in your address shown above. If you do not and I cannot return this document to you when necessary, I will no longer be required to use ordinary care for preservation of the document, and I may transfer it to another depository and give notice of the transfer to the State Bar of California.

(Signature of attorney)

(Address of attorney)

(City, state, ZIP)

My address shown above is correct. I understand that I must keep you advised of any change in this address.

Dated: _____

(Signature of depositor)

Comment. Section 715 is new. By giving the notice and obtaining the acknowledgment provided by this section, the attorney's duty of care may be reduced to slight care if the requirements of Section 716 are satisfied. See also Section 731 (mailing document to address shown in notice and acknowledgment).

§ 716. Reduced standard of care

716. Notwithstanding Section 710, if an attorney has given written notice to the depositor, and has obtained written acknowledgment from the depositor, in substantially the form provided in Section 715, and the requirements of subdivision (a) of Section 732 are satisfied, the attorney, and a successor attorney or trust company that accepts transfer of a document, shall use at least slight care for preservation of a document deposited with the attorney.

Comment. Section 716 is new. The "slight care" standard of Section 716 is the same as the standard of care of a gratuitous depository under Civil Code Section 1846.

Chapter 3. Termination of Deposit

Article 1. Termination by Depositor

§ 720. Termination on demand

720. A depositor may terminate the deposit on demand, in which case the attorney shall deliver the document to the depositor.

Comment. Section 720 is new, and is consistent with Civil Code Section 1822, except that under Section 714 no lien is permitted against the document deposited.

If the depositor has an attorney in fact acting under a statutory form power of attorney that confers general authority with respect to estate transactions, the attorney in fact may terminate the deposit. See Civ. Code § 2493.

If the depositor has a conservator of the estate, the court may order the attorney to deliver the document to the court for examination, and for good cause may order that the document be delivered to some other custodian for safekeeping. Section 2586.

Article 2. Termination by Attorney

§ 730. Attorney may terminate deposit only as provided in this article

730. An attorney with whom a document has been deposited, or to whom a document has been transferred pursuant to this article, may terminate the deposit only as provided in this article.

Comment. Section 730 is new. The methods by which an attorney may terminate a deposit under this article are provided in Sections 731 to 735.

§ 731. Termination by delivery, mailing, or as agreed

731. An attorney may terminate the deposit by one of the following methods:

(a) Personal delivery of the document to the depositor.

(b) Mailing the document to the depositor's last known address, by registered or certified mail with return receipt requested, and receiving the signed receipt of the depositor.

(c) The method agreed on by the depositor and attorney.

Comment. Section 731 is new. The depositor's last known address may be shown in a notice and acknowledgment under Section 715, in the depositor's advice of change of address to the attorney, or otherwise.

Section 731 is permissive. An attorney may also terminate a deposit as provided in Section 732 or, if applicable, Section 734.

§ 732. Termination by transferring document to another attorney, trust company, or superior court clerk; reduced standard of care

732. (a) An attorney may terminate a deposit under this section if both of the following requirements are satisfied:

(1) The attorney has mailed notice to reclaim the document to the depositor's last known address, or, if the attorney does not have an address for the depositor, to any person named in the document as beneficiary, executor, or trustee.

(2) The depositor has failed to reclaim the document within 90 days after the mailing.

(b) Subject to subdivision (e), an attorney may terminate a deposit under this section by transferring the document to any of the following persons:

(1) Another attorney.

(2) A trust company

(3) The clerk of the superior court of the county of the depositor's last known residence. The attorney shall advise the clerk that the document is being transferred pursuant to Probate Code Section 732.

(c) The attorney may not accept a fee or compensation from a transferee for transferring a document under this section.

(d) Transfer of a document by an attorney 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. If the document is privileged under Article 3 (commencing with Section 950) of Chapter 4 of Division 8 of the Evidence Code, the document remains privileged after the transfer.

(e) If the document is a will and the attorney has actual notice that the depositor has died, the attorney may terminate a deposit only as provided in Section 734.

Comment. Section 732 is new. The depositor's last known address may be shown in a notice and acknowledgment under Section 715, in the depositor's advice of change of address to the attorney, or otherwise.

Section 732 is permissive. An attorney may also terminate a deposit as provided in Section 731 or, if applicable, Section 734.

By permitting an attorney to transfer a document to another depository, Section 732 departs from the common law of bailments under which a depository ordinarily has no authority to transfer the property to someone else. See 8 Am. Jur. 2d *Bailments* § 97 (1980).

The fee for transferring an estate planning document to the

superior court clerk under subdivision (b) is \$14. Gov't Code § 26827.6.

See also Sections 1215-1217 (mailing of notice).

§ 733. Notice to State Bar

733. (a) An attorney transferring a document under Section 732 shall mail notice of the transfer to the State Bar of California. The notice shall contain the name of the depositor, the date of the transfer, a description of each document transferred, the name and address of the transferring attorney, and the name and address of the attorney, trust company, or clerk of the superior court to which each document is transferred. If the attorney is required to give notice of cessation of law practice under Article 11 (commencing with Section 6180) of Chapter 4 of Division 3 of the Business and Professions Code, the notice of transfer may be included in the notice of cessation of law practice.

(b) Except as provided in subdivision (c), when filed with the State Bar, information in the notice of transfer relating to a depositor shall be confidential, is not a public record, and is not open to inspection except by the public officers or employees who have the duty of receiving and storing the notice.

(c) On request by the depositor, the State Bar shall furnish to the depositor the information relating to that depositor in the notice of transfer. If the State Bar is furnished with a certified copy of the depositor's death certificate or other satisfactory proof of the depositor's death, the notice of transfer shall be a public record subject to the California Public Records Act, Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code.

Comment. Section 733 is new.

§ 734. Termination after death of depositor

734. (a) In cases not governed by subdivision (b) or (c), after the death of the depositor an attorney may terminate a deposit by personal delivery of the document to the depositor's personal representative.

(b) If the document is a will and the attorney has actual notice that the depositor has died but does not have actual notice that a personal representative has been appointed for the depositor, an attorney may terminate a deposit only as provided in Section 8200.

(c) If the document is a trust, after the death of the depositor an attorney may terminate a deposit by personal delivery of the document either to the depositor's personal representative or to the trustee named in the document.

Comment. Section 734 is new. Subdivisions (a) and (c) are permissive, but subdivision (b) is mandatory. If subdivision (b) does not apply, an attorney may terminate a deposit, for example, by the method agreed on by the depositor and attorney. Section 731.

As used in Section 734, "personal representative" includes a successor personal representative and a personal representative appointed in another state. Section 58. "Trustee" includes a successor trustee (Section 84), and "will" includes a codicil (Section 88).

§ 735. Deceased or incompetent attorney

735. (a) If the attorney is deceased or lacks legal capacity, a deposit may be terminated as provided in this article by the attorney's law partner, by a shareholder of the attorney's law corporation, or by a lawyer or nonlawyer employee of the attorney's firm, partnership, or corporation.

(b) If the attorney lacks legal capacity and there is no person to act under subdivision (a), a deposit may be terminated by the conservator of the attorney's estate or by an attorney in fact acting under a durable power of attorney. A conservator of the attorney's estate may act without court approval.

(c) If the attorney is deceased and there is no person to act under subdivision (a), a deposit may be terminated by the attorney's personal representative.

(d) If a person authorized under this section terminates a deposit as provided in Section 732, the person shall give the notice required by Section 733.

Comment. Section 735 is new.

CONFORMING REVISIONS

Probate Code § 2586 (amended). Production of conservatee's will and other relevant estate plan documents

2586. (a) As used in this section, "estate plan of the conservatee" includes but is not limited to the conservatee's will, any trust of which the conservatee is the settlor or beneficiary, any power of appointment created by or exercisable by the conservatee, and any

contract, transfer, or joint ownership arrangement with provisions for payment or transfer of benefits or interests at the conservatee's death to another or others which the conservatee may have originated.

(b) Notwithstanding Article 3 (commencing with Section 950) of Chapter 4 of Division 8 of the Evidence Code (lawyer-client privilege), the court, in its discretion, may order that any person having possession of any document constituting all or part of the estate plan of the conservatee shall deliver such document to the court for examination by the court, and, in the discretion of the court, by the attorneys for the persons who have appeared in the proceedings under this article, in connection with the petition filed under this article.

(c) Unless the court otherwise orders, no person who examines any document produced pursuant to an order under this section shall disclose the contents of the document to any other person. If such disclosure is made, the court may adjudge the person making the disclosure to be in contempt of court.

(d) For good cause, the court may order that a document constituting all or part of the estate plan of the conservatee, whether or not produced pursuant to an order under this section, shall be delivered for safekeeping to the custodian designated by the court. The court may impose such conditions as it determines are appropriate for holding and safeguarding the document. The court may authorize the conservator to do any acts a depositor could do under Part 14 (commencing with Section 700) of Division 2.

Comment. Section 2586 is amended to add subdivision (d) to permit the court to order that the conservatee's estate planning documents be delivered to some other custodian for safekeeping. Under subdivision (d), "good cause" for ordering a transfer to some other custodian might include, for example, the case where the previous custodian has not used ordinary care for preservation of the document. See Section 710. See generally Sections 700-735 (deposit of estate planning documents with attorney).

Gov't Code § 26810 (added). Microfilming estate planning documents; destruction of originals

26810. (a) The clerk of the superior court may cause the following documents to be microphotographed or otherwise reproduced on film and stored in that form:

(1) A document transferred to the clerk under Section 732 of the Probate Code.

(2) A will delivered to the clerk of the superior court under Section 8200 of the Probate Code if the clerk has held the will for at least ten years.

(b) All film used in the microphotography or other process shall comply with minimum standards of quality approved by the National Bureau of Standards.

(c) Section 26809 does not apply to a will or other document referred to in subdivision (a), or to the reproduction authorized by subdivision (a).

(d) Upon making the reproduction authorized by subdivision (a), the clerk of the superior court may destroy the original document.

Comment. Section 26810 is new and is drawn from other comparable provisions of state law. See Com. Code § 9407.1; Gov't Code §§ 27322.2, 27322.4, 71007, Health & Safety Code § 10036.

Gov't Code § 26827.6 (added). Fee for filing and searching estate planning document

26827.6. (a) The fee for receiving and storing a document transferred to the clerk of the superior court under Section 732 of the Probate Code is fourteen dollars (\$14).

(b) The fee for searching a document transferred to the clerk of the superior court under Section 732 of the Probate Code is the same as the fee under Section 26854 for searching records or files.

Comment. Section 26827.6 is new. The fee for filing is the same as the fee under Section 26827.4 for filing a subsequent paper in a probate proceeding. The fee for searching under Section 26854 is \$1.75 per year.