

STATE OF CALIFORNIA  
California Law Revision Commission

TENTATIVE RECOMMENDATION

*relating to*

DEPOSIT OF ESTATE PLANNING DOCUMENTS WITH ATTORNEY

January 1990

*This tentative recommendation is distributed so interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Comments sent to the Commission are a public record and will be considered at a public meeting when the Commission determines the legislation it will recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise that you believe it should be revised.*

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN MARCH 20, 1990.

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

CALIFORNIA LAW REVISION COMMISSION  
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TENTATIVE RECOMMENDATION  
*relating to*  
DEPOSIT OF ESTATE PLANNING DOCUMENTS  
WITH ATTORNEY

Wills and other estate planning documents are often left with the attorney who drafted them.<sup>1</sup> This creates a bailment.<sup>2</sup> A bailee ordinarily has no authority to transfer the property being held to someone else without consent of the bailor.<sup>3</sup> 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 change to some other kind of practice, retire, resign, or become inactive.

The Commission recommends legislation to permit an attorney who is holding an estate planning document for safekeeping to transfer the document to another attorney or to a trust company when the depositor cannot be found, and to require the attorney to give notice of the transfer to the State Bar.<sup>4</sup> The recommended legislation has the following features:

(1) The attorney 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 must use ordinary care for preservation of the document, whether or not consideration is given.<sup>5</sup>

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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, 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.

5. Under existing law, a gratuitous depositary need only use slight care. Civ. Code § 1846.

(3) The attorney is not liable for loss or destruction of the document if the depositor is notified of the loss or destruction and has 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.<sup>6</sup>

(6) A depositor may terminate a deposit on demand, and the attorney must deliver the document to the depositor.<sup>7</sup>

(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 or to a trust company. The attorney must give notice of the transfer to the State Bar.<sup>8</sup> Before the depositor's death, 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.

(9) 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.

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

7. 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.

8. See *supra* note 4.

(10) 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.

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The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Section 2586 of, and to add Part 14 (commencing with Section 700) to Division 2 of, the Probate Code, relating to estate planning documents.

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

Prob. Code §§ 700-725 (added). Deposit of estate planning documents with attorney

SECTION 1. Part 14 (commencing with Section 700) is added to Division 2 of the Probate Code, to read:

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" includes both of the following:

(a) A law firm.

(b) A law corporation as described in Section 6160 of the Business and Professions Code.

Comment. Section 701 is new.

§ 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 and is drawn from Civil Code Section 1858(a).

§ 704. Document

704. "Document" means any of the following:

(a) A signed original will, declaration of trust, trust amendment, or other document modifying a will or trust.

(b) A signed original power of attorney.

(c) A signed original nomination of conservator.

(d) Any other signed original instrument 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. Protecting document against loss or destruction

710. If a document is deposited with an attorney, the attorney 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. Although Section 710 applies to attorneys who are holding documents on the operative date, an attorney is not liable for action taken before the operative date that was proper when the action was taken. Section 3.

§ 711. Attorney's standard of care

711. (a) Subject to subdivision (b), an attorney shall use ordinary care for preservation of a document deposited with the attorney, whether or not consideration is given.

(b) An attorney is not liable for loss or destruction of a document deposited with the attorney if the depositor is notified of the loss or destruction and has a reasonable opportunity to replace the document.

Comment. Section 711 is new. Under Section 711, an attorney must use ordinary care for preservation of the document deposited, whether

or not consideration is given. This is a departure from Civil Code Sections 1846 and 1852, under which a gratuitous depositary need only use slight care for preservation of the property deposited.

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

Although Section 711 applies to attorneys who are holding documents on the operative date, an attorney is not liable for action taken before the operative date that was proper when the action was taken. Section 3.

#### § 712. No duty to verify contents of document

712. The acceptance by an attorney of a document for deposit imposes no duty on the attorney to inquire into the content, validity, invalidity, or completeness of the document, or the correctness of any information in the document.

Comment. Section 712 is new. Section 712 does not relieve the drafter of the document from the duty of drafting competently.

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

713. (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, even if provided by agreement.

Comment. Section 713 is new. Subdivision (b) is a departure from Civil Code Section 1856 (depositary's lien).

### Chapter 3. Termination of Deposit

#### § 720. Termination by depositor 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 durable power of attorney that confers general authority with respect to estate transactions, the attorney in fact may terminate the deposit. See Civ. Code § 2467.

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.

§ 721. Attorney may terminate deposit only as provided in this chapter

721. An attorney may terminate a deposit only as provided in this chapter.

Comment. Section 721 is new.

§ 722. Termination by attorney by delivery or as agreed

722. An attorney may terminate a deposit by either of the following methods:

(a) By personal delivery of the document to the depositor.

(b) By the method agreed on by the depositor and attorney.

Comment. Section 722 is new.

§ 723. Termination by attorney transferring document to another attorney or trust company

723. (a) An attorney may terminate a deposit by transferring the document to another attorney or to a trust company if both of the following requirements are satisfied:

(1) The attorney does not have actual notice that the depositor has died.

(2) The attorney has mailed notice to reclaim the document to the last known address of the depositor, and the depositor has failed to do so within 90 days.

(b) The attorney shall mail notice of the transfer to the State Bar of California. The notice of transfer shall contain the name of the depositor, a description of the documents transferred, the name and address of the transferring attorney, and the name and address of the attorney or trust company to whom the documents are 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.

(c) On request by the depositor, the State Bar shall furnish to the depositor the information contained 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.

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

(e) Transfer of a document under this section is not a waiver or breach of any privilege or confidentiality associated with the document, and is not a violation of the rules of professional conduct. 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.

Comment. Section 723 is new. By permitting an attorney to transfer a document to another depository, Section 723 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). See also Section 701 ("attorney" includes a law corporation).

#### § 724. Termination by attorney after death of depositor

724. (a) Subject to subdivisions (b) and (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 trust, 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.

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

Comment. Section 724 is new. As used in Section 724, "personal representative" includes a successor personal representative (Section 58), "trustee" includes a successor trustee (Section 84), and "will" includes a codicil. Section 88.

#### § 725. Deceased or incompetent attorney

725. If the attorney is deceased or has become incompetent, the following persons may terminate the deposit as provided in Section 722, 723, or 724, and may give the notice required by subdivision (b) of Section 723:

(a) The attorney's law partner, or, if the attorney is a law corporation, a shareholder of the corporation.

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

(c) If the attorney is deceased and there is no person to act under subdivision (a), the attorney's personal representative, or, if none, the person entitled to collect the attorney's property.

Comment. Section 725 is new.

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

SEC. 2. Section 2586 of the Probate Code is amended to read:

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; and, 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 produced pursuant to an order under this section shall be delivered to some other custodian for safekeeping. The court may specify such conditions as it deems appropriate for the holding and safeguarding of the document.

Comment. Section 2586 is amended to add subdivision (d) to permit the court to order that the conservatee's estate planning documents produced pursuant to this section be delivered to some other custodian for safekeeping. See also Sections 700-725 (deposit of estate planning documents with attorney).