

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATIONS

relating to

Probate Law and Procedure

Missing Persons

Nonprobate Transfers

Emancipated Minors

Notice in Limited Conservatorship Proceedings

Disclaimer of Testamentary and Other Interests

September 1982

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

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NOTE

The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 16 of the Commission's *Reports, Recommendations, and Studies* which is scheduled to be published late in 1983.

Cite this pamphlet as *Recommendations Relating to Probate Law and Procedure*, 16 Cal. L. Revision Comm'n Reports 101 (1982).

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STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Missing Persons

September 1982

**CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306**

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Missing Persons*, 16 Cal. L. Revision Comm'n Reports 105 (1982).

CALIFORNIA LAW REVISION COMMISSION

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September 27, 1982

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

By Resolution Chapter 37 of the Statutes of 1980, the Legislature directed the Law Revision Commission to study the California Probate Code and to consider whether any provisions of the Uniform Probate Code should be enacted in California.

The Commission recommends that provisions permitting the appointment of a conservator of the estate for a missing person be substituted for the existing provisions for the appointment of a trustee to protect and manage the property of a person missing for more than 90 days. If this substitution is made, the detailed provisions of the guardianship-conservatorship law (which govern all aspects of the management of the estate) will apply. These provisions will replace the incomplete and inadequate provisions that now govern the trustee's management of the estate.

The Commission also recommends that the existing provisions for probate of the estate of a missing person be modernized. The length of the absence that gives rise to the presumption of death should be lowered from seven to five years. The normal provisions governing administration of estates of decedents should apply but should be supplemented by special provisions protecting the rights of a missing person who reappears.

Respectfully submitted,

ROBERT J. BERTON
Chairperson

RECOMMENDATION

relating to

MISSING PERSONS

Introduction

A person may disappear and leave property that needs to be managed and protected. Ultimately, if the missing person does not reappear, his or her estate is distributed to those persons who would receive it if the missing person were dead. The Commission has reviewed the existing law that applies in these situations, and this recommendation is the result.

Protection of Property of Missing Person

Existing law provides for appointment of a trustee to protect and manage the property of a person missing for more than 90 days.¹ The Commission recommends that the existing provisions be replaced by provisions permitting the appointment of a conservator of the estate for a missing person.²

A conservatorship is the mechanism now used where a person is "substantially unable to manage his or her own financial resources" by reason of mental incapacity.³ A conservatorship is an equally appropriate mechanism where the inability to manage one's financial affairs is due to physical absence. The conservatorship provisions are detailed and will cover all aspects of the management of the estate of the missing person.⁴ Use of a conservatorship for

¹ Prob. Code §§ 260-272. These provisions fall into the class of statutes where management of the missing person's property is based on the assumption that the missing person is still living. See Jalet, *Mysterious Disappearance: The Presumption of Death and the Administration of the Estates of Missing Persons or Absentees*, 54 Iowa L. Rev. 177, 226-27, 231-36 (1968). Such statutes have been upheld against constitutional challenges on the basis of the need to preserve the missing person's property during his or her absence and to protect the interests of the missing person's dependents. See *Day v. Metropolitan Life Ins. Co.*, 11 Cal. App.2d 681, 54 P.2d 502 (1936).

² In the case of a missing minor, a guardian can be appointed pursuant to Probate Code Section 1514.

³ Prob. Code § 1801.

⁴ See Prob. Code §§ 2400-2644. In contrast, the provisions governing the trustee's management of the estate of a missing person are incomplete and inadequate. See Prob. Code §§ 265, 267-269.

the estate of a missing person has precedent in existing statutory provisions which allow a conservatorship for one class of missing person—the “absentee.”⁵

Under existing law, a person must be missing for at least 90 days before a trustee may be appointed; and a trustee may be appointed only for a missing person who is a resident of this state.⁶ However, it is the practice to appoint a temporary conservator in a case where the person has not yet been missing for 90 days or where the missing person is a nonresident.⁷ The recommended legislation follows existing practice and permits the filing of a petition for the appointment of a conservator of the estate for a missing person without the requirement that the person have been missing for 90 days or that the missing person be a resident of this state. This permits the use of the procedure where there is an immediate need for the protection and management of the missing person’s property,⁸ and provides a more adequate procedure for the protection and management of the property of a missing nonresident.⁹

Administration of Estate of Person Presumed Dead

Existing law provides for the administration of the estate of a person missing for seven years as though the person were dead.¹⁰ Although the seven-year period is the same as the common law presumption of death, technically the presumption is not conclusive at that time. Thus, property in the estate of a missing person may not be distributed until one year after the appointment and qualification of the executor or administrator.¹¹ And, the distributee must

⁵ See Prob. Code § 1803. An “absentee” is a member of the armed forces or a federal employee who is missing. See Prob. Code § 1403. For special provisions applicable where the proposed conservatee is an “absentee,” see Prob. Code §§ 1840-1844. See also Prob. Code §§ 1813, 1864.

⁶ Prob. Code § 260.

⁷ See 3 J. Goddard, Probate Court Practice § 1921 (2d ed. 1977); S. Ross, L. Pruett, & M. Levine, California Conservatorships Supplement § 3.24, at 46 (Cal. Cont. Ed. Bar 1981).

⁸ Under the general provisions of the guardianship-conservatorship law, a temporary guardian or conservator may be appointed in an appropriate case pending the appointment of a permanent conservator. See Prob. Code §§ 2250 (petition for appointment of temporary guardian or conservator), 2252 (powers and duties of temporary guardian or conservator).

⁹ See note 4 *supra*.

¹⁰ Prob. Code §§ 280-294.

¹¹ Prob. Code §§ 285, 286.

give a bond in favor of the missing person if the distribution is made within three years after the appointment and qualification of the executor or administrator unless the person has been missing for more than 10 years at the time of filing the petition for appointment of an administrator or for probate.¹² Only after final distribution and at least 10 years after the missing person disappeared is the statute of limitations deemed to have run against all claimants.¹³

The Commission recommends that this scheme be revised with a view toward shortening the time limits and simplifying the procedure. Specifically, the Commission recommends the following:

(1) The length of the absence that gives rise to the presumption of death should be lowered from seven to five years.¹⁴ The five-year missing period is consistent with the period provided in the Uniform Probate Code¹⁵ and with the general trend in states that have considered this area of the law in recent years.¹⁶

¹² Prob. Code §§ 286, 291.

¹³ Prob. Code § 292.

¹⁴ The recommended legislation also makes clear that the court must be satisfied there has been a diligent search or inquiry in an effort to explain the missing person's absence before the five-year presumption of death applies. This is drawn from Uniform Probate Code § 1-107(3) (1977). Under the recommended provision the person's death is presumed to have occurred at the end of the five-year period unless there is sufficient evidence for determining an earlier date of death. Existing law follows the majority or "English" rule that there is no presumption as to the time of death, but only as to the fact of death. See Jalet, *Mysterious Disappearance: The Presumption of Death and the Administration of the Estates of Missing Persons or Absentees*, 54 Iowa L. Rev. 177, 189 (1968); Roca, *When Did Ulysses Die or Mysterious Disappearances and Life Insurance*, 23 Geo. Wash. L. Rev. 172, 188-89 (1954).

The recommended legislation also revises the general presumption of death in Section 667 of the Evidence Code to adopt the five-year missing period. The Evidence Code provision applies in nonprobate situations, most importantly in cases involving insurance and also in determining survivorship in joint tenancies. The duration of absence should be the same for probate and nonprobate situations. The substitution of a five-year missing period for the existing seven-year period would merely reduce the period but would otherwise have no effect on the case law interpreting Section 667.

¹⁵ See Uniform Probate Code § 1-107(3) (1977). An earlier uniform act, which was not well received, provided that the issue of death of a missing person is to be decided as a question of fact based on the evidence and not on the basis of any particular period of absence. See Uniform Absence as Evidence of Death and Absentees' Property Act § 1 (1939).

¹⁶ At least 14 states provide a five-year period, some of them independently of the Uniform Probate Code. Minnesota has adopted a four-year period. There is precedent for the five-year period in California since that is the period of absence applicable in bigamy situations. See Civil Code §§ 4401(2), 4425(b). In its study of the Uniform Probate Code, the State Bar concluded that "there appears to be no objection to the five year period provided under the UPC." State Bar of California, *The Uniform Probate Code: Analysis and Critique* 7 (1973).

(2) The normal provisions governing administration of estates should be applicable once the five-year missing period has run.

(3) The rights of the missing person should be protected by permitting a missing person who reappears to recover his or her estate remaining in the hands of the personal representative.¹⁷

(4) The statutory scheme outlined above should replace the existing provisions that prevent distribution in the first year after appointment and qualification of the personal representative and that require the distributee to give a bond in a case where the distribution is to be made within three years after the filing of the petition for the appointment of an administrator or for probate.

Proposed Legislation

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

An act to amend Section 667 of the Evidence Code, to amend Section 8627 of the Health and Safety Code, to amend Sections 3700 and 3703 of, to amend the heading of Chapter 5 (commencing with Section 3700) of Part 8 of Division 4 of, to add Sections 1461.7 and 1804 to, to add Chapter 23 (commencing with Section 1300) to Division 3 of, to add Article 5 (commencing with Section 1845) to Chapter 1 of Part 3 of Division 4 of, to add a heading immediately preceding Section 3700 of, to add a heading immediately preceding Section 3701 of, to add Article 3 (commencing with Section 3710) and Article 4 (commencing with Section 3720) to Chapter 5 of Part 8 of Division 4 of, and to repeal Division 2a (commencing with Section 260) of, the Probate Code, relating to missing persons.

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

Evidence Code § 667 (amended). Presumption of death

SECTION 1. Section 667 of the Evidence Code is amended to read:

¹⁷ Compare Uniform Probate Code § 3-412(5) (1977).

667. A person not heard from in ~~seven~~ five years is presumed to be dead.

Comment. Section 667 is amended to adopt a five-year missing period. This period is consistent with Probate Code Section 1301 (administration of estates of persons missing five years) and Civil Code Sections 4401(2), 4425(b) (five-year absence in bigamy situations). Except for the change in the duration of the missing period from seven to five years, the amendment of Section 667 has no effect on the case law interpreting this section.

Health & Safety Code § 8627 (technical amendment). Cemetery property

SEC. 2. Section 8627 of the Health and Safety Code is amended to read:

8627. Cemetery property held in joint tenancy is exempt from the provisions of the ~~Code of Civil Procedure~~ *Probate Code* relating to proceedings for establishing the fact of death of a person whose death affects title to real property.

Comment. Section 8627 is amended to reflect the fact that the provisions referred to in the section are found in the Probate Code.

Probate Code §§ 260-295.4 (repealed). Administration of estates of missing persons

SEC. 3. Division 2a (commencing with Section 260) of the Probate Code is repealed.

Comment. Chapter 1 (commencing with Section 260) of Division 2a, relating to a trustee for the estate of a person missing over 90 days, is superseded by the provisions of guardianship-conservatorship law that provide for the appointment of a conservator of the estate to administer the estate of a missing person. See Sections 1461.7, 1804, 1845-1849.5.

Chapter 2 (commencing with Section 280), relating to the administration of the estate of a person missing over seven years, is superseded by Chapter 23 (commencing with Section 1300) of Division 3.

Chapter 3 (commencing with Section 295), relating to the administration of estates of missing federal employees or members of the armed forces, is superseded by provisions of

Division 4 that provide for the management and disposition of the missing person's property without a court proceeding. See Sections 3700 and 3710-3720.

Probate Code §§ 1300-1309 (added). Administration of estates of missing persons presumed dead

SEC. 4. Chapter 23 (commencing with Section 1300) is added to Division 3 of the Probate Code, to read:

CHAPTER 23. ADMINISTRATION OF ESTATES OF MISSING PERSONS PRESUMED DEAD

§ 1300. Missing person defined

1300. As used in this chapter, unless the provision or context otherwise requires, "missing person" means a person who is presumed to be dead under Section 1301.

Comment. Section 1300, which permits use of the phrase "missing person" for convenient reference, continues the terminology of former Section 280.

§ 1301. Presumption of death for purposes of administration

1301. In proceedings under this division, a person who is absent for a continuous period of five years, during which time the person has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead. The person's death is presumed to have occurred at the end of the period unless there is sufficient evidence to establish that death occurred earlier.

Comment. The first sentence of Section 1301 supersedes a portion of former Section 280 (person deemed missing person if absent for seven years). The second sentence is new. Section 1301 is the same in substance as Uniform Probate Code Section 1-107(3). See also Evid. Code §§ 667 (general presumption of death), 1282 (finding of presumed death by federal employee).

§ 1302. Manner of administration and distribution of missing person's estate

1302. The estate of a missing person may be administered and distributed, as though the person were

dead, in the manner provided generally for the administration and distribution of estates of deceased persons, subject to the provisions of this chapter.

Comment. Section 1302 continues the substance of a portion of former Section 280 and supersedes former Sections 285, 286, and 294. See also Section 1308 (recovery of property by missing person upon reappearance).

§ 1303. Jurisdiction of court

1303. (a) If the missing person was a resident of this state at the time of the person's disappearance, the superior court of the county of the person's last known place of residence has jurisdiction for the purposes of this chapter.

(b) If the missing person was a nonresident of this state at the time of the person's disappearance, the superior court of any county where any real property of the missing person is located, or of the county where any personal property is located if there is no real property in this state, has jurisdiction for the purposes of this chapter.

Comment. Section 1303 continues a portion of former Section 281.

§ 1304. Petition for administration or probate

1304. (a) A petition may be filed in the court having jurisdiction under Section 1303 for the administration of the estate or the probate of the last will, as the case may be, of a missing person.

(b) The petition may be filed by any one or more of the following:

(1) The spouse or a member of the family of the missing person.

(2) A person interested in the estate of the missing person.

(3) A friend of the missing person.

(c) In addition to the matters otherwise required in a petition for administration or probate, the petition shall state all of the following:

(1) The last known place of residence of the missing person.

(2) The time of the person's disappearance.

(3) That the missing person has not been heard from by the persons most likely to hear (naming them and their relationship to the missing person) for a period of five years and the whereabouts of the missing person is unknown to those persons and to the petitioner.

(4) A description of any search or inquiry made concerning the whereabouts of the missing person.

(d) The petition shall be verified to the best knowledge and belief of the petitioner.

Comment. Section 1304 supersedes a portion of former Section 282. Pursuant to subdivision (c) and Section 1302, the general requirements for a petition for probate (see Section 326) or a petition for letters of administration (see Section 440) are applicable.

§ 1305. Time for hearing; notice of hearing

1305. (a) When the petition is filed, the clerk of the court shall set the petition for hearing by the court on a day not less than three months from the date of filing.

(b) Notice of hearing on the petition shall be published in the form of similar notices of hearing in the administration of estates of deceased persons, pursuant to Section 6064 of the Government Code, the first publication to be at least three calendar months prior to the day set for the hearing.

(c) Within 20 days after the filing of the petition, notice of the hearing on the petition shall be:

(1) Served on the persons listed in Section 328 in the manner prescribed in that section.

(2) Sent by registered mail to the missing person at his or her last known address.

(d) Proof of such publication, service, and mailing shall be filed at or prior to the hearing.

Comment. Subdivision (a) of Section 1305 continues a portion of former Section 282. The remainder of Section 1305 supersedes former Section 283. See also Section 5 (certified mail equivalent of registered mail).

§ 1306. Determination whether person is person presumed to be dead; search for missing person

1306. (a) At the hearing, the court shall determine whether the alleged missing person is a person who is

presumed to be dead under Section 1301. In addition to the testimony at the hearing, the court may receive in evidence and consider the affidavits and depositions of persons likely to have heard from or know the whereabouts of the alleged missing person.

(b) If the court is not satisfied that a diligent search or inquiry has been made for the missing person, the court may order the petitioner to conduct a reasonably diligent search and to report the results of the search. The court may order the search to be made in any manner that seems advisable, including any or all of the following methods:

(1) Inserting in one or more suitable periodicals a notice requesting information from any person having knowledge of the whereabouts of the missing person.

(2) Notifying law enforcement officials and public welfare agencies in appropriate locations of the disappearance of the missing person.

(3) Engaging the services of an investigator.

(c) The costs of any search ordered by the court pursuant to subdivision (b) shall be paid by the petitioner if there is no administration or by the estate of the decedent if there is administration.

Comment. Subdivision (a) of Section 1306 is drawn from the last sentence of former Section 284. Subdivisions (b) and (c) are drawn from subdivision (b) of Section 3-403 of the Uniform Probate Code.

§ 1307. Appointment of executor or administrator and determination of date of disappearance

1307. If the court finds that the alleged missing person is a person presumed to be dead under Section 1301, the court shall do both of the following:

(a) Appoint an executor or administrator for the estate of the missing person in the manner provided for the estates of deceased persons.

(b) Determine the date of the missing person's death.

Comment. Section 1307 continues the substance of a portion of former Section 284. See also Sections 1301 (death presumed at end of five-year period unless sufficient evidence of earlier death), 1302 (manner of administration and distribution).

§ 1308. Recovery of property by missing person upon reappearance

1308. If the missing person reappears, the missing person may recover property of the missing person's estate in the hands of the executor or administrator. No action for recovery may be brought against a distributee of the property.

Comment. Section 1308 supersedes former Sections 287-290 and a portion of former Section 292.

§ 1309. Application of chapter

1309. (a) This chapter applies only to cases where a petition is filed under Section 1304 after December 31, 1983. If a petition is filed under Section 1304 after December 31, 1983, the required period of absence of the alleged missing person may include a period of absence that commenced to run before that date.

(b) This chapter does not apply to any proceeding under former Sections 280 to 294, inclusive, that is pending on December 31, 1983, and the law that applies to such proceeding on December 31, 1983, shall continue to apply after that date.

Comment. Section 1309 is drawn in part from former Section 293.

Probate Code § 1461.7 (added). Notice of hearing on petition, report, or account where conservatee is a missing person

SEC. 5. Section 1461.7 is added to the Probate Code, to read:

1461.7. Unless the court for good cause dispenses with such notice, notice of the time and place of the hearing on a petition, report, or account, together with a copy of the petition, report, or account, shall be given to the same persons who are required to be given notice under Section 2581 for the period and in the manner provided in this chapter if both of the following conditions exist:

(a) A conservator of the estate has been appointed under Article 5 (commencing with Section 1845) of

Chapter 1 of Part 3 for a person who is missing and whose whereabouts is unknown.

(b) The petition, report, or account is filed in the conservatorship proceeding under any one or more of the following provisions:

- (1) Section 1861 or 2423.
- (2) Article 7 (commencing with Section 2540) of Chapter 6 of Part 4.
- (3) Section 2570, 2571, 2580, 2592, or 2620.
- (4) Chapter 8 (commencing with Section 2640) of Part 4.
- (5) Chapter 9.5 (commencing with Section 2670) of Part 4.
- (6) Chapter 3 (commencing with Section 3100) of Part 6.

Comment. Section 1461.7 supersedes portions of former Section 268 which provided for giving notice of hearings on certain estate management matters to persons who had an interest in the estate of a missing person for whom a trustee had been appointed. Section 1461.7 adopts by reference Section 2581 (notice to persons known to the petitioner to have a possible interest in the conservatee's estate if the conservatee were dead). The listing of the petitions, reports, and accounts to which Section 1461.7 applies is drawn from Sections 1461 and 1461.5.

Probate Code § 1804 (added). Conservator of estate of missing person

SEC. 6. Section 1804 is added to the Probate Code, to read:

1804. Subject to Section 1800, a conservator of the estate may be appointed for a person who is missing and whose whereabouts is unknown.

Comment. Section 1804 is a new provision that supersedes the former procedure for appointing a trustee for the property of a missing person. See former Sections 260-272 and the Comment thereto. For special provisions applicable where the proposed conservatee is a missing person, see Article 5 (commencing with Section 1845). See also Section 1461.7 (notice of hearing on petition, report, or account). If a minor is a missing person, a guardianship of the estate may be established for the minor. See Section 1514 (guardian may be appointed if it appears necessary or convenient).

Probate Code §§ 1845-1849.5 (added). Special provisions applicable where proposed conservatee is a missing person

SEC. 7. Article 5 (commencing with Section 1845) is added to Chapter 1 of Part 3 of Division 4 of the Probate Code, to read:

Article 5. Special Provisions Applicable Where Proposed Conservatee is a Missing Person

§ 1845. Appointment of a conservator for missing person; procedure

1845. (a) Except as otherwise provided in this article, a conservator of the estate of a person who is missing and whose whereabouts is unknown shall be appointed as provided in Article 3 (commencing with Section 1820).

(b) This article does not apply where the proposed conservatee is an absentee as defined in Section 1403.

Comment. Subdivision (a) of Section 1845 is comparable to Section 1840 (conservatee who is an "absentee"). The appointment of a conservator is governed by other provisions where the proposed conservatee is an absentee as defined in Section 1403. See Article 4 (commencing with Section 1840).

§ 1846. Petition; additional contents

1846. In addition to the other required contents of the petition, if the proposed conservatee is a person who is missing and whose whereabouts is unknown, the petition shall state all of the following:

(a) The proposed conservatee owns or is entitled to the possession of real or personal property situated in this state.

(b) The proposed conservatee is missing and his or her whereabouts is unknown.

(c) The estate of the proposed conservatee requires attention, supervision, and care.

Comment. Section 1846 supersedes a portion of former Section 260 (appointment of trustee of estate of missing person). Section 1846 continues the substance of the standard for appointment of a trustee under former Section 260 with two changes: First, the requirement of former Section 260 that the

missing person be a resident of California is not continued. This omission permits the appointment of a conservator of the estate of a missing person who is a nonresident but who has property in California that requires the attention, supervision, and care of a conservator. Second, the requirement of former Section 260 that the person be missing for 90 days is not continued. Under Section 1800, a conservator may be appointed only if the need therefor is established to the satisfaction of the court. This requirement protects against premature establishment of a conservatorship and, at the same time, permits the protection of the property of a person who has been missing less than 90 days. Under some circumstances, the court may decline to appoint a permanent conservator pending further developments but may appoint a temporary conservator. See Sections 2250 (petition for appointment of a temporary conservator pending the final determination of the court upon the petition for the appointment of the conservator). See also Section 2252 (powers and duties of temporary conservator). In other circumstances, the court may determine that a permanent conservator should be appointed without delay.

§ 1847. Notice of hearing

1847. In addition to the persons and entities to whom notice of hearing is required under Section 1822, if the proposed conservatee is a person who is missing and whose whereabouts is unknown:

(a) A copy of the petition for appointment of a conservator and notice of the time and place of the hearing on the petition shall be mailed at least 15 days before the hearing to the proposed conservatee at the last known address of the proposed conservatee.

(b) Notice of the time and place of the hearing shall also be published pursuant to Section 6061 of the Government Code in a newspaper of general circulation in the county in which the proposed conservatee was last known to reside if the proposed conservatee's last known address is in this state.

(c) Pursuant to Section 1462, the court may require that further or additional notice of the hearing be given.

Comment. Section 1847 supersedes former Section 261 and is drawn from Section 1842 (notice of hearing where proposed

conservatee is an “absentee”). Unlike Section 1842, which requires notice to be published in the county where the hearing will be held, Section 1847 requires notice to be published in the county where the proposed conservatee was last known to reside if his or her last known address is in this state. Publishing notice in this county is more likely to give actual notice to the proposed conservatee. If the last known address is not in this state, Section 1842 does not require the publication of a notice of the time and place of the hearing; but, in such a case, the court may require publication within or without this state pursuant to the authority given the court under subdivision (c). Subdivision (c) of Section 1847 continues the substance of a portion of former Section 261 and makes clear that the court may require such additional notice as is appropriate under the circumstances of the particular case.

Nothing in this section limits the authority of the court in determining the need to establish a conservatorship to require that a search be made for the missing person before a conservator is appointed. Whether to require such a search and the type of search to be required is left to the court’s discretion. In exercising this discretion, the court can take into consideration all the circumstances of the particular case, including the nature of the disappearance, the character and amount of the estate, and the circumstances of the persons who have an interest in the proceeding. For example, the court may dispense with a search if the missing person’s estate is nominal, there are dependents entitled to support, and the funds necessary for support would be significantly reduced by the cost of the search. In other cases, no purpose would be served by a court-ordered search, as where the proposed conservatee is lost at sea.

§ 1848. Certain general requirements for establishment of conservatorship not applicable

1848. In a proceeding to appoint a conservator of the estate of a person who is missing and whose whereabouts is unknown, the following acts are not required:

(a) Issuance of a citation to the proposed conservatee pursuant to Section 1823.

(b) Service of a citation and petition pursuant to Section 1824.

(c) Production of the proposed conservatee at the hearing pursuant to Section 1825.

(d) Performance of the duties of the court investigator pursuant to Section 1826.

(e) Performance of any other act that depends upon knowledge of the location of the proposed conservatee.

Comment. Section 1848 excuses performance of any duty under the general provisions that depends upon knowledge of the whereabouts of the missing person. This section does not limit the authority of the court to require that an attempt be made to locate the missing person. See the Comment to Section 1847.

§ 1849. Appointment of conservator

1849. A conservator of the estate of a person who is missing and whose whereabouts is unknown may be appointed only if the court finds all of the following:

(a) The proposed conservatee owns or is entitled to the possession of real or personal property situated in this state.

(b) The proposed conservatee remains missing and his or her whereabouts remains unknown.

(c) The estate of the proposed conservatee requires attention, supervision, and care.

Comment. Section 1849 supersedes a portion of former Section 260 (appointment of trustee of estate of missing person). See the Comment to Section 1846. For a special provision relating to notice of hearing on a petition, report, or account, see Section 1461.7.

§ 1849.5. Application of article; authority of trustee under prior law

1849.5. (a) This article applies only to cases where a petition is filed under this article after December 31, 1983. After December 31, 1983, a petition may be filed under this article regardless of when the proposed conservatee became missing or how long the proposed conservatee has been missing.

(b) If a trustee was appointed pursuant to former Section 262, the provisions of former Sections 260 to 272, inclusive, continue to apply to the case after December 31, 1983, unless, upon a petition filed under this article after December 31, 1983, the trustee is replaced by a conservator.

Comment. Subdivision (a) of Section 1849.5 provides for the immediate availability of a conservatorship pursuant to this article, notwithstanding the time when the missing person disappeared. Hence, the 90-day period provided by former Section 260 is not applicable after December 31, 1983.

Subdivision (b) makes clear that a trusteeship created under former law may continue to operate under the provisions of former law, but makes the provisions of this article available on petition.

Probate Code—heading for Chapter 5 (commencing with Section 3700) of Part 8 of Division 4 (technical amendment)

SEC. 8. The heading of Chapter 5 (commencing with Section 3700) of Part 8 of Division 4 of the Probate Code is amended to read:

**CHAPTER 5. PERSONAL PROPERTY OF
ABSENTEES *ABSENT FEDERAL PERSONNEL***

Probate Code—heading for Article 1 (commencing with Section 3700) of Chapter 5 of Part 8 of Division 4 (added)

SEC. 9. A heading is added immediately preceding Section 3700 of the Probate Code, to read:

Article 1. Definitions

Probate Code § 3700 (technical amendment). Definitions

SEC. 10. Section 3700 of the Probate Code is amended to read:

3700. As used in this chapter:

(a) "Absentee" is defined in Section 1403.

(b) "*Certificate of missing status*" means the official written report complying with Section 1283 of the Evidence Code and showing the determination of the secretary of the military department or the head of the department or agency concerned or the delegate of the secretary or head that the absentee is in missing status.

~~(b)~~ (c) "Eligible spouse" means the spouse of an absentee who has not commenced an action or proceeding

for judicial or legal separation, divorce, annulment, adjudication of nullity, or dissolution of the marriage of the spouse and the absentee.

~~(e)~~ (d) “Family of an absentee” means an eligible spouse, if any, or if no eligible spouse, the child or children of an absentee, equally, or if no child or children, the parent or parents of an absentee, equally, *provided these persons are dependents of the absentee as defined in Section 401 of Title 37 of the United States Code*, and the guardian of the estate or conservator of the estate of any person bearing such relationship to the absentee.

~~(d)~~ (e) “Secretary concerned” is defined in Section 1440.

Comment. Subdivision (b) of Section 3700 continues the substance of former Section 295(2) and a provision formerly set out in Section 3703(b). Subdivision (d) is amended to continue a limitation provided by former Section 295(4) and apply it to the procedure set out in Article 2 (commencing with Section 3701).

Probate Code—heading for Article 2 (commencing with Section 3701) of Chapter 5 of Part 8 of Division 4 (added)

SEC. 11. A heading is added immediately preceding Section 3701 of the Probate Code, to read:

**Article 2. Court Proceeding to Set Aside
Personal Property of Absentee**

Probate Code § 3703 (technical amendment). Contents of petition

SEC. 12. Section 3703 of the Probate Code is amended to read:

3703. (a) The petition shall contain all of the following:

(1) A statement that the petition is filed under this chapter.

(2) In its caption, the last known military rank or grade and the social security account number of the absentee.

(3) A specific description and estimate of the value of all of the absentee’s property, wherever situated (including all sums due the absentee from the United States).

(4) A designation of the property to be set aside, and the facts establishing that setting aside the property is necessary and in the best interest of the absentee.

(5) If the property is to be set aside for the benefit of the spouse of the absentee, an allegation that the spouse is an eligible spouse.

(6) So far as known to the petitioner, the names and residences of all persons comprising the family of the absentee, and an allegation whether a guardian of the estate or a conservator of the estate of any member of the family of the absentee has been appointed.

(b) There shall be attached to the petition a certificate ~~complying with Section 1283 of the Evidence Code showing the determination of the secretary of the military department or the head of the department or agency concerned or the delegate of the secretary or head that the absentee is in~~ *of missing status*. The certificate *of missing status* shall be received as evidence of that fact and the court shall not determine the status of the absentee inconsistent with the status shown in the certificate.

Comment. The requirements for the certificate formerly set forth in subdivision (b) of Section 3703 are continued in the definition provided by Section 3700(b).

Probate Code §§ 3710-3712 (added)

SEC. 13. Article 3 (commencing with Section 3710) is added to Chapter 5 of Part 8 of Division 4 of the Probate Code, to read:

Article 3. Management and Disposition of Personal Property of Absentee Without Court Proceeding

§ 3710. Authority of family of absentee to manage and dispose of personal property of absentee

3710. The family of an absentee may collect, receive, dispose of, or engage in any transaction relating to the absentee's personal property situated in California without any judicial proceeding if all the following conditions are satisfied:

(a) The absentee owns no real property situated in California.

(b) The aggregate value of all of the absentee's personal property situated in California is five thousand dollars (\$5,000) or less, excluding any money owed the absentee by the United States.

(c) The family of the absentee needs to dispose of such personal property to provide for shelter, food, health care, education, transportation, or the maintenance of a reasonable and adequate standard of living for the family of the absentee.

Comment. Section 3710 continues the substance of the first paragraph of former Section 295.1.

§ 3711. Transfer of evidence of absentee's property right; discharge of third persons from liability

3711. (a) If the conditions set forth in Section 3710 are satisfied, the family of the absentee may have any evidence of interest, indebtedness, or right attributable to the absentee's personal property transferred to the family of the absentee, or transferred to the person to whom the property is to be sold or transferred by the family of the absentee, upon furnishing the person (including any governmental body) having custody of the property both of the following:

(1) A certificate of missing status.

(2) An affidavit stating under oath that the provisions of this article are applicable and that the aggregate value of all property received pursuant to this affidavit, together with all other property previously received under this article, does not exceed five thousand dollars (\$5,000).

(b) The receipt of a certificate of missing status and affidavit under subdivision (a) constitutes sufficient acquittance for any payment of money or delivery of property made pursuant to this article and fully discharges the recipient from any further liability concerning the money or property without the necessity of inquiring into the truth of any of the facts stated in the affidavit.

Comment. Subdivision (a) of Section 3711 continues the substance of the second paragraph of former Section 295.1. Subdivision (b) continues the substance of former Section 295.2.

§ 3712. Action by absentee

3712. The time within which an absentee may commence an action against any person who executes an affidavit and receives property pursuant to this article commences to run on the earlier of the following dates:

(a) Ninety days after the absentee returns to the continental United States after the termination of the condition that caused the classification of an absentee.

(b) Two years after the termination of the condition that caused the classification of an absentee.

Comment. Section 3712 continues the substance of former Section 295.3.

Probate Code § 3720 (added). Absentee's power of attorney

SEC. 14. Article 4 (commencing with Section 3720) is added to Chapter 5 of Part 8 of Division 4 of the Probate Code, to read:

Article 4. Absentee's Power of Attorney**§ 3720. Power of attorney**

3720. If an absentee executed a power of attorney that expires during the period that occasions absentee status, the power of attorney continues in full force and effect until 30 days after the absentee status is terminated. Any person who acts in reliance upon the power of attorney when accompanied by a copy of a certificate of missing status is not liable for relying or acting upon the power of attorney.

Comment. Section 3720 continues the substance of former Section 295.4, but eliminates unnecessary language.

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

relating to

Nonprobate Transfers

September 1982

**CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306**

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Nonprobate Transfers*, 16 Cal. L. Revision Comm'n Reports 129 (1982).

CALIFORNIA LAW REVISION COMMISSION

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September 24, 1982

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

In 1980, the Law Revision Commission recommended that the substance of Article VI of the Uniform Probate Code be enacted in California. See *Recommendation Relating to Non-Probate Transfers*, 15 Cal. L. Revision Comm'n Reports 1605 (1980). This article of the Uniform Probate Code relates to multiple-party accounts in banks and other financial institutions and to "pay-on-death" provisions in contracts, deeds, and other written instruments.

Assembly Bills No. 325 and 2643 were introduced at the 1981-82 session of the Legislature to effectuate the 1980 recommendation but only Assembly Bill No. 2643, a narrow statute authorizing creation of pay-on-death accounts in financial institutions, was enacted. 1982 Cal. Stats. ch. 269. The Commission has given further study to this matter and revised its basic recommendation to cure problems raised concerning the 1980 proposals. With these revisions and other technical changes, the Commission again proposes enactment of the substance of Article VI of the Uniform Probate Code. This recommendation is submitted pursuant to authority of 1980 Cal. Stats. res. ch. 37.

Respectfully submitted,

ROBERT J. BERTON
Chairperson

RECOMMENDATION

relating to

NONPROBATE TRANSFERS

INTRODUCTION

This recommendation first describes the Uniform Probate Code provisions relating to nonprobate transfers. Following this description, the Commission's recommendations are set out. These recommendations propose the enactment of the Uniform Probate Code provisions with a number of revisions, omissions, and additions.

THE UNIFORM PROBATE CODE PROVISIONS

Article VI of the Uniform Probate Code¹ consists of two parts. The first part provides rules as to the ownership of multiple-party accounts in banks and other financial institutions. It also simplifies the procedure for transfer of funds by the bank or other financial institution following the death of the depositor. The second part validates pay-on-death provisions in contracts, deeds, and other instruments.

Multiple-Party Accounts

The Uniform Probate Code (UPC) gives statutory recognition to three types of "multiple-party accounts" designed for the transfer of property at death:

¹ Twenty states have adopted legislation comparable to Article VI of the Uniform Probate Code. See Alaska Stat. § 13.31.005-13.31.070 (1972); Ariz. Rev. Stat. Ann. §§ 14-6101 to 14-6201 (1975); Colo. Rev. Stat. §§ 15-15-101 to 15-15-201 (1973); G. Code Ann. §§ 7-1-810 to 7-1-821 (1982); Haw. Rev. Stat. §§ 560:6-101 to 560:6-113 (1976); Idaho Code §§ 15-6-101 to 15-6-201 (1979); Ind. Code Ann. §§ 32-4-1.5-1 to 32-4-1.5-14 (Burns 1979 Supp.); Ky. Rev. Stat. §§ 391.300-391.360 (1978); Me. Rev. Stat. tit. 18-A, §§ 6-101 to 6-201 (1981); Mich. Stat. Ann. §§ 23.510(1)-23.510(15) (West 1971); Minn. Stat. Ann. §§ 528.01-528.16 (West 1975); Neb. Rev. Stat. §§ 30-2701 to 30-2714 (1979); N.J. Stat. Ann. §§ 17:161-1 to 17:161-17 (West 1982 Supp.); N.M. Stat. Ann. §§ 45-6-101 to 45-6-201 (1978); N.D. Cent. Code §§ 30.1-31-01 to 30.1-31-14 (1976); Or. Rev. Stat. §§ 708.611-708.661 (1981); Pa. Cons. Stat. Ann. 20 § 6301 to 20 § 6306 (Purdon 1982 Supp.); Tex. Prob. Code §§ 436-450 (Vernon 1980); Utah Code Ann. §§ 75-6-101 to 75-6-201 (1978); Va. Code §§ 6.1-125.1 to 6.1-125.16 (1979).

(1) *The joint account.* A joint account is one payable on request to one or more of two or more parties. A right of survivorship exists in such an account whether or not mention is made in the deposit agreement of any right of survivorship unless there is clear and convincing evidence of a contrary intention at the time the account is created. This is comparable to the familiar joint tenancy account used in California.²

(2) *The P.O.D. account.* This is an account payable on request (1) to one person during lifetime and on the death of that person to one or more P.O.D. payees or (2) to one or more persons during their lifetimes and on the death of all of them to one or more P.O.D. payees. This type of account is now authorized in California.³

(3) *The trust account.* This account—a “Totten” trust account—is an account in the name of one or more persons as trustee for one or more beneficiaries where (1) the relationship is established by the form of the account and the deposit agreement with the financial institution, and (2) there is no subject of the trust other than the sums on deposit in the account. The “Totten” trust account is a method of transfer on death that has been widely used in California.⁴

Under the UPC, a multiple-party account may be created by a deposit agreement for a checking account, savings account, certificate of deposit, share account, or other like arrangement.⁵

Ownership of multiple-party accounts while depositor is living. The UPC specifies the ownership rules regarding multiple-party accounts while the depositor is living:

² See Fin. Code §§ 852 (banks), 7602 (savings and loan associations), 11204 (federal savings and loan associations). See also Fin. Code § 14800 (credit unions). Under existing California law, a joint account with a right of survivorship creates a rebuttable presumption of a joint tenancy. *Schmedding v. Schmedding*, 240 Cal. App.2d 312, 315-16, 49 Cal. Rptr. 523 (1966).

³ Legislation enacted at the 1982 legislative session gives statutory authority to financial institutions to offer P.O.D. accounts to their depositors. Fin. Code §§ 852.5, 7604.5, 11203.5, 14854.5, 18318.5 (enacted by 1982 Cal. Stats. ch. 269).

⁴ State Bar of California, *The Uniform Probate Code: Analysis and Critique* 184 (1973).

⁵ The UPC provisions do not apply to:

(1) Accounts established for the deposit of funds of a partnership, joint venture, or other association for business purposes.

(1) A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

(2) A P.O.D. account belongs to the depositor during the depositor's lifetime and not to the P.O.D. payee or payees. If two or more persons are co-depositors, rights between them are governed during their lifetimes by the rules concerning joint accounts discussed above.

(3) The trust account is treated the same as the P.O.D. account. The trustee—but not the trust beneficiary—has the power to make withdrawals during the trustee's lifetime.

Rights of creditors while depositor is living. The UPC permits creditors to reach the ownership interest (outlined above) of the depositor prior to the death of the depositor. Creditors of the P.O.D. payee may not reach funds in the P.O.D. account during the lifetime of the depositor. Likewise, creditors of the trust beneficiary may not reach funds in the trust account during the lifetime of the trustee.

Facilitating transfer of funds by financial institution after death of depositor. The UPC protects the bank or other financial institution that releases an account upon the death of the depositor in accordance with its deposit agreement unless before payment the institution has been served with process in a proceeding by the personal representative of the deceased depositor. This protection is provided to facilitate release of the funds by the financial institution after death.

Rights of survivorship. The UPC contains detailed provisions governing the right of survivorship with respect to various types of accounts:

(1) *Joint account.* The amount on deposit at the death of a party to a joint account belongs to the surviving party or parties as against the estate of the deceased party unless there is clear and convincing evidence of a different

(2) Accounts controlled by one or more persons as the duly authorized agent or trustee for a corporation, unincorporated association, or charitable or civic organization.

(3) A regular fiduciary or trust account where the relationship is established other than by the deposit agreement.

intention at the time the account is created.⁶ The right of survivorship continues between the surviving parties after the death of a party.

(2) *P.O.D. account.* On the death of the sole owner of a P.O.D. account or the death of the survivor of two or more owners, the amount on deposit at the time of death belongs to the P.O.D. payee or payees if they are alive at that time or to the survivors if one or more have previously died.⁷ If one of two or more of the owners of the account dies, the remaining owners hold the account subject to the rules concerning joint accounts and the P.O.D. provision.

(3) *Trust account.* On the death of the sole trustee or the survivor of two or more trustees, the amount on deposit at the time of death belongs to the person or persons named as beneficiaries, if surviving, or to the survivor of them if one or more die before the trustee, unless there is clear evidence of a contrary intent.⁸

(4) *Multiple-party accounts without right of survivorship.* In other cases (such as a joint account where survivorship is expressly negated),⁹ the death of any party to a multiple-party account has no effect on beneficial ownership of the account other than to transfer the rights of the decedent as part of the decedent's estate.

Limitation on effect of will. Although the UPC permits changes in the deposit agreement during the lifetime of the depositors, a testator cannot change by will:

(1) A right of survivorship arising from the express terms of the account or arising under the UPC provisions described above.

(2) A beneficiary designation in a trust account.

(3) A P.O.D. designation in a P.O.D. account.

⁶ If there are two or more surviving parties, their ownership shares are increased by an equal share for each survivor of any interest the deceased party may have owned in the account immediately before death.

⁷ When the account becomes the property of two or more P.O.D. payees, there is no right of survivorship if one of the P.O.D. payees thereafter dies unless the deposit agreement expressly provides otherwise.

⁸ If two or more beneficiaries survive, there is no right of survivorship if one of them dies thereafter unless the deposit agreement expressly provides otherwise.

⁹ Under the UPC, a financial institution may permit depositors to choose between joint accounts "with the right of survivorship" and "without the right of survivorship." However, unless there is clear and convincing evidence of a different intent, the right of survivorship exists whenever an account is payable on request to one or more of two or more parties, whether or not mention is made of the right. See Uniform Probate Code §§ 6-101(4), 6-104(a).

Pay-on-Death Provisions in Contracts and Instruments

The UPC authorizes pay-on-death provisions in bonds, mortgages, promissory notes, and conveyances, as well as other contractual instruments and deems such provisions to be nontestamentary. In particular, the UPC validates contractual provisions that money or other benefits payable to or owned by the decedent may be paid after the decedent's death "to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently." The UPC provision validates contractual arrangements which might be held testamentary and invalid because not made in a valid will. The sole purpose of the provision is to eliminate the testamentary characterization of arrangements falling within the terms of the provision. The provision avoids the need to execute the instrument in compliance with the requirements for a will and avoids the need to have the instrument probated. Nothing in the UPC provision limits the rights of creditors under other laws.

RECOMMENDATIONS

The Law Revision Commission recommends that the substance of Article VI of the Uniform Probate Code, less the provision which permits creditors of a depositor in a multiple-party account to reach account funds after the depositor's death,¹⁰ be enacted in California with some substantive and technical revisions. The enactment of Article VI with these revisions will make it easier—particularly for those who have small estates—to transfer property upon death to their designated beneficiaries without the need for probate.

Multiple-Party Accounts

The legislation recommended by the Commission would make substantive and technical changes in the UPC provisions relating to accounts held by banks and other financial institutions. These changes are described below. Also described below are the major substantive changes in existing law that are made in the recommended legislation.

¹⁰ Uniform Probate Code § 6-107. Omission of this provision will preserve existing California decisional law.

Ownership of joint account. The UPC provides that a joint account belongs to the parties during their lifetimes in proportion to their net contributions unless there is clear and convincing evidence of a contrary intent. This adopts the gift tax rule of the Internal Revenue Service (IRS) in place of the existing California rule that a joint tenancy account belongs equally to the co-depositors.¹¹ For gift tax purposes, IRS has taken the position that no completed gift occurs upon the opening of the account; rather the gift occurs when the nondepositing tenant makes a withdrawal.¹² Adoption of the IRS concept is a desirable modification of existing law. Many lay persons have the erroneous understanding that creation of a joint tenancy account has no effect until death.¹³ Often the person making a deposit names another as a joint tenant merely to facilitate the withdrawal of funds by the joint tenant for the depositor and the transfer of the funds to the joint tenant upon death of the depositor. The depositor often has no intent to make a gift of one-half of the funds to the other joint tenant merely by making the person a joint tenant. The depositor can, of course, clearly indicate a different intent (as by executing an instrument that makes clear the intent to make a gift) and then that intent will be given effect.

Right of survivorship. The UPC provides for a right of survivorship in a joint account (whether or not the account is described as a "joint tenancy" or mentions any right of survivorship) which may be rebutted by clear and convincing evidence of a different intention.¹⁴ This

¹¹ *Wallace v. Riley*, 23 Cal. App.2d 654, 667, 74 P.2d 807 (1937). The recommended legislation would add a provision to the UPC provisions to deal with the case where the amount of a party's net contribution cannot be established. This provision reads: "In the absence of proof otherwise, only parties who have a present right of withdrawal shall be considered as having a net contribution and the net contribution of each of the parties having a present right of withdrawal shall be deemed an equal amount."

¹² See Treas. Reg. § 25.2511-1 (1958).

¹³ State Bar of California, *The Uniform Probate Code: Analysis and Critique* 184-85 (1973).

¹⁴ The legislation recommended by the Commission does not include the UPC requirement that the evidence of a different intention exist "at the time the account is created." Thus, the intention to negate survivorship may be shown to have existed after the account's creation, although the evidence must be clear and convincing. The ordinary method that will be used to establish a joint account without the right of survivorship will be to establish a "JOINT ACCOUNT—NO SURVIVORSHIP" or "JOINT ACCOUNT—WITHOUT RIGHT OF SURVIVORSHIP."

strengthens survivorship rights, since under existing law the presumption of survivorship arising from the joint tenancy form of the account may be overcome by a preponderance of the evidence.¹⁵ Most persons who use joint accounts want the survivor or survivors to have all balances remaining at death, and the UPC presumption of survivorship for joint accounts gives effect to this intent.

Tentative trust accounts. The UPC makes the tentative or "Totten" trust a more reliable estate planning device by making it more difficult for heirs of the depositor to break the trust: Under the UPC, the presumption that the account funds vest in the named beneficiary on the depositor's death can be overcome only by "clear and convincing" evidence, and the trust cannot be revoked or modified by the depositor's will. These UPC provisions will have the beneficial effect of reducing litigation after the depositor's death,¹⁶ and will permit depositors to create tentative trusts with confidence. Under existing law, a tentative trust has sometimes been defeated on flimsy or circumstantial evidence that the depositor intended some other disposition of the proceeds.¹⁷

P.O.D. accounts. The UPC authorizes the "pay-on-death" account. Such an account is now authorized in California by 1982 legislation that gives statutory authority to financial institutions to offer this type of account to their depositors.¹⁸ This new authority will permit a depositor to use an account form that accomplishes his or her objective without the need to resort to trust theory or other legal fictions. When the depositor's intent in creating

¹⁵ See *Schmedding v. Schmedding*, 240 Cal. App.2d 312, 315-16, 49 Cal. Rptr. 523 (1966) (presumption rebuttable); Evid. Code § 115 (except as otherwise provided by law, burden of proof requires preponderance of evidence); Comment to Evid. Code § 606 (ordinarily party against whom a rebuttable presumption operates must overcome the presumption by a preponderance of the evidence).

Existing statutes provide that if a deposit is made in the names of two or more persons in such form that the moneys in the account are payable to the survivor or survivors, then the deposit is the property of such persons as joint tenants. Fin. Code §§ 852 (banks), 7602 (savings and loan associations), 11204 (federal savings and loan associations). It is not necessary, however, that the account expressly provide for a right of survivorship; survivorship follows as a legal incident of the creation of a joint tenancy account. *Kennedy v. McMurray*, 169 Cal. 287, 294, 146 P. 647 (1915).

¹⁶ See G. Bogert, *The Law of Trusts and Trustees* § 47, at 335, 354 (2d ed. 1965); Estes, *In Search of a Less Tentative Totten*, 5 *Pepperdine L. Rev.* 21, 36, 39 (1977).

¹⁷ See 7 B. Witkin, *Summary of California Law Trusts* § 18, at 5380-82 (8th ed. 1974).

¹⁸ Fin. Code §§ 852.5, 7604.5, 11203.5, 14854.5, 18318.5 (enacted by 1982 Cal. Stats. ch. 269).

a multiple-party account is solely to provide for payment of the funds to a named beneficiary on the depositor's death, the "pay-on-death" account is superior to the joint account because the depositor retains sole ownership of the account funds during his or her lifetime. It is superior to the tentative or "Totten" trust account for such purpose because the effect of the "pay-on-death" account form will be more readily understood by lay persons who use it.

Community property rights. Article VI of the UPC was drafted principally with common law states in mind.¹⁹ If Article VI is to be enacted in California, a provision should be added to make clear its effect when community property funds are deposited in a joint account.

Under existing California law, when married persons deposit community funds into a joint tenancy bank account, a presumption arises that they thereby intended to transmute their community funds into a true common law joint tenancy.²⁰ If the presumption is overcome, the funds are treated as community property notwithstanding the joint tenancy form of the account. The result is a hybrid kind of property: community property in joint tenancy form.²¹

If the spouse dies without a will, the community funds in joint tenancy form go to the surviving spouse by right of survivorship according to the ostensible joint tenancy form if there is no probate, or by intestate succession as community property if probate proceedings are commenced.²² The survivorship feature of community

¹⁹ See, e.g., Uniform Probate Code § 6-106; Comment to Part 2 of Article II of the Uniform Probate Code.

²⁰ See *In re McCain*, 9 Cal. App.2d 480, 50 P.2d 114 (1935) (presumption of transmutation); *Schmedding v. Schmedding*, 240 Cal. App.2d 312, 49 Cal. Rptr. 523 (1966) (presumption rebuttable).

²¹ Griffith, *Community Property in Joint Tenancy Form*, 14 Stan. L. Rev. 87 (1961). Courts in finding property to be community property notwithstanding its ostensible joint tenancy form have reached the following results: (1) The first spouse to die may dispose of his or her half by will; (2) creditors of the deceased spouse may reach the property to the same extent that they could reach any other community property; (3) tax authorities must treat the property as community, not joint tenancy, for all tax purposes; (4) an attempted gift or other transfer by one spouse without consent of the other causes no severance but may be set aside on discovery; (5) the property is divisible on dissolution of their marriage; (6) under the laws of succession one-half of the property which had been community with a previously deceased spouse goes to relatives of that spouse in spite of the joint tenancy form. *Id.* at 93-94. However, the property does not lose all of the characteristics of a joint tenancy since a bona fide purchaser is protected. See *id.* at 94.

²² *Id.* at 96.

property in joint tenancy form is particularly advantageous where the decedent's estate is small and there are no unpaid debts or taxes: The surviving spouse may have immediate access to the funds and probate is unnecessary. Creditors are not prejudiced since they may petition for probate²³ and prove their claims.

In most cases, when married persons put community funds into a joint tenancy account they do so to permit both spouses to make withdrawals during their lifetimes and to avoid the delay and expense of probate by taking advantage of the automatic survivorship feature; but they do not intend to give up the other advantages of community property.²⁴ The law should carry out this intent since it generally produces desirable results.²⁵

The Commission recommends that a provision be added to make it easier for married persons who deposit community funds into a joint tenancy account simultaneously to have the advantages of community property and the survivorship feature of joint tenancy property as they generally intend. The provision would reverse the present unrealistic presumption of transmutation, and instead create a rebuttable²⁶ presumption that funds of married persons on deposit in an account to which they are both parties are presumed to be their community property, whether or not they are described in the deposit agreement as husband and wife. This will permit the court to divide the funds in case of dissolution of the marriage,²⁷ but the recommended provision makes clear that a right of survivorship arising

²³ Prob. Code § 422.

²⁴ Griffith, *Community Property in Joint Tenancy Form*, 14 Stan. L. Rev. 87, 90, 95, 106-09 (1961).

²⁵ See note 21 *supra*.

²⁶ Under the proposed law, the presumption may be rebutted (1) by tracing the funds from separate property (absent an agreement expressing a clear intent to transmute the funds to community property) or (2) by an agreement separate from the deposit agreement which expressly provides that the funds are not community property. If separate funds have been so commingled with community funds that it is no longer possible to segregate one from the other, the separate funds will lose their separate character and be treated as community funds. See 7 B. Witkin, *Summary of California Law Community Property* §§ 33-34, at 5126-28 (8th ed. 1974).

²⁷ On dissolution of marriage, the court may divide the community and quasi-community property of the parties. Civil Code § 4800. True joint tenancy property (*i.e.*, joint tenancy property which is not merely community property held in joint tenancy form) is ordinarily beyond the power of the court to divide upon dissolution of marriage. *Walker v. Walker*, 108 Cal. App.2d 605, 608, 239 P.2d 106 (1952).

from the express terms of the account or by virtue of the statute cannot be changed by will.²⁸

Set-off rights. The Uniform Probate Code creates additional set-off rights of financial institutions against multiple-party accounts.²⁹ New set-off rights should not be created; existing set-off rights are adequate.³⁰

Conforming revisions. The provisions of the Financial Code and Civil Code relating to joint tenancy and P.O.D. accounts in financial institutions³¹ should be revised to be consistent with the new provisions concerning multiple-party accounts. The provisions of the Financial Code that permit joint tenants to require more than one signature for withdrawals or on checks or receipts in the case of banks,³² savings and loan associations,³³ federal savings and loan associations,³⁴ and credit unions³⁵ should be relocated in a single comprehensive provision in the new provisions concerning multiple-party accounts. The Financial Code provision that permits trust account funds to be paid to a minor beneficiary on the death of the trustee³⁶ should be revised to make such payment subject to the general rules concerning payment to a minor,³⁷ and moved from the Financial Code to the new statute.

Pay-on-Death Provisions in Contracts and Instruments

The UPC would make clear the validity of the following "pay-on-death" provisions in a broad class of written instruments (including contracts, gifts, and conveyances):

²⁸ This is consistent with the UPC rule that, although changes may be made in the deposit agreement during the lifetime of the depositors, the right of survivorship cannot be changed by will. Uniform Probate Code § 6-104(e).

²⁹ Uniform Probate Code § 6-113.

³⁰ See Fin. Code §§ 864 (bank set-off), 7609.5 (savings and loan association set-off); *Kruger v. Wells Fargo Bank*, 11 Cal.3d 352, 357, 521 P.2d 441, 113 Cal. Rptr. 449 (1974) (right of set-off is "based upon general principles of equity").

³¹ See Civil Code § 683; Fin. Code §§ 852, 852.5, 853, 7602, 7603, 7603.5, 7604, 7604.5, 7606, 11203, 11203.5, 11204, 11205, 11206, 11206.5, 14854, 14854.5, 18318.5.

³² Fin. Code § 852 (third sentence).

³³ Fin. Code § 7603 (second sentence).

³⁴ Fin. Code § 11204 (third sentence).

³⁵ Fin. Code § 14854 (second sentence).

³⁶ Fin. Code § 853.

³⁷ Prob. Code §§ 3400-3413.

(1) A provision that money or other benefits theretofore due to the maker of the instrument shall be paid to a designated person on the death of the maker.

(2) A provision that money due or to become due under the instrument shall cease to be payable in the event of the death of the promisee or promisor before payment or demand.

(3) A provision that any property which is the subject of the instrument shall pass to a designated person on death of the maker.

Enactment of this portion of the UPC would codify California case law that a promissory note may contain a provision for the cancellation of the debt on the death of the payee,³⁸ and that an employment contract may provide for ownership of a business to pass to the employee-manager on the death of the owner.³⁹ The UPC may expand California law by validating a provision in a promissory note that on the payee's death the note shall be paid to another person.⁴⁰ There appears to be no sound reason for holding these types of provisions in written instruments to be invalid merely because the instrument has not been executed in accordance with the formalities of the will statutes.⁴¹ Experience with insurance contracts, revocable living trusts, multiple-party bank accounts, and United States government bonds with "pay-on-death" provisions demonstrates that the evils envisioned if will statutes are not rigidly enforced simply do not materialize.⁴²

RECOMMENDED LEGISLATION

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

³⁸ *Bergman v. Ornbaun*, 33 Cal. App.2d 680, 92 P.2d 654 (1939).

³⁹ *Estate of Howe*, 31 Cal.2d 395, 189 P.2d 5 (1948). See generally 7 B. Witkin, *Summary of California Law Wills and Probate* §§ 87-89, at 5607-09 (8th ed. 1974).

⁴⁰ Although the issue has not been decided in California, most courts treat as testamentary and therefore invalid a provision in a promissory note that on the payee's death the note shall be paid to another person. Comment to Uniform Probate Code § 6-201.

⁴¹ The requisites of a formal or witnessed will are (1) a writing, (2) subscription by the testator, (3) acknowledgment and publication by the testator, and (4) attestation by witnesses. Prob. Code § 50; 7 B. Witkin, *Summary of California Law Wills and Probate* § 113, at 5628 (8th ed. 1974).

⁴² Comment to Uniform Probate Code § 6-201.

An act to amend Section 683 of the Civil Code, to amend Sections 7603.5, 7606, 11206, and 11206.5 of, to add Section 14854 to, and to repeal Sections 852, 852.5, 853, 7602, 7603, 7604, 7604.5, 11203, 11203.5, 11204, 11205, 14854, 14854.5, and 18318.5 of, the Financial Code, and to amend Section 647 of, and to add Division 5 (commencing with Section 5100) to, the Probate Code, relating to nonprobate transfers.

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

Civil Code § 683 (amended). Joint interest defined; creation of joint tenancy in personal property

SECTION 1. Section 683 of the Civil Code is amended to read:

683. (a) A joint interest is one owned by two or more persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or by transfer from a sole owner to himself *or herself* and others, or from tenants in common or joint tenants to themselves or some of them, or to themselves or any of them and others, or from a husband and wife, when holding title as community property or otherwise to themselves or to themselves and others or to one of them and to another or others, when expressly declared in the transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants. A joint tenancy in personal property may be created by a written transfer, instrument, or agreement.

(b) Provisions of this section ~~shall do not restrict the creation of~~ *apply to a joint tenancy in a bank deposit as provided for in the Bank Act account in a financial institution if Part 1 (commencing with Section 5100) of Division 5 of the Probate Code applies to such account.*

Comment. Section 683 is amended to change the former reference to a joint tenancy in a bank deposit under the Bank Act to a reference to a joint account in a financial institution under newly-enacted provisions of the Probate Code (Sections 5100-5407). Such accounts are governed by the new Probate Code sections and various provisions of the Financial Code.

Financial Code § 852 (repealed). Joint accounts

SEC. 2. Section 852 of the Financial Code is repealed.

852. When a deposit is made in a bank in the names of two or more persons, whether minor or adult, in such form that the moneys in the account are payable to the survivor or survivors then such deposit and all additions thereto shall be the property of such persons as joint tenants. The moneys in such account may be paid to or on the order of any one of such persons during their lifetimes or to or on the order of any one of the survivors of them after the death of any one or more of them. By written instructions given to the bank by the depositor or depositors, the signatures of more than one of such persons during their lifetimes or of more than one of the survivors after the death of any one of them may be required on any check, receipt, or withdrawal order in which case the bank shall pay the moneys in the account only in accordance with such instructions but no such instructions shall limit the right of the survivor or survivors to receive the moneys in the account.

Payment of all or any of the moneys in such account as provided in the preceding paragraph of this section shall discharge the bank from liability with respect to the moneys so paid, prior to receipt by the particular office or branch office of the bank where such account is carried of a written notice from any one of them directing the bank not to permit withdrawals in accordance with the terms of the account or the instructions. After receipt of such notice, a bank may refuse, without liability, to honor any check, receipt, or withdrawal order on the account pending determination of the rights of the parties.

Comment. Former Section 852 is superseded by Part 1 (commencing with Section 5100) of Division 5 of the Probate Code relating to multiple-party accounts. The first two sentences of former Section 852 are superseded by Sections 5301, 5302, 5401, 5402, and 5407 of the Probate Code. The third sentence of former Section 852 is continued in Section 5401 of the Probate Code. The fourth and fifth sentences of former Section 852 are superseded by Sections 5101 and 5405 of the Probate Code.

Financial Code § 852.5 (repealed). Pay-on-death accounts

SEC. 3. Section 852.5 of the Financial Code is repealed.

852.5. (a) As used in this section, “pay/on/death provision” means:

(1) A provision of a bank account agreement for an account which is in the name of one person, which provides that upon the death of that person the moneys in the account shall become the property of and are payable to, one or more designated payees.

(2) A provision of a bank account agreement for an account which is in the name of two or more persons, which provides that upon the death of all of such persons the moneys in the account shall become the property of, and are payable to, one or more designated payees.

(b) Any transfer of property to the designated payee or payees pursuant to the terms of a pay/on/death provision shall be given effect under the terms of the bank account agreement and shall not be deemed to be a testamentary disposition of property. The right of the designated payee or payees to receive such property shall not be denied, abridged, or affected on the grounds that the right has not been created by a writing executed in accordance with the laws of this state prescribing the requirements to effect a valid testamentary disposition of property.

(c) The bank shall make payment in accordance with the pay/on/death provision, and such payment shall discharge the bank from liability with respect to the moneys so paid, unless prior to the payment the bank has been served with a court order restraining the payment.

Comment. The substance of subdivision (a) of former Section 852.5 is continued in Probate Code Section 5101(i) (“P.O.D. account” defined). The substance of subdivision (b) is continued in Probate Code Section 5304 (transfers nontestamentary). The substance of subdivision (c) is continued in Probate Code Section 5405 (payment as discharge).

Financial Code § 853 (repealed). Trust accounts

SEC. 4. Section 853 of the Financial Code is repealed.

853. Whenever any deposit is made in a bank by any person which in form is in trust for another, but no other or further notice of the existence and terms of a legal and valid trust is given in writing to the bank, in the event of the death of the trustee, the deposit or any part thereof may

be paid to the person for whom the deposit was made, whether or not such person is a minor.

Comment. Former Section 853 is superseded by Sections 5404, 5406, and 5407 of the Probate Code.

Financial Code § 7602 (repealed). Joint tenants

SEC.5. Section 7602 of the Financial Code is repealed.

~~7602. When shares or investment certificates are issued in the name of two or more persons whether minor or adult as joint tenants or in form to be paid to any of them or the survivors of them, such shares or certificates and all dues paid thereon become the property of such persons as joint tenants.~~

Comment. Former Section 7602 is superseded by Part 1 (commencing with Section 5100) of Division 5 of the Probate Code relating to multiple-party accounts.

Financial Code § 7603 (repealed). Payments to joint tenants

SEC. 6. Section 7603 of the Financial Code is repealed.

~~7603. Shares or investment certificates owned in joint tenancy and all dividends and interest thereon are held for the exclusive use of the joint tenants and may be paid to any of them during their lifetime or to the survivor or any one of the survivors of them after the death of one or more of the joint tenants. By written instructions of all joint tenants given to the association, they may require the signatures of more than one of such persons during their lifetimes or of more than one of the survivors after the death of any one of them on any notice of withdrawal, request for withdrawal, check endorsement or receipt, in which case the association shall pay withdrawals, dividends and interest only in accordance with such instructions, but no such instructions shall limit the right of the sole survivor or of all of the survivors to receive withdrawal payments, dividends and interest. Payment as provided in this section and the receipt or acquittance of any joint tenant is a valid and sufficient release and discharge of such association for all payments made on account of shares or certificates owned in joint tenancy prior to the receipt by such~~

~~association of notice in writing from any one of them not to make payments in accordance with the terms of such shares or certificates or of such written instructions. After receipt of such notice an association may refuse, without liability, to pay withdrawals, dividends or interest pending determination of the rights of the parties.~~

Comment. Former Section 7603 is superseded by Part 1 (commencing with Section 5100) of Division 5 of the Probate Code relating to multiple-party accounts. The first sentence of former Section 7603 is superseded by Sections 5301, 5302, 5401, 5402, and 5407 of the Probate Code. The second sentence of former Section 7603 is continued in Section 5401 of the Probate Code. The third and fourth sentences of former Section 7603 are superseded by Section 5405 of the Probate Code.

Financial Code § 7603.5 (technical amendment).

Assignment or pledge of shares or certificates

SEC. 7. Section 7603.5 of the Financial Code is amended to read:

7603.5. (a) Shares or investment certificates ~~owned in joint tenancy held as a joint account~~ and any dividends or interest thereon may be assigned or pledged to the association by any one of the ~~joint tenants parties~~ during their lifetime or by the survivor or any one of the survivors of them after the death of one or more of the ~~joint tenants parties~~, and such assignment or pledge may secure a loan from the association to any one or more of the ~~joint tenants parties~~ or to any one or more of the survivors of them after the death of one or more of them. By written instructions of all ~~joint tenants parties~~ given to the association, they may require the signatures of more than one of such persons during their lifetime or of more than one of the survivors after the death of any one of them for any assignment or pledge, but no such instructions shall limit the right of the sole survivor or of all of the survivors to assign or pledge to the association the shares or investment certificates and any dividends and interest thereon. No assignment or pledge to the association by less than all of the ~~joint tenants parties~~ or by less than all of the survivors of the ~~joint tenants parties~~ shall operate to sever or terminate, either in whole or in part, the continuance of the ~~joint tenancy joint account~~, subject to the effect of such pledge or assignment.

(b) As used in this section, "joint account" and "parties" have the meaning given those terms under Section 5101 of the Probate Code.

Comment. Section 7603.5 is amended to replace the former references to joint tenancy with a reference to "joint account" as defined in Section 5101 of the Probate Code, and to replace the former references to joint tenants with a reference to "parties" as defined in Section 5101 of the Probate Code. This expands the application of Section 7603.5 to include joint accounts in form other than the traditional common law joint tenancy account.

Financial Code § 7604 (repealed). Conclusive evidence of survivorship

SEC. 8. Section 7604 of the Financial Code is repealed.

~~7604. The purchase or acceptance of shares or investment certificates in the name of two or more persons as joint tenants or in form to be paid to any of them or the survivors of them, in the absence of fraud or undue influence, is conclusive evidence in any action or proceeding to which either the association or the surviving share or certificate holders may be a party, of the intention of such share or certificate holders to vest title to such shares or certificates and dues paid on account thereof and dividends and interest thereon in the survivors.~~

Comment. Former Section 7604 is superseded by Part 1 (commencing with Section 5100) of Division 5 of the Probate Code relating to multiple-party accounts. The conclusive presumption of former Section 7604 has been replaced by a rebuttable presumption under Section 5302 of the Probate Code: The presumption of survivorship may be rebutted by clear and convincing evidence of a different intention. Prob. Code § 5302. However, the financial institution is protected from liability if it pays the account to the survivor. See Prob. Code §§ 5402, 5405.

Financial Code § 7604.5 (repealed). Pay-on-death provision

SEC. 9. Section 7604.5 of the Financial Code is repealed.

~~7604.5. (a) As used in this section, "pay/on/death provision" means:~~

~~(1) A provision or term of a share or investment certificate which is in the name of one person, which~~

provides that upon the death of that person the share or investment certificate shall become the property of one or more designated payees:

(2) A provision or term of a share or investment certificate which is in the name of two or more persons which provides that upon the death of all of such persons the share or investment certificate shall become the property of one or more designated payees:

(b) Any transfer of property to the designated payee or payees pursuant to the terms of a pay/on/death provision shall be given effect under the terms of the share or certificate and shall not be deemed to be a testamentary disposition of property. The right of the designated payee or payees to receive such property shall not be denied, abridged, or affected on the grounds that the right has not been created by a writing executed in accordance with the laws of this state prescribing the requirements to effect a valid testamentary disposition of property.

(c) The association shall make payment in accordance with the pay/on/death provision, and such payment shall discharge the association from liability with respect to the moneys so paid, unless prior to the payment the association has been served with a court order restraining the payment.

Comment. The substance of subdivision (a) of former Section 7604.5 is continued in Probate Code Section 5101(i) ("P.O.D. account" defined). The substance of subdivision (b) is continued in Probate Code Section 5304 (transfers nontestamentary). The substance of subdivision (c) is continued in Probate Code Section 5405 (payment as discharge).

Financial Code § 7606 (amended). Payment on death of fiduciary

SEC. 10. Section 7606 of the Financial Code is amended to read:

7606. When a person holding shares or investment certificates as trustee or guardian dies and no notice of the terms, revocation, or termination of the trust or guardianship is given in writing to the association, the withdrawal or other value of the shares or investment certificates or any part thereof may be paid to the

~~beneficiary or ward. If no beneficiary or ward has been designated in writing to the association, the withdrawal or other value or any part thereof may be paid to the trustee's or guardian's executor or administrator. Such payment by any association is a valid and sufficient release and discharge of the association for the payment whether or not such payment is made to a minor .~~

Comment. Section 7606 is amended to eliminate references to guardians and wards. Insofar as Section 7606 applied to an account held by a guardian, the section was inconsistent with the guardianship-conservatorship law. A guardianship or conservatorship of the estate does not terminate on the death of the guardian or conservator. See Prob. Code §§ 1600 (guardianship), 1860 (conservatorship). The death of the guardian or conservator merely terminates the relationship of guardian and ward or conservator and conservatee but does not terminate the guardianship or conservatorship proceeding. The court retains jurisdiction of the proceeding despite the termination of the relationship. See the Comment to Probate Code Section 1860. Upon the death of the guardian or conservator of the estate, the estate is not paid to the ward or conservatee. Instead, a successor guardian or conservator of the estate may be appointed, and the successor guardian or conservator is then responsible for the management of the estate of the ward or conservatee.

Insofar as the section dealt with payment to a trust beneficiary on the death of the trustee, the section is superseded by Section 5406 of the Probate Code. If the trust is a true trust (as distinguished from a Totten trust), the trust does not terminate on the death of the trustee and a new trustee may be appointed by the court. Civil Code § 2289; 7 B. Witkin, Summary of California Law *Trusts* § 30, at 5393 (8th ed. 1974).

Financial Code § 11203 (repealed). Payment on death of fiduciary

SEC. 11. Section 11203 of the Financial Code is repealed.

~~**11203.** Whenever a person dies holding shares or share accounts of a federal savings and loan association as trustee or other fiduciary, in trust for a named beneficiary, and no written notice of the revocation or termination of the trust relationship has been given to the association, the~~

repurchase value of the shares or share accounts; and dividends thereon; or other rights relating thereto, may be paid or delivered, in whole or in part, to the named beneficiary of such trust. The payment or delivery to any beneficiary pursuant to this section, or a receipt or acquittance signed by such beneficiary for any payment or delivery, whether or not such person is a minor, is a valid and sufficient release and discharge of the association for the payment or delivery so made.

Comment. Section 11203 is superseded by Section 5406 of the Probate Code. Section 11203 applied to Totten trusts, since the section provided for payment to the beneficiary on the death of the trustee. See 7 B. Witkin, *Summary of California Law Trusts* § 17, at 5379 (8th ed. 1974). If the trust is a true trust, it does not terminate on the death of the trustee and a new trustee may be appointed by the court. Civil Code § 2289; 7 B. Witkin, *supra* § 30, at 5393.

Financial Code § 11203.5 (repealed). Pay-on-death provision

SEC. 12. Section 11203.5 of the Financial Code is repealed.

11203.5. (a) As used in this section, "pay/on/death provision" means:

(1) A provision or term of a share, share account, or savings account of a federal savings and loan association which is in the name of one person, which provides that upon the death of that person the share or account shall become the property of one or more designated payees.

(2) A provision or term of a share, share account, or savings account of a federal savings and loan association which is in the name of two or more persons, which provides that upon the death of all of such persons the share or account shall become the property of one or more designated payees.

(b) Any transfer of property to the designated payee or payees pursuant to the terms of a pay/on/death provision shall be given effect under the terms of the share or account involved and shall not be deemed to be a testamentary disposition of property. The right of the designated payee or payees to receive such property shall not be denied;

abridged, or affected on the grounds that the right has not been created by a writing executed in accordance with the laws of this state prescribing the requirements to effectuate a valid testamentary disposition of property.

(e) The association shall make payment in accordance with the pay/on/death provision, and such payment shall discharge the association from liability with respect to the moneys so paid, unless prior to the payment the association has been served with a court order restraining the payment.

Comment. The substance of subdivision (a) of former Section 11203.5 is continued in Probate Code Section 5101(i) ("P.O.D. account" defined). The substance of subdivision (b) is continued in Probate Code Section 5304 (transfers nontestamentary). The substance of subdivision (c) is continued in Probate Code Section 5405 (payment as discharge).

Financial Code § 11204 (repealed). Joint tenants

SEC. 13. Section 11204 of the Financial Code is repealed.

~~11204. When shares or share accounts in a federal savings and loan association are issued in the name of two or more persons, whether minor or adult, as joint tenants or in form to be paid to any of them or the survivors, the shares or share accounts are the property of those persons as joint tenants. Such shares or share accounts, together with all dividends thereon, shall be held for the exclusive use of such joint tenants and may be paid to any of them, or to the survivor or any one of the survivors after the death of one or more of them. By written instructions of all such joint tenants given to the association, they may require the signatures of more than one of such persons during their lifetimes or of more than one of the survivors after the death of any one of them on any request for withdrawal, check endorsement or receipt, in which case the association shall pay withdrawals and dividends only in accordance with such instructions, but no such instructions shall limit the right of the sole survivor or of all of the survivors to receive withdrawal payments or dividends.~~

Payment as provided in the preceding paragraph and the receipt or acquittance of the person to whom such payment

is made is a valid and sufficient release and discharge of the association for the payment made on account of the shares or share accounts prior to the receipt by such association of a notice in writing from any one of them not to make payments in accordance with the terms of the shares or share accounts or of such instructions. After receipt of such notice an association may refuse, without liability, to pay withdrawals or dividends pending determination of the rights of the parties.

Comment. Former Section 11204 is superseded by Part 1 (commencing with Section 5100) of Division 5 of the Probate Code relating to multiple-party accounts. The first two sentences of former Section 11204 are superseded by Sections 5301, 5302, 5401, 5402, and 5407 of the Probate Code. The third sentence of former Section 11204 is continued in Section 5401 of the Probate Code. The fourth and fifth sentences of former Section 11204 are superseded by Section 5405 of the Probate Code.

Financial Code § 11205 (repealed). Conclusive evidence of survivorship

SEC. 14. Section 11205 of the Financial Code is repealed.

11205. The purchase or acceptance of shares or share accounts of a federal savings and loan association in the name of two or more persons to be paid to either of them or the survivors is, in the absence of fraud or undue influence, conclusive evidence, in any action or proceeding to which either the association or the surviving share or share account holders are a party, of the intention of the share or share account holders to vest title to the shares or share accounts and payments made on account thereof and dividends thereon in such survivors.

Comment. Former Section 11205 is superseded by Part 1 (commencing with Section 5100) of Division 5 of the Probate Code relating to multiple-party accounts. The conclusive presumption of former Section 11205 has been replaced by a rebuttable presumption under Section 5302 of the Probate Code: The presumption of survivorship may be rebutted by clear and convincing evidence of a different intention. Prob. Code § 5302. However, the financial institution is protected against liability if it pays the account to the survivor. See Prob. Code §§ 5402, 5405.

Financial Code § 11206 (amended). Single membership of joint share accounts

SEC. 15. Section 11206 of the Financial Code is amended to read:

11206. Shares, or share accounts issued in the joint names of two or more persons, whether as joint tenants ~~or as~~ , tenants in common, *or otherwise*, create but a single membership in the association.

Comment. Section 11206 is amended to include forms of joint ownership other than joint tenancy or tenancy in common. See, *e.g.*, Prob. Code § 5101 ("joint account" defined to mean an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship).

Financial Code § 11206.5 (amended). Assignment or pledge of savings or share account

SEC. 16. Section 11206.5 of the Financial Code is amended to read:

11206.5. (a) Savings accounts and share accounts of a federal savings and loan association ~~owned in joint tenancy held as a joint account~~ and any dividends thereon may be assigned or pledged to the association by any one of the ~~joint tenants parties~~ during their lifetime or by the survivor or any one of the survivors of them after the death of one or more of the ~~joint tenants parties~~ , and such assignment or pledge may secure a loan from the association to any one or more of the ~~joint tenants parties~~ or to any one or more of the survivors of them after the death of one or more of them. By written instructions of all ~~joint tenants parties~~ given to the association, they may require the signatures of more than one of such persons during their lifetime or of more than one of the survivors after the death of any one of them for any assignment or pledge, but no such instructions shall limit the right of the sole survivor or of all of the survivors to assign or pledge to the association the savings accounts or share accounts and any dividends thereon. No assignment or pledge to the association by less than all of the ~~joint tenants parties~~ or by less than all of the survivors of the ~~joint tenants parties~~ shall operate to sever or terminate, either in whole or in part, the continuance of

the ~~joint tenancy joint account~~, subject to the effect of such pledge or assignment.

(b) As used in this section, "joint account" and "parties" have the meaning given those terms under Section 5101 of the Probate Code.

Comment. Section 11206.5 is amended to replace the former references to joint tenancy with a reference to "joint account" as defined in Section 5101 of the Probate Code, and to replace the former references to joint tenants with a reference to "parties" as defined in Section 5101 of the Probate Code. This expands the application of Section 11206.5 to include joint accounts in form other than the traditional common law joint tenancy account.

Financial Code § 14854 (repealed). Joint tenancy

SEC. 17. Section 14854 of the Financial Code is repealed.

~~14854. Shares or certificates for funds owned in joint tenancy and all dividends and interest thereon may be paid to any of the joint tenants during their lifetime or to the survivor or any one of the survivors of them after the death of one or more of the joint tenants. By written instructions of all joint tenants given to the credit union, the joint tenants may require the signatures of more than one of such persons during their lifetimes or of more than one of the survivors after the death of any one of them on any notice of withdrawal, request for withdrawal, check endorsement or receipt, in which case the credit union shall pay withdrawals, dividends and interest only in accordance with such instructions, but no such instructions shall limit the right of the sole survivor or of all of the survivors to receive withdrawal payments, dividends and interest. Payment as provided in this section and the receipt or acquittance by any joint tenant is a valid and sufficient release and discharge of the depository credit union for all payments made on account of shares or certificates for funds owned in joint tenancy prior to the receipt by such credit union of notice in writing from any one of them not to make payments in accordance with the terms of such shares or certificates for funds or of such written instructions. After receipt of such notice a credit union may refuse, without liability, to pay withdrawals, dividends, or~~

interest pending a determination of the rights of the parties.

Comment. Former Section 14854 is superseded by Part 1 (commencing with Section 5100) of Division 5 of the Probate Code relating to multiple-party accounts. The first sentence of former Section 14854 is superseded by Sections 5301, 5302, 5401, 5402, and 5407 of the Probate Code. The second sentence of former Section 14854 is continued in Section 5401 of the Probate Code. The third and fourth sentences of former Section 14854 are superseded by Section 5405 of the Probate Code.

Financial Code § 14854 (added). Multiple-party accounts

SEC. 18. Section 14854 is added to the Financial Code, to read:

14854. Subject to Section 14860, a credit union share account that is a multiple-party account, as defined in Section 5101 of the Probate Code, is governed by Part 1 (commencing with Section 5100) of Division 5 of the Probate Code.

Comment. Section 14854 makes reference to the California Multiple-Party Accounts Law (Probate Code §§ 5100-5407) which applies to credit unions. The section also makes clear that the restrictions found in Section 14860 of the Financial Code are not affected by the enactment of the California Multiple-Party Accounts Law.

Financial Code § 14854.5 (repealed). Pay-on-death accounts

SEC. 19. Section 14854.5 of the Financial Code is repealed.

~~14854.5. (a) As used in this section, "pay/on/death provision" means:~~

~~(1) A provision or term of a credit union share or certificate for funds which is in the name of one person, which provides that upon the death of that person the account shall become the property of one or more designated payees.~~

~~(2) A provision or term of a credit union share or certificate for funds which is in the name of two or more persons, which provides that upon the death of all of such persons the account shall become the property of one or more designated payees.~~

(b) Any transfer of property to the designated payee or payees pursuant to the terms of a pay/on/death provision shall be given effect under the terms of the share or certificate and shall not be deemed to be a testamentary disposition of property. The right of the designated payee or payees to receive such property shall not be denied, abridged, or affected on the grounds that the right has not been created by a writing executed in accordance with the laws of this state prescribing the requirements to effect a valid testamentary disposition of property.

(c) The credit union shall make payment in accordance with the pay/on/death provision, and such payment shall discharge the credit union from liability with respect to the moneys so paid, unless prior to the payment the credit union has been served with a court order restraining the payment.

Comment. The substance of subdivision (a) of former Section 14854.5 is continued in Probate Code Section 5101(i) ("P.O.D. account" defined). The substance of subdivision (b) is continued in Probate Code Section 5304 (transfers nontestamentary). The substance of subdivision (c) is continued in Probate Code Section 5405 (payment as discharge).

Financial Code § 18318.5 (repealed). Pay-on-death accounts

SEC. 20. Section 18318.5 of the Financial Code is repealed.

18318.5. (a) As used in this section, "pay/on/death provision" means:

(1) A provision or term of an investment or thrift certificate which is in the name of one person, which provides that upon the death of that person the investment or thrift certificate shall become the property of one or more designated payees.

(2) A provision or term of an investment or thrift certificate which is in the name of two or more persons which provides that upon the death of all of such persons the investment or thrift certificate shall become the property of one or more designated payees.

(b) Any transfer of property to the designated payee or payees pursuant to the terms of a pay/on/death provision

shall be given effect under the terms of the investment or thrift certificate and shall not be deemed to be a testamentary disposition of property. The right of the designated payee or payees to receive such property shall not be denied, abridged, or affected on the grounds that the right has not been created by a writing executed in accordance with the laws of this state prescribing the requirements to effect a valid testamentary disposition of property.

(e) The company shall make payment in accordance with the pay/on/death provision, and such payment shall discharge the industrial loan company from liability with respect to the moneys so paid, unless prior to the payment the company has been served with a court order restraining the payment.

Comment. The substance of subdivision (a) of former Section 18318.5 is continued in Probate Code Section 5101(i) ("P.O.D. account" defined). The substance of subdivision (b) is continued in Probate Code Section 5304 (transfers nontestamentary). The substance of subdivision (c) is continued in Probate Code Section 5405 (payment as discharge).

Probate Code § 647 (amended). Exclusion of certain property from set-aside provisions

SEC. 21. Section 647 of the Probate Code is amended to read:

647. For the purposes of this article ; ~~any~~ :

(a) *Any* property or interest therein or lien thereon which, at the time of the decedent's death, was held by ~~him~~ *the decedent* as joint tenant, or in which ~~he~~ *the decedent* had a life or other estate terminable upon ~~his~~ *the decedent's* death, shall be excluded in determining the estate of the decedent or its value.

(b) *A multiple-party account to which the decedent was a party at the time of the decedent's death shall be excluded in determining the estate of the decedent or its value, whether or not all or a portion of the sums on deposit are community property, to the extent that the sums on deposit belong after the death of the decedent to a surviving party, P.O.D. payee, or beneficiary. As used in this subdivision, the terms "multiple-party account," "party," "P.O.D. payee,"*

and "beneficiary" have the meaning given those terms by Section 5101.

Comment. Section 647 is amended to add subdivision (b). Subdivision (b) is a special application of subdivision (a) and continues prior law by making clear that funds in a multiple-party account as defined in Section 5101 are excluded in determining the estate of the decedent or its value under this article to the extent that the funds belong after the death of the decedent to a surviving party, P.O.D. payee, or beneficiary. Under prior law, joint tenancy accounts were expressly excluded from the decedent's estate for the purpose of this article, and Totten trust accounts were presumably also excluded as an estate terminable upon the decedent's death.

Subdivision (b) excludes multiple-party account funds whether or not they are community property under Section 5305 to the extent that the funds pass to a surviving party, P.O.D. payee, or beneficiary. Under prior law, when community funds were deposited into the spouses' joint tenancy account, there was a presumption of an intent to transmute the funds into true joint tenancy (see *In re McCoin*, 9 Cal. App.2d 480, 50 P.2d 114 (1935)), with the result that on the death of one spouse the funds would be excluded from the decedent's estate for the purpose of this article. To this extent, the effect of subdivision (b) on community property funds deposited into the spouses' joint account is generally the same as under prior law.

To the extent that the funds do not belong after the death of the decedent to a surviving party, P.O.D. payee, or beneficiary (as, for example, an interest in community property claimed as a statutory intestate share by a surviving spouse who is not a party to the account—see Section 201), the funds are includable in the decedent's estate for the purpose of this article. See *Estate of Pezzola*, 112 Cal. App.3d 752, 169 Cal. Rptr. 464 (1980).

Probate Code §§ 5100-5501 (added). Nonprobate transfers

SEC. 22. Division 5 (commencing with Section 5100) is added to the Probate Code, to read:

DIVISION 5. NONPROBATE TRANSFERS**PART 1. MULTIPLE-PARTY ACCOUNTS****CHAPTER 1. SHORT TITLE AND DEFINITIONS****Probate Code § 5100. Short title**

5100. This part may be cited as the California Multiple-Party Accounts Law.

Comment. Division 5 (commencing with Section 5100) is drawn from Article VI of the Uniform Probate Code, with changes adapting it to California law. Section 5100 is not found in the Uniform Probate Code. For comparable provisions, see Minn. Stat. Ann. § 528.01 (West 1975) and N.J. Stat. Ann. § 17:16I-1 (West Supp. 1981).

Probate Code § 5101. Definitions

5101. In this part, unless the context otherwise requires:

(a) "Account" means a contract of deposit of funds between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account, and other like arrangement.

(b) "Beneficiary" means a person named in a trust account as one for whom a party to the account is named as trustee.

(c) "Financial institution" means any organization authorized to do business under state or federal laws relating to financial institutions, including, without limitation, banks and trust companies, savings banks, building and loan associations, savings and loan companies or associations, credit unions, and industrial loan companies.

(d) "Joint account" means an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship.

(e) A "multiple-party account" is any of the following types of account: (1) a joint account, (2) a P.O.D. account, or (3) a trust account. It does not include: (1) accounts established for deposit of funds of a partnership, joint venture, or other association for business purposes, (2) accounts controlled by one or more persons as the duly

authorized agent or trustee for a corporation, unincorporated association, charitable or civic organization, or (3) a regular fiduciary or trust account where the relationship is established other than by deposit agreement.

(f) "Net contribution" of a party to a joint account as of any given time is the sum of all deposits thereto made by or for the party, less all withdrawals made by or for the party that have not been paid to or applied to the use of any other party, plus a pro rata share of any interest or dividends included in the current balance. The term includes, in addition, any proceeds of deposit life insurance added to the account by reason of the death of the party whose net contribution is in question. In the absence of proof otherwise, only parties who have a present right of withdrawal shall be considered as having a net contribution and the net contribution of each of the parties having a present right of withdrawal is deemed to be an equal amount.

(g) "Party" means a person who, by the terms of the account, has a present right, subject to request, to payment from a multiple-party account. A P.O.D. payee or beneficiary of a trust account is a party only after the account becomes payable to the payee or beneficiary by reason of surviving the original payee or trustee. Unless the context otherwise requires, "party" includes a guardian, conservator, personal representative, or assignee, including a levying creditor, of a party. "Party" also includes a person identified as a trustee of an account for another whether or not a beneficiary is named, but does not include any named beneficiary unless the beneficiary has a present right of withdrawal.

(h) "Payment" of sums on deposit includes withdrawal, payment on check or other directive of a party, and any pledge of sums on deposit by a party and any set-off, or reduction or other disposition of all or part of an account pursuant to a pledge.

(i) "P.O.D. account" means an account payable on request to one person during the person's lifetime and on the person's death to one or more P.O.D. payees, or to one

or more persons during their lifetimes and on the death of all of them to one or more P.O.D. payees.

(j) "P.O.D. payee" means a person designated on a P.O.D. account as one to whom the account is payable on request after the death of one or more persons.

(k) "Proof of death" includes an original or attested or certified copy of a death certificate or record or report that is prima facie evidence of death under Section 10577 of the Health and Safety Code, Sections 1530 to 1532, inclusive, of the Evidence Code, or another statute of this state.

(l) A financial institution "receives" an order or notice under this part when it is received by the particular office or branch office of the financial institution where the account is carried.

(m) "Request" means a proper request for withdrawal, or a check or order for payment, that complies with all conditions of the account, including special requirements concerning necessary signatures, and regulations of the financial institution; but if the financial institution conditions withdrawal or payment on advance notice, for purposes of this part the request for withdrawal or payment is treated as immediately effective and a notice of intent to withdraw is treated as a request for withdrawal.

(n) "Sums on deposit" means the balance payable on a multiple-party account including interest, dividends, and in addition any deposit life insurance proceeds added to the account by reason of the death of a party.

(o) "Trust account" means an account in the name of one or more parties as trustee for one or more beneficiaries where the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sums on deposit in the account. In a trust account, it is not essential that payment to the beneficiary be mentioned in the deposit agreement. A trust account does not include (1) a regular trust account under a testamentary trust or a trust agreement that has significance apart from the account or (2) a fiduciary account arising from a fiduciary relation such as attorney-client.

(p) "Withdrawal" includes payment to a third person pursuant to check or other directive of a party.

Comment. Section 5101 is the same as Section 6-101 of the Uniform Probate Code with some technical modifications. These include the following:

(1) The last sentence is added to subdivision (f) to establish a clear rule concerning the amount of "net contribution" in a case where the actual amount cannot be established.

(2) A reference to a "levying" creditor is substituted in subdivision (g) for the reference in the UPC to an "attaching" creditor; "attaching creditor" might be construed in California to be restricted to one who levies under a writ of attachment (prejudgment) and not to include one who levies under a writ of execution (postjudgment).

(3) As defined in subdivision (i), "P.O.D. account" includes an account containing a "pay-on-death" provision created pursuant to former Financial Code Sections 825.5, 7604.5, 11203.5, 14854.5, or 18318.5.

(4) The reference to UPC Section 1-107 has been replaced in subdivision (k) by a reference to the statutes of this state that make a death certificate or record or report prima facie evidence of death; the reference to "an original or attested or certified copy" has been added, consistent with the statutes referred to in subdivision (k).

(5) Subdivision (l) is new and is drawn from former Section 852 of the Financial Code.

CHAPTER 2. GENERAL PROVISIONS

Probate Code § 5201. Ownership as between parties and others; protection of financial institutions

5201. (a) The provisions of Chapter 3 (commencing with Section 5301) concerning beneficial ownership as between parties, or as between parties and P.O.D. payees or beneficiaries of multiple-party accounts, are relevant only to controversies between these persons and their creditors and other successors, and have no bearing on the power of withdrawal of these persons as determined by the terms of account contracts.

(b) The provisions of Chapter 4 (commencing with Section 5401) govern the liability of financial institutions who make payments pursuant to that chapter.

Comment. Section 5201 is the same in substance as Section 6-102 of the Uniform Probate Code. Nothing in this part affects set-off rights of financial institutions. See Fin. Code §§ 864 (bank

set-off), 7609.5 (savings and loan association set-off); *Kruger v. Wells Fargo Bank*, 11 Cal.3d 352, 357, 521 P.2d 441, 113 Cal. Rptr. 449 (1974) (right of set-off is "based upon general principles of equity").

Probate Code § 5202. Transfers in fraud of creditors

5202. Nothing in this part affects the law relating to transfers in fraud of creditors.

Comment. Section 5202 is not found in the Uniform Probate Code.

CHAPTER 3. OWNERSHIP BETWEEN PARTIES AND THEIR CREDITORS AND SUCCESSORS

Probate Code § 5301. Ownership during lifetime

5301. (a) A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

(b) A P.O.D. account belongs to the original payee during his or her lifetime and not to the P.O.D. payee or payees. If two or more parties are named as original payees, during their lifetimes the account belongs to them in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

(c) Unless a contrary intent is manifested by the terms of the account or the deposit agreement or there is other clear and convincing evidence of an irrevocable trust, a trust account belongs beneficially to the trustee during his or her lifetime, and if two or more parties are named as trustee on the account, during their lifetimes the account belongs beneficially to them in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent. If there is an irrevocable trust, the account belongs beneficially to the beneficiary.

Comment. Section 5301 is the same in substance as Section 6-103 of the Uniform Probate Code. The presumption under subdivision (a) that a joint account belongs to the parties during their lifetimes in proportion to the net contributions by each

changes the rule under former law. Under former law, if the joint account provided for rights of survivorship, the account was presumed to be a joint tenancy and each joint tenant was presumed to have an equal interest in the account. *Wallace v. Riley*, 23 Cal. App.2d 654, 667, 74 P.2d 807 (1937).

Subdivision (b) is new. Former law was silent as to the ownership rights of parties to a pay-on-death account.

The first sentence of subdivision (c) codifies the judicially-recognized rule that, in the case of a tentative or "Totten" trust, the depositor has unrestricted access to the funds on deposit during the depositor's lifetime. See 7 B. Witkin, *Summary of California Law Trusts* § 17, at 5379 (8th ed. 1974).

When a husband and wife are parties to a multiple-party account, their funds on deposit are presumed to be community property funds notwithstanding the form of the account. See Section 5305. Accordingly, unless the presumption is rebutted, during their lifetimes their interests are present, existing, and equal. See Civil Code § 5105.

Probate Code § 5302. Right of survivorship

5302. (a) Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention. If there are two or more surviving parties, their respective ownerships during lifetime shall be in proportion to their previous ownership interests under Section 5301 augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before the decedent's death; and the right of survivorship continues between the surviving parties.

(b) If the account is a P.O.D. account:

(1) On death of one of two or more original payees, the rights to any sums remaining on deposit are governed by subdivision (a).

(2) On death of the sole original payee or of the survivor of two or more original payees, (A) any sums remaining on deposit belong to the P.O.D. payee or payees if surviving, or to the survivor of them if one or more die before the original payee, (B) if two or more P.O.D. payees survive, any sums remaining on deposit belong to them in equal and undivided shares unless the terms of the account or deposit

agreement expressly provide for different shares, and (C) if two or more P.O.D. payees survive, there is no right of survivorship in the event of death of a P.O.D. payee thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

(c) If the account is a trust account:

(1) On death of one of two or more trustees, the rights to any sums remaining on deposit are governed by subdivision (a).

(2) On death of the sole trustee or the survivor of two or more trustees, (A) any sums remaining on deposit belong to the person or persons named as beneficiaries, if surviving, or to the survivor of them if one or more die before the trustee, unless there is clear and convincing evidence of a contrary intent, (B) if two or more beneficiaries survive, any sums remaining on deposit belong to them in equal and undivided shares unless the terms of the account or deposit agreement expressly provide for different shares, and (C) if two or more beneficiaries survive, there is no right of survivorship in event of death of any beneficiary thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

(d) In other cases, the death of any party to a multiple-party account has no effect on beneficial ownership of the account other than to transfer the rights of the decedent as part of the decedent's estate.

(e) A right of survivorship arising from the express terms of the account or under this section, a beneficiary designation in a trust account, or a P.O.D. payee designation, cannot be changed by will.

Comment. Section 5302 is the same in substance as Section 6-104 of the Uniform Probate Code except that Section 5302 omits the UPC requirement that the intent that there be no rights of survivorship exist "at the time the account is created." Thus, under Section 5302 the intention to negate survivorship may be shown to have existed after the time of creation of the account, although the evidence must be clear and convincing.

Subdivision (a) creates a right of survivorship in a joint account whether or not the account is described as a "joint tenancy" or

mentions any right of survivorship. See Section 5101(d). The right of survivorship created by subdivision (a) may be rebutted by clear and convincing evidence of a different intention. This strengthens survivorship rights, since under prior law the presumption of survivorship arising from the joint tenancy form of the account could be overcome by a preponderance of the evidence. See *Schmedding v. Schmedding*, 240 Cal. App.2d 312, 315-16, 49 Cal. Rptr. 523 (1966) (presumption rebuttable); Evid. Code § 115 (except as otherwise provided by law, burden of proof requires preponderance of evidence); Comment to Evid. Code § 606 (ordinarily party against whom a rebuttable presumption operates must overcome the presumption by a preponderance of the evidence). To rebut the right of survivorship where no right of survivorship is desired, the parties to a joint account may, for example, establish a "JOINT ACCOUNT—NO SURVIVORSHIP."

Paragraph (2) (B) of subdivision (b), and paragraph (2) (B) of subdivision (c), are clarifying provisions not found in the Uniform Probate Code. These provisions are drawn from the law of Maine. See Me. Rev. Stat. Tit. 18-A, § 6-104 (West 1981).

Community funds may be deposited in an account held jointly by one of the spouses and a third person, with the other spouse not being a party to the account. Also community funds may be deposited in an account by one spouse as a trustee for a beneficiary who is not the other spouse or in a P.O.D. account where the P.O.D. payee is not the other spouse. In any of these cases, upon the death of the spouse who is a party to the account, the non-party spouse may recover his or her half interest in the community funds in preference to the survivorship rights of the third person. See Section 201; *Mazman v. Brown*, 12 Cal. App.2d 272, 55 P.2d 539 (1936) (Probate Code Section 201 applies to nonprobate transfers with testamentary effect such as life insurance).

Even though the funds in a multiple-party account may be community funds under Section 5305, the financial institution may rely on the form of the account as a joint account, P.O.D. account, or trust account and may make payment pursuant to Chapter 4 (commencing with Section 5401), and is protected from liability in so doing. See Section 5405. The nature of the property rights in such funds is to be determined among the competing claimants, and the financial institution has no interest in this controversy. See Section 5201.

Subdivision (b) is new. Former law was silent as to the survivorship rights of parties to a pay-on-death account.

Subdivision (c) codifies the judicially-recognized rule that, in the case of a tentative or "Totten" trust, the sums on deposit vest in the designated beneficiary on the death of the trustee. See 7 B. Witkin, *Summary of California Law Trusts* § 17, at 5379 (8th ed. 1974). However, subdivision (c) strengthens the rights of the beneficiary by permitting the trust to be attacked only by "clear and convincing" evidence that survivorship was not intended. Under prior California law, a tentative or "Totten" trust could be defeated by circumstantial and often flimsy evidence, making its use unreliable. *Id.* § 18, at 5381-82.

Subdivision (e) changes the rule applicable to a tentative or "Totten" trust under prior California law by preventing revocation or modification of the trust by will. See *Brucks v. Home Fed. Sav. & Loan Ass'n*, 36 Cal.2d 845, 852-53, 228 P.2d 545 (1951) (testamentary plan wholly inconsistent with terms of tentative trust revokes the trust).

Nothing in Section 5302 prevents the court, for example, from enforcing a promise by the surviving beneficiary to share the account funds with someone else. *Cf. Jarkieh v. Badagliacco*, 75 Cal. App.2d 505, 170 P.2d 994 (1946).

Probate Code § 5303. Change in terms of account

5303. (a) The provisions of Section 5302 as to rights of survivorship are determined by the form of the account at the death of a party.

(b) Once established, the terms of a multiple-party account can be changed only by any of the following methods:

(1) Closing the account and reopening it under different terms.

(2) Presenting to the financial institution a modification agreement that is signed by all parties with a present right of withdrawal. If the financial institution has a form for this purpose, it may require use of the form.

(3) If the provisions of the terms of the account or deposit agreement provide a method of modification of the terms of the account, complying with those provisions.

Comment. Subdivision (a) of Section 5303 is the same as the first sentence of Section 6-105 of the Uniform Probate Code.

Subdivision (b) is substituted for the remainder of the Uniform Probate Code Section and is drawn from Georgia law. See Ga. Code Ann. § 41A-3805 (Harrison Supp. 1981). Paragraph (3) of

subdivision (b) permits a change in the terms of a multiple-party account by complying with a method of modification provided in the terms of the account or deposit agreement. Accordingly, for example, if the terms of the account or deposit agreement permit a party to the account to change a P.O.D. beneficiary or to substitute a new party to a joint account for an original party to the account, the change would be effective to give the right of survivorship to the new beneficiary or new party to the joint account. The requirement of paragraph (1) that the account be closed and reopened under different terms would not apply where the modification is made under paragraph (2) or (3) of subdivision (b).

Section 5303 does not affect the presumption established by Section 5305 (funds of married persons who are parties to joint account presumed to be community property). See also Section 5405 (notice to financial institution from party that withdrawals should not be permitted).

Probate Code § 5304. Transfers nontestamentary

5304. Any transfers resulting from the application of Section 5302 are effective by reason of the account contracts involved and this part and are not to be considered as testamentary. The right under this part of a surviving party to a joint account, or of a beneficiary, or of a P.O.D. payee, to the sums on deposit on the death of a party to a multiple-party account shall not be denied, abridged, or affected because such right has not been created by a writing executed in accordance with the laws of this state prescribing the requirements to effect a valid testamentary disposition of property.

Comment. Section 5304 continues a portion of former Financial Code Sections 852.5, 7604.5, 11203.5, 14854.5, and 18318.5 (pay-on-death transfers nontestamentary). The first sentence is the same as the first portion of Section 6-106 of the Uniform Probate Code. The remainder of the Uniform Probate Code section is omitted. The second sentence of Section 5304 is drawn from the New Jersey law. See N.J. Stat. Ann. § 17:16I-14 (West Supp. 1981). The purpose of Section 5304 is to make clear that the effectiveness of transfers under this part is not to be determined by the requirements for a will.

A transfer under this part is effective by reason of the provisions of this part and the terms of the account or deposit agreement. This transfer avoids the need for a probate

proceeding to accomplish a transfer. However, the transfer does not affect rights otherwise provided by law. Also, for example, Section 5304 has no effect on a surviving spouse's right to his or her share of community funds deposited in a multiple-party account under which a third person has a survivorship right upon the death of the other spouse. See the Comment to Section 5302.

Probate Code § 5305. Presumption that sums on deposit are community property

5305. (a) Notwithstanding Sections 5301 to 5303, inclusive, if parties to an account are married to each other, whether or not they are so described in the deposit agreement, their net contribution to the account is presumed to be and remain their community property.

(b) The presumption established by this section is a presumption affecting the burden of proof and may be rebutted by proof of either of the following:

(1) The sums on deposit that are claimed to be separate property can be traced from separate property unless it is proved that the married persons made an agreement that expressed their clear intent that such sums be their community property.

(2) The married persons made a written agreement, separate from the deposit agreement, that expressly provided that the sums on deposit, claimed not to be community property, were not to be community property.

(c) Notwithstanding subdivision (a), a right of survivorship arising from the express terms of the account or under Section 5302, a beneficiary designation in a trust account, or a P.O.D. payee designation, cannot be changed by will.

(d) Except as provided in subdivision (c), a multiple-party account created with community property funds does not in any way alter community property rights.

Comment. Section 5305 is a new provision; there is no comparable provision in the Uniform Probate Code.

Section 5305 applies to all "accounts" (defined in subdivision (a) of Section 5101), not just "multiple-party accounts" (defined in subdivision (e) of Section 5101). Thus, the presumption of community property applies, for example, to a husband and wife who have funds on deposit in a partnership account.

Section 5305 does not affect or limit the right of the financial institution to make payments pursuant to Sections 5401-5407 and the deposit agreement. See Section 5201. For this reason, Section 5305 does not affect the definiteness and certainty that the financial institution must have in order to be induced to make payments from the account and, at the same time, the section preserves the rights of the parties, creditors, and successors that arise out of the nature of the funds—community or separate—in the account.

With respect to the spouses and those claiming under them, Section 5305 reverses the presumption under former law that community funds deposited into a joint account with right of survivorship are presumed to be converted into true joint tenancy funds and to lose their character as community property. See *In re McCoin*, 9 Cal. App.2d 480, 50 P.2d 114 (1935). See also Griffith, *Community Property in Joint Tenancy Form*, 14 Stan. L. Rev. 87, 91-93 (1961). The former presumption was inconsistent with the general belief of married persons. Married persons generally believe that community funds deposited in a joint tenancy account remain community property. See Griffith, *supra* at 90, 95, 106-109. The presumption created by Section 5305 is consistent with this general belief.

The presumption created by Section 5305 is one affecting the burden of proof. See also Evid. Code § 606 (“The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact”). This requires proof that the funds of married persons in a joint account are not community property. Subdivision (b) of Section 5305 specifies the proof that must be made to rebut the presumption that the property is community property.

Paragraph (1) of subdivision (b) specifies one of the two methods of rebutting the presumption—the source-of-funds or tracing rule. If the person having the burden of proof can trace separate funds into a joint account, the presumption of community property is overcome and the funds retain their separate character. If separate funds have been commingled with community funds but remain ascertainable or traceable into a proportionate share of the account, the funds retain their separate character. On the other hand, if separate and community funds are so commingled that the party having the burden of proving that the funds are separate cannot meet that burden, then the entire account is treated as community property. See generally 7 B. Witkin, *Summary of California Law*

Community Property §§ 33-34, at 5126-28 (8th ed. 1974). Even though the separate funds can still be traced, nothing prevents the married persons from making an agreement that expresses their clear intent that the funds be community property. If the person claiming that such an agreement was made proves that fact by a preponderance of the evidence, the agreement is given effect as provided in the last clause of paragraph (1).

Paragraph (2) of subdivision (b) specifies the other method by which the presumption may be rebutted: The spouses may expressly agree that the sums on deposit are not community property. But lay persons often do not understand the detailed provisions of the deposit agreement, and those provisions may not reflect the intent of the spouses as to the character of the property in the joint account. For this reason, paragraph (2) provides that the character of the property as community property is not changed unless there is an agreement—*separate from the deposit agreement*—expressly providing, for example, that the sums on deposit are not community property or that such sums are the separate property of one or both of the spouses. This scheme gives the spouses the necessary flexibility to change the character of the property where that is their intention but, at the same time, protects the spouses against unintentionally changing community property into separate property merely by signing a deposit agreement that would have that unintended effect.

The presumption created by Section 5305 does not affect the provisions of Sections 5302, 5402, and 5405 that permit prompt payment of the sums on deposit in a joint account to the surviving spouse. The prompt payment provisions are most useful where the estate is small and payment to the surviving spouse will avoid the expense and delay of probate. Yet, because the presumption created by Section 5305 governs the rights between the spouses and their successors, claimants who wish to show that the funds are community funds will find it easier to do so.

In the case of dissolution of the marriage, the community property sums on deposit in the joint account are subject to division by the court. Civil Code § 4800. By way of contrast, a true joint tenancy account is ordinarily not subject to division on dissolution of marriage because the sums on deposit are separate property of the spouses. *Cf. Walker v. Walker*, 108 Cal. App.2d 605, 608, 239 P.2d 106 (1952) (real property). An attempted gift or other disposition of community sums on deposit without valuable consideration and without the consent of the other spouse may be set aside. Civil Code § 5125(b).

Community property funds on deposit in a multiple-party account are not subject to testamentary disposition by the deceased depositor. See subdivision (c). This is consistent with the general Uniform Probate Code rule stated in subdivision (e) of Section 5302. If a right to dispose of community property in a multiple-party account by will is desired to be retained, that objective can be accomplished by the two spouses establishing a joint account with the express provision that no right of survivorship arises upon the death of one of the spouses.

Probate Code § 5306. Transitional provision

5306. For the purposes of this chapter, if a joint account was established before July 1, 1984, and the account was established as a "tenancy in common" account, no right of survivorship arises from the terms of the account or under Section 5302.

Comment. Section 5306 is new; there is no comparable provision in the Uniform Probate Code. The purpose of Section 5306 is to preserve the effect of a tenancy in common account established under prior law. As to accounts established after the operative date of this part, the form of the account should specifically provide that it is a nonsurvivorship account if that is the intent of the depositor. See Section 5302(a) (clear and convincing evidence of intent that account be a nonsurvivorship account required).

CHAPTER 4. PROTECTION OF FINANCIAL INSTITUTION

Probate Code § 5401. Establishment of and payment from multiple-party accounts; inquiry not required to establish net contributions

5401. (a) Financial institutions may enter into multiple-party accounts to the same extent that they may enter into single-party accounts. Any multiple-party account may be paid, on request and according to its terms, to any one or more of the parties.

(b) The terms of the account or deposit agreement may require the signatures of more than one of the parties to a multiple-party account during their lifetimes or of more than one of the survivors after the death of any one of them on any check, check endorsement, receipt, notice of

withdrawal, request for withdrawal, or withdrawal order. In such case, the financial institution shall pay the sums on deposit only in accordance with such terms, but those terms do not limit the right of the sole survivor or of all of the survivors to receive the sums on deposit.

(c) A financial institution shall not be required to inquire as to the source of funds received for deposit to a multiple-party account, or to inquire as to the proposed application of any sum withdrawn from an account, for purposes of establishing net contributions.

Comment. Subdivision (a) of Section 5401 is the same as the first two sentences of Section 6-108 of the Uniform Probate Code with the addition of the clarifying phrase "and according to its terms."

Subdivision (b) is not contained in the Uniform Probate Code. It continues the substance of provisions of former Financial Code Section 852 (third sentence) (banks), Section 7603 (second sentence) (savings and loan associations), Section 11204 (third sentence) (federal savings and loan associations), and Section 14854 (second sentence) (credit unions).

Subdivision (c) is the same as the last sentence of Section 6-108 of the Uniform Probate Code.

Probate Code § 5402. Payment of joint account

5402. Any sums in a joint account may be paid, on request and according to its terms, to any party without regard to whether any other party is incapacitated or deceased at the time the payment is demanded; but payment may not be made to the personal representative or heirs of a deceased party unless proof of death is presented to the financial institution showing that the decedent was the last surviving party or unless there is no right of survivorship under Section 5302.

Comment. Section 5402 is the same in substance as Section 6-109 of the Uniform Probate Code

Probate Code § 5403. Payment of P.O.D. account

5403. Any P.O.D. account may be paid, on request and according to its terms, to any original party to the account. Payment may be made, on request, to the P.O.D. payee or to the personal representative or heirs of a deceased P.O.D.

payee upon presentation to the financial institution of proof of death showing that the P.O.D. payee survived all persons named as original payees. Payment may be made to the personal representative or heirs of a deceased original payee if proof of death is presented to the financial institution showing that the deceased original payee was the survivor of all other persons named on the account either as an original payee or as P.O.D. payee.

Comment. Section 5403 is the same in substance as Section 6-110 of the Uniform Probate Code.

Probate Code § 5404. Payment of trust account

5404. Any trust account may be paid, on request and according to its terms, to any trustee. Unless the financial institution has received written notice that the beneficiary has a vested interest not dependent upon surviving the trustee, payment may be made to the personal representative or heirs of a deceased trustee if proof of death is presented to the financial institution showing that the deceased trustee was the survivor of all other persons named on the account either as trustee or beneficiary. A trust account may be paid to a beneficiary or beneficiaries or the personal representative or heirs of a beneficiary or beneficiaries if proof of death is presented to the financial institution showing that the beneficiary or beneficiaries survived all persons named as trustees.

Comment. Section 5404 is the same in substance as Section 6-111 of the Uniform Probate Code.

Probate Code § 5405. Payment as discharge

5405. (a) Payment made pursuant to Section 5401, 5402, 5403, or 5404 discharges the financial institution from all claims for amounts so paid whether or not the payment is consistent with the beneficial ownership of the account as between parties, P.O.D. payees, or beneficiaries, or their successors.

(b) The protection provided by subdivision (a) does not extend to payments made after the financial institution has been served with a court order restraining payment. No other notice or any other information shown to have been

available to a financial institution shall affect its right to the protection provided by subdivision (a).

(c) Unless the notice is withdrawn, after receipt of a written notice from any party that withdrawals in accordance with the terms of the account should not be permitted, the financial institution may refuse, without liability, to pay any sums on deposit pending determination of the rights of the parties or their successors.

(d) The protection provided by this section has no bearing on the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of funds in, or withdrawn from, multiple-party accounts and is in addition to, and not exclusive of, any protection provided the financial institution by any other provision of law.

Comment. Section 5405 is drawn in part from Section 6-112 of the Uniform Probate Code. Subdivision (a) is the same in substance as a portion of the Uniform Probate Code section. Subdivision (b) is substituted for the comparable portion of the Uniform Probate Code section, and continues the provisions of former Financial Code Sections 852.5, 7604.5, 11203.5, 14854.5, and 18318.5 relating to service of a court order restraining payment. Subdivision (c) continues the substance of the fifth sentence of former Section 852 of the Financial Code and the fourth sentence of former Section 7603 of the Financial Code. Subdivision (d) is the same in substance as the comparable portion of the Uniform Probate Code section. Receipt of notice under this section must be at the particular office or branch office where the account is carried. See Section 5101(1).

Probate Code § 5406. Payment of account held in trust form where financial institution has no notice that account is not a “trust account”

5406. The provisions of this chapter that apply to the payment of a trust account apply to an account in the name of one or more parties as trustee for one or more other persons if the financial institution has no other or further notice that the account is not a trust account as defined in Section 5101.

Comment. Section 5406 continues the substance of former Section 853 of the Financial Code which applied to banks, but

extends the former provision to apply to all financial institutions (defined in Section 5101), including banks, savings and loan associations, and credit unions, except that the provision of former Section 853 concerning payment to a minor is superseded by Section 5407.

Section 5406 permits a financial institution to treat an account in trust form as a trust account (defined in Section 5101) if it is unknown to the financial institution that the funds on deposit are subject to a trust created other than by the deposit of the funds in the account in trust form. If the financial institution does not have the additional information, the financial institution is protected from liability if it pays the account as provided in this chapter. See Section 5405. However, Section 5406 does not affect the rights as between the parties to the account, the beneficiary, or their successors. See Sections 5201, 5301(c), and 5302(c).

Probate Code § 5407. Payment to minor

5407. If a financial institution is required or permitted to make payment pursuant to this chapter to a person who is a minor:

(a) If the minor is a party to a multiple-party account, payment may be made to the minor or to the minor's order, and payment so made is a valid release and discharge of the financial institution, but this subdivision does not apply if the account is to be paid to the minor because the minor was designated as a P.O.D. payee or as a beneficiary of a trust account.

(b) In cases where subdivision (a) does not apply, payment shall be made as provided in Chapter 2 (commencing with Section 3400) of Part 8 of Division 4.

Comment. Section 5407 is new; there is no comparable provision in Article VI of the Uniform Probate Code. Subdivision (a) of Section 5407 is consistent with Section 850 of the Financial Code but applies to all financial institutions, not merely banks. Subdivision (b) supersedes the last portion of former Section 853 of the Financial Code (direct payment to minor beneficiary permitted on death of trustee), and substitutes the protective provisions of Sections 3400-3413 of the Probate Code.

PART 2. DISPOSITIVE PROVISIONS IN WRITTEN INSTRUMENTS

Probate Code § 5501. Dispositive provisions in written instruments

5501. (a) Any of the following provisions in an insurance policy, contract of employment, bond, mortgage, promissory note, deposit agreement, pension or profit-sharing plan, trust agreement, conveyance or any other written instrument effective as a contract, gift, conveyance, or trust is not invalid because the instrument is not executed with the formalities of a will, and this code does not invalidate the instrument or any of the following provisions:

(1) That money or other benefits theretofore due to, controlled or owned by a decedent shall be paid after the decedent's death to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently.

(2) That any money due or to become due under the instrument shall cease to be payable in event of the death of the promisee or the promisor before payment or demand.

(3) That any property which is the subject of the instrument shall pass to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently.

(b) Nothing in this section limits the rights of creditors under other laws of this state.

Comment. Section 5501 is the same in substance as Section 6-201 of the Uniform Probate Code. The Uniform Probate Code language that the provisions referred to in this section are "deemed to be nontestamentary" has been replaced by the language making them "not invalid because the instrument is not executed with the formalities of a will." See generally 7 B. Witkin, *Summary of California Law Wills and Probate* § 113, at 5628 (8th ed. 1974). This change is nonsubstantive.

Paragraphs (1) and (3) of subdivision (a) may expand California law with respect to the kinds of transfers on death

which are valid. For example, although the question has not been decided in California, most courts treat as testamentary and therefore invalid a provision in a promissory note that on the payee's death the note shall be paid to another person. Comment to Uniform Probate Code Section 6-201. However, a contractual provision has been upheld that should the owner of a business predecease the manager, the manager would receive the business, on the theory that it was additional compensation to the manager and could not be severed from the remainder of the agreement. *Estate of Howe*, 31 Cal.2d 395, 189 P.2d 5 (1948). Also, the payment of employee death benefits to a designated beneficiary has long been statutorily recognized in California. See, e.g., Gov't Code §§ 21332-21335 (public employees' death benefits). See also Civil Code § 704 (payable-on-death designations in United States bonds and obligations).

Paragraph (2) codifies California case law. See *Bergman v. Ornbaun*, 33 Cal. App.2d 680, 92 P.2d 654 (1939) (unpaid installments under promissory note cancelled on death of promisee). See generally 7 B. Witkin, *Summary of California Law Wills and Probate* §§ 87-89, at 5607-09 (8th ed. 1974).

Duty of financial institutions

SEC. 23. (a) A financial institution has no duty to inform any of the following of the enactment of Division 5 (commencing with Section 5100) of the Probate Code:

(1) Any depositor holding an account on the operative date of Part 1 (commencing with Section 5100) of Division 5 of the Probate Code.

(2) Any beneficiary named in a trust account on the operative date of Part 1 (commencing with Section 5100) of Division 5 of the Probate Code.

(3) Any P.O.D. payee designated on a P.O.D. account on the operative date of Part 1 (commencing with Section 5100) of Division 5 of the Probate Code.

(b) No liability shall be imposed on a financial institution for failing to inform any person described in subdivision (a) of the enactment of Part 1 (commencing with Section 5100) of Division 5 of the Probate Code.

Comment. Section 23 is designed to avoid any expense to financial institutions of advising existing depositors concerning the enactment of this act.

Operative date

SEC. 24. Section 5501, which is added to the Probate Code by this act, shall become operative on January 1, 1984. The remainder of this act shall become operative on July 1, 1984, and shall apply to accounts in existence on that date and accounts thereafter established.

Comment. Section 24 is drafted on the assumption that this act will become effective on January 1, 1984. The operative date is delayed until July 1, 1984, so that financial institutions will have time to take any necessary action to operate under the provisions of the act and so persons who have accounts in existence on the effective date (January 1, 1984) will have time to make any changes in the deposit agreement that they believe are desirable in view of the enactment of this act.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Emancipated Minors

September 1982

**CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306**

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Emancipated Minors*, 16 Cal. L. Revision Comm'n Reports 183 (1982).

CALIFORNIA LAW REVISION COMMISSION

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September 27, 1982

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

This recommendation proposes that an emancipated minor be permitted to make or revoke a will and to take various other actions, primarily ones relating to estate planning and probate proceedings.

This recommendation is submitted pursuant to Resolution Chapter 37 of the Statutes of 1980 (Probate Code study) and Resolution Chapter 19 of the Statutes of 1979 (study of law relating to the rights and disabilities of minors).

Respectfully submitted,

ROBERT J. BERTON
Chairperson

RECOMMENDATION

relating to

EMANCIPATED MINORS

Introduction

The California Emancipation of Minors Act (Civil Code Sections 60-70) was enacted in 1978¹ to provide a clear statement defining emancipation and its consequences and to permit an emancipated minor to obtain a court declaration of his or her status.²

Civil Code Section 62 provides that a person under the age of 18 years is an emancipated minor if the minor has entered into a valid marriage,³ is on active duty with the armed forces of the United States, or has received a court declaration of emancipation.⁴ Civil Code Section 63 gives the emancipated minor important capacities and rights that otherwise are restricted to adults. It provides, for example, that an emancipated minor shall be considered as being over the age of majority for the purposes of entering into a binding contract, suing or being sued in his or her own name, buying or selling real property, and obtaining a work permit without the request of parents or guardian.

In the course of its study of probate law, the Commission has reviewed the Emancipation of Minors Act and related provisions. The Commission recommends that a provision be added to the Emancipation of Minors Act to provide expressly that an emancipated minor has the capacity to make or revoke a will. Provisions also should be added to that act to provide express authorization for an emancipated minor to take various actions necessary for estate planning or in connection with probate proceedings.

¹ 1978 Cal. Stats. ch. 1059.

² See Civil Code § 61.

³ The minor remains emancipated whether or not the marriage was terminated by dissolution. Civil Code § 62(a).

⁴ Civil Code § 64 provides a procedure for obtaining a court declaration of emancipation. Civil Code § 61 provides in part: "This part is not intended to affect the status of minors who are now or may become emancipated under present decisional case law." Civil Code § 65 provides a court procedure for rescission of the declaration of emancipation, and Civil Code § 69 provides for a proceeding to void a declaration of emancipation obtained by fraud or by the withholding of material information.

Various other clarifications of the act also should be made.⁵ The significant recommendations are discussed in more detail below.

Making and Revoking Wills

An emancipated minor should be given the capacity to make or revoke a will. An emancipated minor does not have this capacity under existing law.⁶ Accordingly, unless an emancipated minor resorts to a permitted form of nonprobate transfer during his or her lifetime,⁷ the minor's estate must pass by intestate succession.⁸

The existing rule precluding an emancipated minor from making a will is particularly undesirable in the usual case—where a minor becomes emancipated as a result of a valid marriage. In such a case, the minor may wish to leave his or her entire estate to his or her surviving spouse. But under existing law, the surviving spouse takes all of the decedent's separate property only if the decedent dies without leaving surviving issue, parent, brother, sister, or descendant of a deceased brother or sister.⁹ In cases where the surviving spouse does not take all of the separate property, the share of the surviving spouse in the separate

⁵ Existing law gives an emancipated minor the capacity to enter into a binding contract. Civil Code § 63(b). Section 10112 of the Insurance Code requires written consent of a parent or guardian for certain transactions with respect to life or disability insurance or annuity contracts involving a minor. A provision should be added to the Emancipation of Minors Act to make clear that the written consent requirement of Section 10112 does not apply in the case of an emancipated minor.

A provision should be added to the Emancipation of Minors Act to make clear that an emancipated minor has the power to settle or compromise claims and actions by or against the minor. This power would appear to exist under the provisions of Civil Code Section 63 which give an emancipated minor the capacity to sue and be sued in his or her own name and to enter into binding contracts.

⁶ Prob. Code §§ 20 and 21 require that a person be over the age of 18 to dispose of property by will. Civil Code § 63, which lists the purposes for which an emancipated minor shall be considered as being over the age of majority, does not include in the list the making of a will.

⁷ An emancipated minor might use insurance, joint deposit accounts in financial institutions, joint tenancy in real property, or a trust to transfer property to a survivor upon the death of the emancipated minor. Provisions should be added to the Emancipation of Minors Act to make clear that these and various other nonprobate transfer devices may be utilized by an emancipated minor. See discussion, *infra*.

⁸ See Prob. Code §§ 200-230.

⁹ Prob. Code § 224.

property of the decedent is one-half¹⁰ or one-third,¹¹ depending upon the circumstances. For example, if the decedent is survived by a spouse and a nephew, the nephew takes as much of the separate property as the spouse. Although this result might be tolerated if it could be avoided by making a will,¹² it demonstrates the need for giving an emancipated minor the power to make a will.

To make a will one need only have sufficient mental capacity to understand the nature of the act, to understand and recollect the nature and situation of one's property, and to remember and understand one's relations to the persons who have claims on one's bounty and whose interests are affected by the will.¹³ The inability to transact even ordinary business is not alone sufficient to establish lack of capacity to make a will.¹⁴ Civil Code Section 63 gives an emancipated minor powers that require significantly greater capacities than the capacity that is required to make a will; the emancipated minor is given the capacity to engage in ordinary business activities, such as entering into binding contracts, buying and selling real property, suing and being sued in his or her own name, and obtaining employment. Accordingly, granting an emancipated minor the capacity to make a will not only would permit the minor to avoid the inflexibility of the intestate succession

¹⁰ The surviving spouse receives one-half of the intestate decedent's separate property if the decedent is survived by only one child or only the issue of one deceased child (Prob. Code § 221) or if the decedent dies without issue but is survived by one or both parents or the issue of one or both parents (Prob. Code § 223).

¹¹ The surviving spouse receives one-third of the intestate decedent's separate property if the decedent is survived by two or more children, by one child and the issue of one or more deceased children, or by the issue of two or more deceased children. Prob. Code § 221.

¹² The Commission has concluded that the existing California intestate succession rules need significant revisions and plans to submit a separate recommendation proposing such a revision.

¹³ See 7 B. Witkin, *Summary of California Law Wills and Probate* § 97, at 5614 (8th ed. 1974).

¹⁴ *In re Estate of Sexton*, 199 Cal. 759, 768, 251 P. 778, 782 (1926) (“[a]bility to transact important business, or even ordinary business, is not the legal standard of testamentary capacity”). Although establishment of a conservatorship ordinarily deprives the conservatee of the capacity to contract and to manage and control estate property (see Prob. Code §§ 1870-1876), the establishment of a conservatorship does not affect the power of the conservatee to make a will (see subdivision (c) Probate Code Section 1871). This is consistent with the holdings that a lesser capacity is required to make a will. See the Legislative Committee Comment to Probate Code § 1871 (“Appointment of a conservator is not a determination that the conservatee lacks testamentary capacity. Testamentary capacity is determined by a different standard, which depends upon soundness of mind.”).

provisions but also would be consistent with the policy already expressed in the Emancipation of Minors Act.

Estate Planning and Probate Proceedings

An emancipated minor may wish to use various nonprobate transfer devices to transfer property in event of the minor's death. An emancipated minor may need to take various actions in connection with probate proceedings. A conservator of the estate can take such actions for an adult conservatee under the substituted judgment provisions of the Guardianship-Conservatorship Law.¹⁵ But the substituted judgment provisions do not apply to a minor; a guardian of the estate has no general authority to engage in estate planning for the minor ward and only limited authority to take actions in connection with probate proceedings.

The Commission recommends that an emancipated minor be given the capacity to take the following actions which a conservator can be authorized to take under the doctrine of substituted judgment:¹⁶

- (1) Make a gift, outright or in trust.¹⁷
- (2) Convey or release contingent or expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy, and consent to a transfer, encumbrance, or gift of marital property.¹⁸
- (3) Exercise or release his or her powers as donee of a power of appointment unless the creating instrument otherwise provides.¹⁹

¹⁵ See Prob. Code §§ 2580-2586.

¹⁶ See Prob. Code § 2580. In addition, the emancipated minor, having the capacity to enter into a binding contract, would continue to have the capacity to give a power of attorney, including a durable power of attorney. See Civil Code § 2296 ("[a]ny person having capacity to contract may appoint an agent"). See also Civil Code § 2356 (power of attorney terminated by the "incapacity of the principal to contract" unless the power of attorney is a durable power of attorney).

¹⁷ Section 63 of the Civil Code already gives an emancipated minor the capacity to enter into a binding contract (which might involve only a nominal consideration) and the right to control his or her earnings. Expressly giving the emancipated minor the capacity to make a gift is consistent with these provisions and probably would be implied from existing Section 63.

¹⁸ These powers would appear to be implied under existing law from the power to sue and be sued (such as a proceeding to dissolve a marriage) and the power to buy and sell real property. The recommended provision also makes clear that the emancipated minor can consent to a transfer, encumbrance, or gift of marital property. See, e.g., Civil Code §§ 5125, 5127.

¹⁹ Subdivision (a) of Civil Code Section 1384.1 requires that a donee have the capacity to transfer the interest in property to which the power of appointment relates

(4) Create for his or her own benefit or for the benefit of others a revocable or irrevocable trust.²⁰

(5) Revoke a revocable trust.²¹

(6) Elect to take under or against a will.²²

(7) Renounce or disclaim any interest acquired by testate or intestate succession or by inter vivos transfer, including the right to surrender the right to revoke a revocable trust.²³

(8) Make an election or an election and agreement referred to in Section 202 of the Probate Code.²⁴

(probably granted by existing Section 63 of the Civil Code), but subdivision (b) of Civil Code Section 1384.1 precludes a minor donee from exercising a power of appointment during minority unless the creating instrument otherwise provides. It is unclear whether Section 63 authorizes an emancipated minor to exercise a power of appointment. Civil Code Section 1388.3 provides that a *release* of a power of appointment may be made on behalf of a minor donee by the guardian of the estate of the minor pursuant to a court order. No provision is made for the *exercise* of a power of appointment by an emancipated minor unless the creating instrument provides for such exercise. Giving the emancipated minor the capacity to exercise or release a power of appointment (unless the creating instrument otherwise provides) would be consistent with the other capacities of an emancipated minor, would clarify existing law, and would avoid the need to appoint a guardian to petition to court for authorization to release the power of appointment. Moreover, if an emancipated minor is given the capacity to make a will as recommended, it should be made clear that a power of appointment that is testamentary may be exercised by the minor's will.

²⁰ The capacity necessary to create a trust is the capacity to transfer property. See 7 B. Witkin, Summary of California Law *Trusts* § 11, at 5375 (8th ed. 1974). Section 63 of the Civil Code gives an emancipated minor the capacity to enter into a binding contract and to buy and sell real property. These capacities probably would be held to be sufficient to permit an emancipated minor to establish a trust. Moreover, giving an emancipated minor the capacity to transfer real and personal property as recommended above would by itself be sufficient to give the minor the capacity to create a trust, but it is desirable to make the matter clear by an express provision giving an emancipated minor the capacity to create a trust.

²¹ If an emancipated minor is given the capacity to create a revocable trust (see note 20 *supra*), it would necessarily follow that the minor should have the capacity to revoke the trust.

²² This provision would make clear that an emancipated minor has the capacity to make this election. The matter is not covered by existing statutes.

²³ Probate Code Section 190.2 provides that a disclaimer of a testamentary or other interest on behalf of a minor shall be made by the guardian of the estate of the minor. Whether an emancipated minor can disclaim or only his or her guardian can disclaim is unclear. Consistent with the other capacities that would be given emancipated minors, the power to renounce or disclaim should be included as a capacity of an emancipated minor. This would avoid the need to appoint a guardian of the estate in order to permit a disclaimer.

²⁴ Section 202 of the Probate Code provides for an election of a surviving spouse to have all or part of the community property or quasi-community property administered in the estate of the deceased spouse. The section authorizes a guardian of the estate of the surviving spouse to make the election. It is not clear whether an emancipated minor has the capacity to make the election, although the capacity to sue and be sued in his or her own name could be construed to give an emancipated minor the capacity to make the election. Consistent with the other capacities that would be given to emancipated minors, the power to make the election should be included as

Deposit Accounts

Provisions of the Financial Code permit a minor, whether or not emancipated, to make deposits and withdrawals from accounts in banks,²⁵ savings and loan associations,²⁶ federal savings and loan associations,²⁷ and with respect to industrial loan company investment certificates.²⁸ However, the provisions of the Financial Code governing credit unions require that a parent or guardian consent to the account if the receipt or acquittance of the minor is to constitute a valid release and discharge of the credit union.²⁹ The provisions relating to credit unions should be conformed to those governing other types of financial institutions. This would give all minors, whether or not emancipated, the right to make deposits and withdrawals in accordance with the deposit contract.

Proposed Legislation

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

An act to amend Section 63 of, and to add Sections 63.1 and 63.2 to, the Civil Code, and to amend Sections 14853 and 14854 of the Financial Code, relating to minors.

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

Civil Code § 63 (amended). Purposes for which emancipated minor considered over age of majority

SECTION 1. Section 63 of the Civil Code is amended to read:

63. An emancipated minor shall be considered as being over the age of majority for the following purposes:

a capacity of an emancipated minor. This would avoid the need to appoint a guardian of the estate in order to make the election.

²⁵ See Fin. Code §§ 850, 851, 852.

²⁶ See Fin. Code §§ 7600, 7601, 7602.

²⁷ See Fin. Code §§ 11200, 11204.

²⁸ See Fin. Code § 18318. See also Fin. Code § 18523 (types of industrial loan company accounts).

²⁹ See Fin. Code § 14853.

(a) For the purpose of consenting to medical, dental, or psychiatric care, without parental consent, knowledge, or liability.

~~(b)~~ For the purpose of his capacity to enter into a binding contract.

~~(c)~~ For the purpose of his capacity to sue and be sued in his own name.

(b) For the purpose of the minor's capacity to do any of the following:

(1) Enter into a binding contract.

(2) Buy, sell, lease, encumber, exchange, or transfer any interest in real or personal property, including but not limited to shares of stock in a domestic or foreign corporation or a membership in a nonprofit corporation.

(3) Sue or be sued in his or her own name.

(4) Compromise, settle, arbitrate, or otherwise adjust a claim, action, or proceeding by or against the minor.

(5) Make or revoke a will.

(6) Make a gift, outright or in trust.

(7) Convey or release contingent or expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy, and consent to a transfer, encumbrance, or gift of marital property.

(8) Exercise or release his or her powers as donee of a power of appointment unless the creating instrument otherwise provides.

(9) Create for his or her own benefit or for the benefit of others a revocable or irrevocable trust.

(10) Revoke a revocable trust.

(11) Elect to take under or against a will.

(12) Renounce or disclaim any interest acquired by testate or intestate succession or by inter vivos transfer, including exercising the right to surrender the right to revoke a revocable trust.

(13) Make an election or an election and agreement referred to in Section 202 of the Probate Code.

~~(d)~~ (c) For the purpose of his the minor's right to support by his or her parents.

~~(e)~~ (d) For purposes of the rights of his the minor's parents or guardian to his the minor's earnings, and to control him the minor.

~~(f)~~ (e) For the purpose of establishing his *or her* own residence.

~~(g)~~ For the purpose of buying or selling real property.

~~(h)~~ (f) For purposes of the application of Sections 300 and 601 of the Welfare and Institutions Code.

~~(i)~~ (g) For purposes of applying for a work permit pursuant to Section 49110 of the Education Code without the request of parents or guardian.

~~(j)~~ (h) For the purpose of ending all vicarious liability of the minor's parents or guardian for the minor's torts; provided, that nothing in this section shall affect any liability of a parent, guardian, spouse, or employer imposed by the Vehicle Code, or any vicarious liability which arises from an agency relationship.

~~(k)~~ (i) For the purpose of enrolling in any school or college.

Comment. Section 63 is amended to expand and clarify the purposes for which an emancipated minor is considered as being over the age of majority.

Paragraph (1) of subdivision (b) continues former subdivision (b). Paragraph (2) continues and expands former subdivision (g) which was limited to "buying or selling real property." However, this paragraph to a large extent makes clear capacities that were included in the capacity to enter into a binding contract. To the extent that paragraph (2) expands the capacity of an emancipated minor beyond that formerly provided, the paragraph is consistent with paragraphs (5)-(10) of subdivision (b). Paragraph (3) continues former subdivision (c). Paragraph (4) is new, but this paragraph probably merely makes clear a capacity that was included within the capacities to make a binding contract and to sue and be sued in his or her own name.

Paragraph (5), which gives a minor the capacity to make or revoke a will, is added because the power to make a will is important and is not a power that can be performed for a minor by a guardian. Moreover, the making of a will requires a lesser capacity than the capacity to enter into a binding contract (a capacity that is provided for in paragraph (1) and was included under Section 63 as it formerly read). See, *In re Estate of Sexton*, 199 Cal. 759, 768, 251 P. 778, 782 (1926) ("[a]bility to transact important business, or even ordinary business, is not the legal standard of testamentary capacity"). Giving the emancipated minor the capacity to make or revoke a will permits the minor to avoid the inflexible rules that govern intestate succession and

to leave his or her property as he or she desires. See *Recommendation Relating to Emancipated Minors*, 16 Cal. L. Rev. Comm'n Reports 183 (1982).

Paragraphs (6)-(13) make clear that an emancipated minor may take various actions that formerly might not have been embraced within the capacity to enter into a binding contract (a capacity that was included under Section 63 as it formerly read). These paragraphs are drawn from Probate Code Section 2580, a provision of the Guardianship-Conservatorship Law relating to substituted judgment. Probate Code Section 2580 applies only to the case of a conservatee; it does not apply to a minor since a conservator of the estate may be appointed only for an adult. Giving an emancipated minor the capacity to take actions a conservator could be authorized or required to take under Section 2580 permits the emancipated minor to take actions that in some cases could not be taken even if a guardian of the estate of the minor were appointed. For example, a guardian cannot exercise a power of appointment. Paragraphs (6)-(13) recognize that a married minor or other emancipated minor may need to utilize the estate planning devices and probate procedures provided for in those paragraphs. In those cases where a guardian of a minor could take an action listed in one of those paragraphs, giving the emancipated minor the capacity to take the action may avoid the need to establish a guardianship for the minor. See, e.g., Civil Code § 1388.3 (guardian of estate may *release* power of appointment on behalf of a minor donee pursuant to court order); Prob. Code §§ 190.2 (disclaimer of a testamentary or other interest on behalf of a minor by guardian of the estate of the minor), 202 (election by guardian under Probate Code Section 202).

Civil Code § 63.1 (added). Insurance contracts

SEC. 2. Section 63.1 is added to the Civil Code, to read:

63.1. An insurance contract entered into by an emancipated minor has the same effect as if it were entered into by an adult and, with respect to such a contract, the minor has the same rights, duties, and liabilities as an adult.

Comment. Section 63.1 is a specific application of the general provision of Section 63 giving an emancipated minor the capacity to enter into a binding contract. Section 63.1 is included to make clear that the restrictions imposed by Section 10112 of the Insurance Code with respect to life or disability insurance or annuity contracts involving a minor do not apply where the minor is an emancipated minor.

Civil Code § 63.2 (added). Voting and other rights in connection with stock and other property

SEC. 3. Section 63.2 is added to the Civil Code, to read:

63.2. With respect to any shares of stock in a domestic or foreign corporation held by an emancipated minor, any membership in a nonprofit corporation held by an emancipated minor, or any other property held by an emancipated minor, the minor may do all of the following:

(a) Vote in person, and give proxies to exercise any voting rights, with respect to such shares or memberships or property.

(b) Waive notice of any meeting or give consent to the holding of any meeting.

(c) Authorize, ratify, approve, or confirm any action which could be taken by shareholders, members, or property owners.

Comment. Section 63.2 is drawn from Probate Code Section 2458 (powers of guardian or conservator). Section 63.2 applies only where the shares, memberships, or property are held by the emancipated minor.

Financial Code § 14853 (amended). Minor's account in credit union

SEC. 4. Section 14853 of the Financial Code is amended to read:

14853. A credit union may issue shares or certificates for funds to a minor of any age or maintain any other account authorized for credit union members for a minor, and receive payments thereon by or for ~~such~~ *the* minor. ~~Such~~ *The* minor is entitled to withdraw, transfer, or pledge any shares or certificates or other moneys owned by *him or her* and to receive from the credit union all dividends, interest, or other money due thereon in the same manner and subject to the same conditions as an adult. The receipt or acquittance of a minor ~~whose parent or guardian has consented to the account, whether before or after any transaction therein,~~ constitutes a valid release and discharge of the credit union for the payment of dividends, interest, or other money due to ~~such minors~~ *the minor*.

Comment. Section 14853 is amended to delete the requirement that a "parent or guardian has consented to the account" as a condition for payment to the minor. The amendment makes Section 14853 read the same in substance as Section 7600 (savings and loan associations). The amendment is also consistent with the treatment given the account of a minor under Financial Code Sections 850 (banks), 11200 (federal savings and loan associations), and 18318 (investment or thrift certificates of industrial loan company).

Financial Code § 14854 (amended). Joint tenancy account in credit union

SEC. 5. Section 14854 of the Financial Code is amended to read:

14854. Shares or certificates for funds owned in joint tenancy, *whether the joint tenants are minors or adults*, and all dividends and interest thereon, may be paid to any of the joint tenants during their lifetime or to the survivor or any one of the survivors of them after the death of one or more of the joint tenants. By written instructions of all joint tenants given to the credit union, the joint tenants may require the signatures of more than one of ~~such~~ *those* persons during their lifetimes or of more than one of the survivors after the death of any one of them on any notice of withdrawal, request for withdrawal, check endorsement or receipt, in which case the credit union shall pay withdrawals, dividends, and interest only in accordance with ~~such~~ *those* instructions, but ~~no such~~ *those* instructions shall *not* limit the right of the sole survivor or of all of the survivors to receive withdrawal payments, dividends, and interest. Payment as provided in this section and the receipt or acquittance by any joint tenant is a valid and sufficient release and discharge of the depository credit union for all payments made on account of shares or certificates for funds owned in joint tenancy prior to the receipt by ~~such~~ *the* credit union of notice in writing from any one of them not to make payments in accordance with the terms of ~~such~~ *the* shares or certificates for funds or of ~~such~~ *the* written instructions. After receipt of ~~such~~ *the* notice a credit union may refuse, without liability, to pay withdrawals, dividends, or interest pending a determination of the rights of the parties.

Comment. Section 14854 is amended to make clear that a minor may be a joint tenant and that payment may be made to a minor joint tenant unless otherwise provided in the instructions. The amendment is consistent with treatment given minors with respect to accounts in other types of financial institutions. See Sections 852 (banks), 7602 (savings and loan associations), 11204 (federal savings and loan associations).

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Notice in Limited Conservatorship
Proceedings

September 1982

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Notice in Limited Conservatorship Proceedings*, 16 Cal. L. Revision Comm'n Reports 199 (1982).

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DAVID ROSENBERG

September 27, 1982

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The new guardianship-conservatorship law was enacted in 1979 upon recommendation of the Law Revision Commission. 1979 Cal. Stats. ch. 726. See *Recommendation Relating to Guardianship-Conservatorship Law*, 14 Cal. L. Revision Comm'n Reports 501 (1978). In 1980, provisions relating to limited conservatorships (not recommended by the Commission) were enacted. 1980 Cal. Stats. ch. 1304.

Pursuant to Resolution Chapter 27 of the Statutes of 1972, the Commission has reviewed the experience under the new guardianship-conservatorship law to determine whether any technical or substantive revisions in the new law are needed. This recommendation is submitted as a result of this continuing review.

Section 1827.5 of the Probate Code provides for an assessment of a proposed limited conservatee by a regional center and requires that a copy of the report of the regional center be given to the proposed limited conservatee and the petitioner. The Commission recommends that the list of persons to be given a copy of the report be expanded to include the attorneys for the parties and such other persons as the court orders. To ensure that the copy is received a sufficient time before the hearing, the

Commission recommends that it be mailed at least five days before the hearing on the petition to establish the limited conservatorship.

Respectfully submitted,

ROBERT J. BERTON
Chairperson

RECOMMENDATION

relating to

NOTICE IN LIMITED CONSERVATORSHIP PROCEEDINGS

Section 1827.5 of the Probate Code provides for an assessment of a proposed limited conservatee by a regional center.¹ The regional center submits a written report of its findings and recommendations to the court. The regional center furnishes a copy of its report to the proposed limited conservatee and to the petitioner.

The Commission recommends that Section 1827.5 be amended to require that:

(1) A copy of the report of the regional center be mailed to the attorneys and other interested persons designated by the court (not just the proposed limited conservatee and the petitioner).²

(2) The copy be mailed at least five days before the hearing on the petition to establish the limited conservatorship.³

Section 1827.5 does not now specify the time when the copy of the report must be delivered. The Commission is aware of a case where the copy of the report was delivered on the morning of the day the hearing was to be held.⁴ The report recommended a change in residence of the

¹ The proposed limited conservatee, with his or her consent, must be assessed at a regional center as provided in Chapter 5 (commencing with Section 4620) of Division 4.5 of the Welfare and Institutions Code. The assessment must be made within 30 days after the filing of the petition for limited conservatorship. Prob. Code § 1827.5.

² Section 1827.5 requires that a copy of the report be provided only to the proposed limited conservatee and to the petitioner. Other interested persons should receive a copy of the report. If the proposed limited conservatee has an attorney, both the proposed limited conservatee and the attorney should receive a copy. If the proposed conservatee is not the petitioner, the attorney for the petitioner instead of the petitioner should receive a copy if the petitioner has an attorney. In addition, the court should be given express authority to require that a copy be furnished to any other person the court specifies. The requirement that copies be provided to attorneys, if any, for the proposed limited conservatee and petitioner and to such other persons as the court orders is drawn from Section 1826(k) of the Probate Code (report of court investigator).

³ Compare Prob. Code § 1826(k) (report of court investigator must be mailed to interested persons at least five days before the hearing).

⁴ Letter dated July 13, 1982, from David H. Spencer, Los Altos, California, lawyer (on file in the office of the Commission).

proposed limited conservatee and suggested that a general, rather than a limited, conservatorship was appropriate. In such a case, the lack of sufficient advance notice makes it difficult or impossible for the parties and their attorneys to contest or support at the hearing the findings and recommendations contained in the report. The recommended five-day mailing requirement will assure sufficient advance notice.

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

An act to amend Section 1827.5 of the Probate Code, relating to limited conservatorships.

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

SECTION 1. Section 1827.5 of the Probate Code is amended to read:

1827.5. (a) In the case of any proceeding to establish a limited conservatorship, within 30 days after the filing of a petition for limited conservatorship, a proposed limited conservatee, with his or her consent, shall be assessed at a regional center as provided in Chapter 5 (commencing with Section 4620) of Division 4.5 of the Welfare and Institutions Code. ~~Such~~ *The* regional center shall submit a written report of its findings and recommendations to the court ~~with copies to the proposed limited conservatee and to the petitioner~~. The report shall include a description of the proposed limited conservatee's specific areas, nature, and degree of disability, if any. The findings and recommendations of the regional center ~~shall~~ *are not be* binding upon the court.

(b) *At least five days before the hearing on the petition, the regional center shall mail a copy of the report referred to in subdivision (a) to all of the following:*

- (1) *The proposed limited conservatee.*
- (2) *The attorney, if any, for the proposed limited conservatee.*

(3) If the petitioner is not the proposed limited conservatee, the attorney for the petitioner or the petitioner if the petitioner does not have an attorney.

(4) Such other persons as the court orders.

Comment. Section 1827.5 is amended to require that copies of the report be mailed at least five days before the hearing and to require that copies be mailed to the attorney, if any, for the proposed limited conservatee, to the attorney for the petitioner instead of the petitioner if the petitioner has an attorney, and to such other persons as the court orders. The amended section continues the former requirement that in every case a copy be provided to the proposed limited conservatee. The new requirement that copies be mailed to attorneys, if any, for the proposed limited conservatee and petitioner and to such other persons as the court orders is drawn from Section 1826(k) (report of court investigator). See also Sections 1465 (manner of mailing; when mailing complete), 1466 (personal delivery in lieu of mailing).

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

**Disclaimer of Testamentary
and Other Interests**

September 1982

**CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306**

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Disclaimer of Testamentary and Other Interests*, 16 Cal. L. Revision Comm'n Reports 207 (1982).

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DAVID ROSENBERG

September 27, 1982

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

This recommendation proposes the enactment of a new, comprehensive statute governing the disclaimer of testamentary and other interests. The new statute makes disclaimers that are valid under federal law also valid under the California statute. The new statute also makes clear that a disclaimer is not a fraudulent conveyance against creditors of the beneficiary who disclaims.

This recommendation is submitted pursuant to Resolution Chapter 37 of the Statutes of 1980, which directed the Law Revision Commission to study the Probate Code.

Respectfully submitted,

ROBERT J. BERTON
Chairperson

RECOMMENDATION

relating to

DISCLAIMER OF TESTAMENTARY AND OTHER INTERESTS

The California disclaimer statute¹ permits the recipient of an interest under a will, by intestate succession, or by some other mechanism² to disclaim the interest within a reasonable time, with the effect that the person is treated as if he or she never received the property.³ The Commission has concluded that a new, comprehensive disclaimer statute is needed to improve the organization of the existing statute, to make clarifying and substantive changes in existing law, and to bring the California statute into closer conformity with federal law.

The new disclaimer statute would make the following significant clarifications or changes in existing law:⁴

(1) The new statute makes clear that a qualified disclaimer under federal law⁵ is also valid under the

¹ Prob. Code §§ 190-190.10. Disclaimers may also be termed renunciations. See Uniform Probate Code § 2-801 (1977). "Disclaimer" seems to be the preferred term. See I.R.C. § 2518; Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act (1978); Uniform Disclaimer of Transfers Under Nontestamentary Instruments Act (1978); Uniform Disclaimer of Property Interests Act (1978).

² Such as by inter vivos gift, as a surviving joint tenant, or as a beneficiary under an insurance policy or retirement plan. The disclaimer statute was amended in 1982 to expand the types of interests that may be disclaimed. 1982 Cal. Stats. ch. 41, § 1.

³ Prob. Code § 190.6. But see the text at note 7 *infra*.

⁴ The proposed disclaimer statute is drawn in part from a draft statute prepared by the Probate, Trust and Estate Planning Committee of the Beverly Hills Bar Association on file in the Commission's office.

⁵ Section 2518 of the Internal Revenue Code provides:

(a) For purposes of this subtitle, if a person makes a qualified disclaimer with respect to any interest in property, this subtitle shall apply with respect to such interest as if the interest had never been transferred to such person.

(b) For purposes of subsection (a), the term "qualified disclaimer" means an irrevocable and unqualified refusal by a person to accept an interest in property but only if—

(1) such refusal is in writing,

(2) such writing is received by the transferor of the interest, his legal representative, or the holder of the legal title to the property to which the interest relates not later than the date which is 9 months after the later of—

(A) the day on which the transfer creating the interest in such person is made,

or

(B) the day on which such person attains age 21,

(3) such person has not accepted the interest or any of its benefits, and

(4) as a result of such refusal, the interest passes without any direction on the part of the person making the disclaimer and passes either—

California statute. This facilitates the primary purpose of disclaimers to minimize taxes.⁶

(2) Under the new statute, a disclaimer is not a fraudulent conveyance as against creditors of the person disclaiming. This adopts the majority rule and rejects the contrary California case-law rule⁷ that pre-dates enactment of the California statute. This new rule will not unjustly affect the rights of the creditor who extends credit in reliance upon the beneficiary's anticipated acceptance of a disclaimable interest; the new statute permits the beneficiary to waive the right to disclaim a specific interest, and the creditor may require such a waiver as a condition to extending the credit.

(3) The new statute liberalizes the requirements for filing disclaimers. This liberalization will avoid a disclaimer from being held ineffective because it was filed with the wrong person or in the wrong place. The new statute does not continue the existing requirement that a disclaimer of an interest in real property be acknowledged,⁸ but acknowledgment is required in order to record the disclaimer under the laws relating to the recording of instruments affecting real property.

(A) to the spouse of the decedent, or

(B) to a person other than the person making the disclaimer.

(c) For purposes of subsection (a)—

(1) A disclaimer with respect to an undivided portion of an interest which meets the requirements of the preceding sentence shall be treated as a qualified disclaimer of such portion of the interest.

(2) A power with respect to property shall be treated as an interest in such property.

(3) For purposes of subsection (a), a written transfer of the transferor's entire interest in the property—

(A) which meets requirements similar to the requirements of paragraphs (2) and (3) of subsection (b), and

(B) which is to a person or persons who would have received the property had the transferor made a qualified disclaimer (within the meaning of subsection (b)),

shall be treated as a qualified disclaimer.

⁶ See Comment, *How to Look A Gift Horse in the Mouth—Disclaimers Under California Law and the Tax Reform Act of 1976*, 18 Santa Clara L. Rev. 217, 218-23 (1978). A disclaimer may meet the requirements of California law but fail under federal law, particularly where timeliness of filing is involved. See I.R.C. § 2518; Jewett v. Commissioner, 102 S. Ct. 1082 (1982).

⁷ See *In re Estate of Kalt*, 16 Cal.2d 807, 108 P.2d 401 (1940); Bennett, *Using Disclaimers* § 5.9, in *Using Disclaimers and Powers of Appointment* 9-10 (Cal. Cont. Ed. Bar 1981). See also the Comment to Section 3 of the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act (1978). Since the disclaimed interest is treated in Probate Code Section 190.6 as never having belonged to the disclaimant, there is nothing for the creditor to reach.

⁸ Prob. Code § 190.4.

(4) The new statute rejects language in a recent case to the effect that the normal disclaimer rules are inapplicable to a devise conditioned on survival.⁹

(5) The provision of existing law permitting common law disclaimers¹⁰ is not continued in the new statute. This avoids the possibility of litigation resulting from the uncertainty created under existing law when a disclaimer that fails to satisfy the requirements of the disclaimer statute is claimed to be a valid common law disclaimer. Moreover, common law disclaimers are no longer needed in view of the expansion of the scope of the disclaimer statute¹¹ and the provision of the new statute that makes a disclaimer valid under federal law also valid under the California statute.¹²

Proposed Legislation

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

An act to amend Sections 591.6 and 2580 of, to add Division 2.5 (commencing with Section 260) to, and to repeal Chapter 12 (commencing with Section 190) of Division 1 of, the Probate Code, relating to disclaimers.

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

Probate Code §§ 190-190.10 (repealed). Disclaimer of testamentary and other interests

SECTION 1. Chapter 12 (commencing with Section 190) of Division 1 of the Probate Code is repealed.

Comment. Former Chapter 12 (commencing with Section 190) is superseded by Division 2.5 (commencing with Section 260). The disposition of former Sections 190-190.10 is indicated below.

§ 190. Definitions. The substance of the introductory clause of former Section 190 is continued in Section 260 (application of definitions). The substance of subdivision (a) is continued in

⁹ See *Estate of Murphy*, 92 Cal. App.3d 413, 426, 154 Cal. Rptr. 859 (1979) (dictum).

¹⁰ Prob. Code § 190.10. See also *Estate of Murphy*, 92 Cal. App.3d 413, 422, 154 Cal. Rptr. 859 (1979).

¹¹ See note 2 *supra*.

¹² See text at note 5 *supra*.

Sections 262 (“beneficiary” defined) and 267 (“interest” defined). Subdivision (b) is continued in Section 267(a) (“interest” defined). Subdivision (c) is continued in Section 265 (“disclaimer” defined). Subdivision (d) is continued in Section 264 (“disclaimant” defined).

§ 190.1. *Disclaiming interest; contents of disclaimer.* The first sentence of former Section 190.1 is continued in Section 275 (right to disclaim interest). The substance of the second sentence is continued in Section 278 (contents of disclaimer).

§ 190.2. *Disclaimer by guardian, conservator, or representative.* The substance of former Section 190.2 is continued in Sections 276 (disclaimer on behalf of conservatee), 277(a) (disclaimer on behalf of minor), and 277(b) (disclaimer on behalf of decedent).

§ 190.3. *Effectiveness of disclaimer.* The introductory clause and subdivisions (a) and (b) of former Section 190.3 are superseded by Section 279 (time within which disclaimer must be filed). Subdivision (c) is not continued.

§ 190.4. *Filing of disclaimer.* Former Section 190.4 is superseded by Section 280 (filing and recording of disclaimers).

§ 190.5. *Binding effect of disclaimer; waiver.* The first sentence of former Section 190.5 is continued in Section 281 (disclaimer irrevocable and binding). The substance of the second sentence is continued in Section 284 (waiver of right to disclaim).

§ 190.6. *Disposition of disclaimed interest.* Former Section 190.6 is superseded by Section 282 (effect of disclaimer).

§ 190.7. *Restriction on making disclaimer.* The first sentence of former Section 190.7 is continued in Section 285(a) (no disclaimer after acceptance). The substance of the second sentence is continued in Section 285(c). The third sentence is superseded by Section 285(b).

§ 190.8. *Right to disclaim not affected by spendthrift or other restrictions.* Former Section 190.8 is continued in Section 286.

§ 190.9. *Operative effect of chapter.* The substance of former Section 190.9 is continued in Section 287 as revised for the operative date of the new statute.

§ 190.10. *Savings clause.* The substance of former Section 190.10 is continued in Section 288, except that the new statute is the exclusive method of making disclaimers after its operative date. A purported disclaimer made after the operative date must comply with the requirements of the new statute and, if it does not, it is not recognized as valid as a common law disclaimer or renunciation.

Probate Code §§ 260-295 (added). Disclaimer of testamentary and other interests

SEC. 2. Division 2.5 (commencing with Section 260) is added to the Probate Code, to read:

DIVISION 2.5. DISCLAIMER OF TESTAMENTARY AND OTHER INTERESTS

CHAPTER 1. DEFINITIONS

§ 260. Application of definitions

260. Unless the provision or context otherwise requires, the words and phrases defined in this chapter govern the construction of this division.

Comment. Section 260 is new.

§ 261. Account

261. "Account" means a contract of deposit of funds between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account, and other like arrangement.

Comment. Section 261 is new and is the same in substance as Section 6-101(1) of the Uniform Probate Code (1977).

§ 262. Beneficiary

262. "Beneficiary" means the person entitled, but for the person's disclaimer, to take an interest.

Comment. Section 262 continues the substance of the first portion of subdivision (a) of former Section 190. See also Section 268 ("person" defined).

§ 263. Creator of the interest

263. (a) "Creator of the interest" means a person who establishes, declares, creates, or otherwise brings into existence an interest.

(b) "Creator of the interest" includes, but is not limited to, the following:

(1) With respect to an interest created by intestate succession, the person dying intestate.

(2) With respect to an interest created under a will, the testator.

(3) With respect to an interest created under a trust, the trustor.

(4) With respect to an interest created by succession to a disclaimed interest, the disclaimant of the disclaimed interest.

(5) With respect to an interest created by virtue of an election to take against a will, the testator.

(6) With respect to an interest created by creation of a power of appointment, the donor.

(7) With respect to an interest created by exercise or nonexercise of a power of appointment, the donee.

(8) With respect to an interest created by an inter vivos gift, the donor.

(9) With respect to an interest created by surviving the death of a depositor of a Totten trust account or P.O.D. account, the deceased depositor.

(10) With respect to an interest created under an insurance or annuity contract, the owner, the insured, or the annuitant.

(11) With respect to an interest created by surviving the death of another joint tenant, the deceased joint tenant.

(12) With respect to an interest created under an employee benefit plan, the employee or other owner of an interest in the plan.

(13) With respect to an interest created under an individual retirement account, annuity, or bond, the owner.

Comment. Section 263 is new. See also Sections 266 (“employee benefit plan” defined), 267 (“interest” defined), 268 (“person” defined), 269 (“P.O.D. account” defined), 270 (“Totten trust account” defined).

§ 264. Disclaimant

264. “Disclaimant” means a beneficiary who executes a disclaimer on his or her own behalf or a person who executes a disclaimer on behalf of a beneficiary.

Comment. Section 264 continues subdivision (d) of former Section 190.

§ 265. Disclaimer

265. “Disclaimer” means any writing which declines, refuses, renounces, or disclaims any interest that would otherwise be taken by a beneficiary.

Comment. Section 265 continues subdivision (c) of former Section 190.

§ 266. Employee benefit plan

266. "Employee benefit plan" includes, but is not limited to, any pension, retirement, death benefit, stock bonus, or profit sharing plan, system, or trust.

Comment. Section 266 is new.

§ 267. Interest

267. (a) "Interest" includes the whole of any property, real or personal, legal or equitable, or any fractional part, share, or particular portion or specific assets thereof, or any estate in any such property, or any power to appoint, consume, apply, or expend property, or any other right, power, privilege, or immunity relating to property.

(b) "Interest" includes, but is not limited to, an interest created in any of the following manners:

- (1) By intestate succession.
- (2) Under a will.
- (3) Under a trust.
- (4) By succession to a disclaimed interest.
- (5) By virtue of an election to take against a will.
- (6) By creation of a power of appointment.
- (7) By exercise or nonexercise of a power of appointment.
- (8) By an inter vivos gift, whether outright or in trust.
- (9) By surviving the death of a depositor of a Totten trust account or P.O.D. account.
- (10) Under an insurance or annuity contract.
- (11) By surviving the death of another joint tenant.
- (12) Under an employee benefit plan.
- (13) Under an individual retirement account, annuity, or bond.
- (14) Any other interest created by any testamentary or inter vivos instrument or by operation of law.

Comment. Subdivision (a) of Section 267 continues the substance of subdivision (b) of former Section 190. Subdivision (b) of Section 267 continues a portion of subdivision (a) of former Section 190 (as amended by 1982 Cal. Stats. ch. 41). See also Sections 266 ("employee benefit plan" defined), 269 ("P.O.D. account" defined), 270 ("Totten trust account" defined).

§ 268. Person

268. "Person" means an individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, or other entity.

Comment. Section 268 makes clear that artificial persons are included within the meaning of "person."

§ 269. P.O.D. account

269. "P.O.D. account" means an account subject to a pay-on-death provision as provided in Section 852.5, 7604.5, 11203.5, 14854.5, or 18318.5 of the Financial Code.

Comment. Section 269 is new. See also Section 261 ("account" defined).

§ 270. Totten trust account

270. "Totten trust account" means an account in the name of one or more parties as trustee for one or more beneficiaries where the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sums on deposit in the account. In a Totten trust account, it is not essential that payment to the beneficiary be mentioned in the deposit agreement. A Totten trust account does not include (1) a regular trust account under a testamentary trust or a trust agreement which has significance apart from the account or (2) a fiduciary account arising from a fiduciary relation such as attorney-client.

Comment. Section 270 is new and is the same in substance as Section 6-101(14) of the Uniform Probate Code (1977). See also Section 261 ("account" defined).

CHAPTER 2. GENERAL PROVISIONS**§ 275. Right to disclaim interest**

275. A beneficiary may disclaim any interest, in whole or in part, by filing a disclaimer as provided in this division.

Comment. Section 275 continues the first sentence of former Section 190.1. A disclaimer may be valid under this chapter but not meet the requirements of federal law. See I.R.C. § 2518; *Jewett v. Commissioner*, 102 S. Ct. 1082 (1982). Hence, if a

disclaimer is executed to avoid federal taxes, the requirements of federal law must be met.

§ 276. Disclaimer on behalf of conservatee

276. A disclaimer on behalf of a conservatee shall be made by the conservator of the estate of the conservatee pursuant to a court order obtained under Article 10 (commencing with Section 2580) of Chapter 6 of Part 4 of Division 4 authorizing or requiring the conservator to execute and file the disclaimer.

Comment. Section 276 continues the substance of a portion of former Section 190.2 and adds a reference to the substituted judgment provisions of the guardianship-conservatorship law. This continues prior law which made the substituted judgment provisions specifically applicable to disclaimers. See paragraph (9) of subdivision (b) of Section 2580.

§ 277. Disclaimer on behalf of minor or decedent

277. (a) A disclaimer on behalf of a minor shall be made by the guardian of the estate of the minor if one has been appointed or, if none has been appointed, by a guardian ad litem of the minor. A disclaimer by a guardian is not effective unless made pursuant to a court order obtained under this section.

(b) A disclaimer on behalf of a decedent shall be made by the personal representative of the decedent. Except as provided in Article 2 (commencing with Section 591) of Chapter 8 of Division 3, a disclaimer by a personal representative is not effective unless made pursuant to a court order obtained under this section.

(c) A petition for an order authorizing or requiring a guardian or personal representative to execute and file a disclaimer shall be filed in the superior court in the county in which the estate of the minor or decedent is administered or, if there is no administration, the superior court in any county in which administration would be proper. The petition may be filed by the guardian, personal representative, or other interested person.

(d) The petition shall:

- (1) Identify the creator of the interest.
- (2) Describe the interest to be disclaimed.
- (3) State the extent of the disclaimer.

(4) Identify the person or persons the petitioner believes would take the interest in the event of the disclaimer.

(e) Notice of the hearing on the petition shall be given as follows:

(1) If the petition is for an order authorizing or requiring the guardian of the estate of a minor to execute and file the disclaimer, notice of the hearing on the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1 of Division 4 to all of the persons (other than the petitioner or persons joining in the petition) required to be given notice under that chapter.

(2) If the petition is for an order authorizing or requiring the personal representative of a decedent to execute and file the disclaimer, notice of the hearing on the petition shall be given for the period and in the manner provided in Section 1200.5.

(3) If the petition is for an order authorizing or requiring a guardian ad litem of a minor to execute and file the disclaimer, notice of the hearing on the petition shall be given to the persons and in the manner that the court shall by order direct.

(4) The court may require that additional notice be given in such manner as the court directs.

(f) After hearing, the court in its discretion may make an order authorizing or requiring the guardian or personal representative to execute and file the disclaimer if the court determines, taking into consideration all of the relevant circumstances, that the minor or decedent as a prudent person would disclaim the interest if he or she had the capacity to do so.

Comment. Subdivision (a) of Section 277 continues the substance of a portion of former Section 190.2 but adds a reference to a guardian ad litem and requires court approval. Subdivision (b) continues the substance of a portion of former Section 190.2 and requires court approval unless the personal representative is acting under the Independent Administration of Estates Act. Subdivisions (c), (d), (e), and (f) are new. Paragraph (1) of subdivision (e) is drawn from Civil Code Section 1388.3 (release of power of appointment on behalf of minor donee). Subdivision (f) adopts the standard provided by Civil Code Section 1388.3 for release of a power of appointment on behalf of a minor donee.

§ 278. Contents of disclaimer

278. The disclaimer shall be in writing, shall be signed by the disclaimant, and shall:

- (a) Identify the creator of the interest.
- (b) Describe the interest to be disclaimed.
- (c) State the disclaimer and the extent thereof.

Comment. Section 278 continues the substance of the second sentence of former Section 190.1.

§ 279. Time within which disclaimer must be filed

279. (a) A disclaimer to be effective shall be filed within a reasonable time after the person able to disclaim acquires knowledge of the interest.

(b) In the case of any of the following interests, a disclaimer is conclusively presumed to have been filed within a reasonable time if it is filed within nine months after the death of the creator of the interest or within nine months after the interest becomes indefeasibly vested, whichever occurs later:

- (1) An interest created under a will.
- (2) An interest created by intestate succession.
- (3) An interest created pursuant to the exercise or nonexercise of a testamentary power of appointment.
- (4) An interest created by surviving the death of a depositor of a Totten trust account or P.O.D. account.
- (5) An interest created under a life insurance or annuity contract.
- (6) An interest created by surviving the death of another joint tenant.
- (7) An interest created under an employee benefit plan.
- (8) An interest created under an individual retirement account, annuity, or bond.

(c) In the case of an interest created by an inter vivos trust, an interest created by the exercise of a presently exercisable power of appointment, an outright inter vivos gift, a power of appointment, or an interest created or increased by succession to a disclaimed interest, a disclaimer is conclusively presumed to have been filed within a reasonable time if it is filed within nine months after whichever of the following times occurs latest:

- (1) The time of the creation of the trust, the exercise of the power of appointment, the making of the gift, the

creation of the power of appointment, or the disclaimer of the disclaimed property.

(2) The time the first knowledge of the interest is acquired by the person able to disclaim.

(3) The time the interest becomes indefeasibly vested.

(d) In case of an interest not described in subdivision (b) or (c), a disclaimer is conclusively presumed to have been filed within a reasonable time if it is filed within nine months after whichever of the following times occurs later:

(1) The time the first knowledge of the interest is acquired by the person able to disclaim.

(2) The time the interest becomes indefeasibly vested.

(e) In the case of a future estate, a disclaimer is conclusively presumed to have been filed within a reasonable time if it is filed within whichever of the following times occurs later:

(1) Nine months after the time the interest becomes an estate in possession.

(2) The time specified in subdivision (b), (c), or (d), whichever is applicable.

(f) If the disclaimer is not filed within the time provided in subdivision (b), (c), (d), or (e), the disclaimant has the burden of establishing that the disclaimer was filed within a reasonable time after the disclaimant acquired knowledge of the interest.

Comment. Section 279 supersedes former Section 190.3. See also Sections 263 ("creator of the interest" defined), 266 ("employee benefit plan" defined), 268 ("person" defined), 269 ("P.O.D. account" defined), 270 ("Totten trust account" defined). Section 279 provides a more liberal rule concerning time of filing than does federal law. See I.R.C. § 2518; *Jewett v. Commissioner*, 102 S. Ct. 1082 (1982). Federal law should be consulted if the disclaimer is executed to avoid federal taxes.

§ 280. Filing of disclaimer; recording of disclaimers affecting real property

280. (a) A disclaimer shall be filed with any of the following:

(1) The superior court in the county in which the estate of the decedent is administered or, if there is no administration of the decedent's estate, the superior court in any county in which administration of the estate of the decedent would be proper.

(2) The trustee, personal representative, other fiduciary, or person responsible for distributing the interest to the beneficiary.

(3) Any other person having custody or possession of or legal title to the interest.

(4) The creator of the interest.

(b) If a disclaimer made pursuant to this division affects real property or an obligation secured by real property and the disclaimer is acknowledged and proved in like manner as a grant of real property, the disclaimer may be recorded in like manner and with like effect as a grant of real property, and all statutory provisions relating to the recordation or nonrecordation of conveyances of real property and to the effect thereof apply to the disclaimer with like effect, without regard to the date when the disclaimer was filed pursuant to subdivision (a). Failure to file a disclaimer pursuant to subdivision (a) which is recorded pursuant to this subdivision does not affect the validity of any transaction with respect to the real property or the obligation secured thereby, and the general laws on recording and its effect govern any such transaction.

Comment. Subdivision (a) of Section 280 supersedes the first paragraph of former Section 190.4 and is less restrictive than the former law. Subdivision (b) supersedes the second paragraph of former Section 190.4 and makes clear that acknowledgment of a disclaimer affecting real property is permissible but is not a prerequisite to the effectiveness of the disclaimer. However, acknowledgment of a disclaimer affecting real property remains a prerequisite to recording the disclaimer under subdivision (b).

§ 281. Disclaimer irrevocable and binding

281. A disclaimer, when effective, is irrevocable and binding upon the beneficiary and all persons claiming by, through, or under the beneficiary, including creditors of the beneficiary.

Comment. Section 281 continues the substance of the first sentence of former Section 190.5 and also makes clear the effect of a disclaimer on creditors of the beneficiary. See also Section 283 (disclaimer not a fraudulent conveyance). The binding effect of a disclaimer has no effect on the passing of the disclaimed interest pursuant to Section 282.

§ 282. Effect of disclaimer

282. Unless the creator of the interest provides for a specific disposition of the interest in the event of a disclaimer, the interest disclaimed shall descend, go, be distributed, or continue to be held (1) as to a present interest, as if the disclaimant had predeceased the creator of the interest or (2) as to a future interest, as if the disclaimant had died before the event determining that the taker of the interest had become finally ascertained and the taker's interest indefeasibly vested. A disclaimer relates back for all purposes to the date of the death of the creator of the disclaimed interest or the determinative event, as the case may be.

Comment. Section 282 supersedes former Section 190.6. The introductory clause makes clear that a condition of survivorship is not a contingency otherwise provided in the will, disapproving dictum in *Estate of Murphy*, 92 Cal. App.3d 413, 426, 154 Cal. Rptr. 859 (1979).

Clause (2) of the first sentence is a new provision making clear that a disclaimer has the effect of accelerating the possession and enjoyment of subsequent interests. This provision is drawn from Section 3 of the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act (1978) and Section 3 of the Uniform Disclaimer of Transfers Under Nontestamentary Instruments Act (1978). The pertinent portion of the Comment to Section 3 of the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act explains the provision as follows:

Acceleration of Future Interests: If a life estate or other future interest is disclaimed, the problem is raised of whether succeeding interests or estates accelerate in possession or enjoyment or whether the disclaimed interest must be marshalled to await the actual happening of the contingency. Section 3 provides that remainder interests are accelerated, the second clause specifically stating that any future interest which is to take effect in possession or enjoyment after the termination of the estate or interest disclaimed, takes effect as if the disclaimant had predeceased the event which determines that the taker has become finally ascertained and his interest indefeasibly vested. Thus, unless the decedent or donor of the power has otherwise provided, if T leaves his estate in trust to pay the income to his son S for life, remainder to his son's children who survive him, and S disclaims with two children then living, the remainder in the children accelerates; the trust terminates and the children receive possession and

enjoyment, even though the son may subsequently have other children or one or more of the living children may die during their father's lifetime. The will or instrument of transfer may be drafted to avoid acceleration if desired.

§ 283. Disclaimer not a fraudulent conveyance

283. A disclaimer is not a fraudulent conveyance by the beneficiary under Title 2 (commencing with Section 3439) of Part 2 of Division 4 of the Civil Code.

Comment. Section 283 rejects the rule of *Estate of Kalt*, 16 Cal.2d 807, 108 P.2d 401 (1940), that the disclaimer of a legacy after the testator's death may be a fraudulent conveyance. See also Section 281 (binding effect of disclaimer).

§ 284. Waiver of right to disclaim

284. A person who could file a disclaimer under this division may instead file a written waiver of the right to disclaim. The waiver shall specify the interest to which the waiver applies. Upon being filed as provided in Section 280, the waiver is irrevocable and is binding upon the beneficiary and all persons claiming by, through, or under the beneficiary.

Comment. Section 284 continues the substance of the second sentence of former Section 190.5.

§ 285. Disclaimer not permitted after interest accepted

285. (a) A disclaimer may not be made after the beneficiary has accepted the interest sought to be disclaimed.

(b) For the purpose of this section, a beneficiary has accepted an interest if any of the following occurs before a disclaimer is filed with respect to that interest:

(1) The beneficiary, or someone acting on behalf of the beneficiary, makes a voluntary assignment, conveyance, encumbrance, pledge, or transfer of the interest or part thereof, or contracts to do so.

(2) The beneficiary, or someone acting on behalf of the beneficiary, executes a written waiver under Section 284 of the right to disclaim the interest.

(3) The beneficiary, or someone acting on behalf of the beneficiary, accepts the interest or part thereof or benefit thereunder.

(4) The interest or part thereof is sold at a judicial sale.

(c) An acceptance does not preclude a beneficiary from thereafter disclaiming all or part of an interest if both of the following requirements are met:

(1) The beneficiary became entitled to the interest because another person disclaimed an interest.

(2) The beneficiary or other person acting on behalf of the beneficiary at the time of the acceptance had no knowledge of the interest to which the beneficiary so became entitled.

(d) The acceptance by a joint tenant of the joint tenancy interest created when the joint tenancy is created is not an acceptance by the joint tenant of the interest created when the joint tenant survives the death of another joint tenant.

Comment. Section 285 supersedes former Section 190.7. Subdivision (b) is drawn in part from Section 4(a) of the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act (1978).

Subdivision (d) makes clear that a joint tenant is not, during the life of the joint tenancy, to be considered as having accepted the interest that is taken by surviving the other joint tenant. This is consistent with Sections 263(b)(11) (“creator of the interest” defined with respect to joint tenancies) and 267(b)(11) (“interest” defined). Under this chapter there are two interests that may be disclaimed by a joint tenant—the interest created when the person becomes a joint tenant and the interest that is acquired by operation of the right of survivorship when the other joint tenant dies. A similar rule is provided in Section 2(d) of the Uniform Disclaimer of Property Interests Act (1978) and in Section 1 of the Uniform Disclaimer of Transfers Under Nontestamentary Instruments Act (1978).

§ 286. Right to disclaim not affected by spendthrift or similar restriction

286. The right to disclaim exists regardless of any limitation imposed on the interest of a beneficiary in the nature of an expressed or implied spendthrift provision or similar restriction.

Comment. Section 286 continues former Section 190.8. As to the effect of a disclaimer, see Sections 281-283.

§ 287. Application of division to interest created before January 1, 1984

287. An interest created before January 1, 1984, that has not been accepted may be disclaimed after December 31, 1983, in the manner provided in this division, but no interest that arose before January 1, 1984, in a person other than the beneficiary may be destroyed or diminished by any action of the disclaimant taken pursuant to this division.

Comment. Section 287 is drawn from former Section 190.9 but provides a new operative date.

§ 288. Preexisting rights not affected

288. This division does not limit or abridge any right a person may have under any other law to assign, convey, or release any property or interest, but after December 31, 1983, an interest that would otherwise be taken by a beneficiary may be declined, refused, renounced, or disclaimed only as provided in this division.

Comment. Section 288 continues the substance of former Section 190.10 except that this section makes ineffective a common law renunciation or disclaimer that does not satisfy the requirements of this division. See also Section 295 (disclaimers effective under federal law are effective under this division).

CHAPTER 3. DISCLAIMERS EFFECTIVE UNDER FEDERAL LAW

§ 295. Disclaimers effective under federal law effective under this division

295. Notwithstanding any other provision of this division, if as a result of a disclaimer or transfer the disclaimed or transferred interest is treated pursuant to the provisions of Title 26 of the United States Code, as now or hereafter amended, or any successor statute thereto, and the regulations promulgated thereunder, as never having been transferred to the beneficiary, then the disclaimer or transfer is effective as a disclaimer under this division.

Comment. Section 295 is a new provision intended to make disclaimers valid under federal law effective under California law even though the disclaimer would not otherwise be effective under this division. See I.R.C. § 2518 (qualified disclaimers for purposes of federal gift tax). Section 295 also makes clear that

certain transfers qualifying as disclaimers under federal law are effective as disclaimers under California law. See I.R.C. § 2518(c)(3).

Probate Code § 591.6 (amended). Powers under Independent Administration of Estates Act

SEC. 3. Section 591.6 of the Probate Code is amended to read:

591.6. Unless restricted by the will, an executor or administrator who has been granted authority to administer the estate without court supervision shall have all of the following powers, in addition to any other powers granted by this code, which powers can be exercised in the manner provided in this article:

(a) To manage, control, convey, divide, exchange, partition, and to sell for cash or on credit; to lease for any purpose, including exploration for and removal of gas, oil, or other minerals; to enter into community oil leases; and to grant options to purchase real property for a period within or beyond the administration of the estate.

(b) To invest and reinvest money of the estate in deposits in banks and insured savings and loan association accounts and in direct obligations of the United States maturing not later than one year from the date of investment or reinvestment; to invest and reinvest any surplus moneys in his or her hands in any manner provided by the will.

(c) To borrow; to place, replace, renew or extend any encumbrance upon any property in the estate.

(d) To abandon worthless assets or any interest therein.

(e) To make ordinary or extraordinary repairs or alterations in buildings or other property.

(f) To vote a security, in person or by general or limited proxy.

(g) To sell or exercise stock subscription or conversion rights.

(h) To hold a security in the name of a nominee or in other form without disclosure of the estate, so that title to the security may pass by delivery, but the executor or administrator is liable for any act of the nominee in connection with the security so held.

(i) To insure the assets of the estate against damage or loss, and the executor or administrator against liability with respect to third persons.

(j) To allow, pay, reject, contest and compromise any claim by or against the estate by compromise; to release, in whole or in part, any claim belonging to the estate to the extent that the claim is uncollectible; to institute, compromise and defend actions and proceedings.

(k) To pay taxes, assessments, and other expenses incurred in the collection, care and administration of the estate.

(l) To continue the operation of the decedent's business to such extent as he or she shall deem to be for the best interest of the estate and those interested therein.

(m) To pay a reasonable family allowance.

(n) *To make a disclaimer.*

Comment. Subdivision (n) is added to Section 591.6 to make clear that an executor or administrator may make a disclaimer pursuant to the Independent Administration of Estates Act. See Section 277 (disclaimer on behalf of decedent).

Probate Code § 2580 (technical amendment). Petition for conservator to exercise substituted judgment

SEC. 4. Section 2580 of the Probate Code is amended to read:

2580. (a) The conservator or other interested person may file a petition under this article for an order of the court authorizing or requiring the conservator to take a proposed action for any one or more of the following purposes:

(1) Benefiting the conservatee or the estate.

(2) Minimizing current or prospective taxes or expenses of administration of the conservatorship estate or of the estate upon the death of the conservatee.

(3) Providing gifts for such purposes, and to such charities, relatives (including the other spouse), friends, or other objects of bounty, as would be likely beneficiaries of gifts from the conservatee.

(b) The action proposed in the petition may include, but is not limited to, the following:

(1) Making gifts of principal or income, or both, of the estate, outright or in trust.

(2) Conveying or releasing the conservatee's contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety.

(3) Exercising or releasing the conservatee's powers as donee of a power of appointment.

(4) Entering into contracts.

(5) Creating for the benefit of the conservatee or others, revocable or irrevocable trusts of the property of the estate, which trusts may extend beyond the conservatee's disability or life.

(6) Exercising options of the conservatee to purchase or exchange securities or other property.

(7) Exercising the rights of the conservatee to elect benefit or payment options, to terminate, to change beneficiaries or ownership, to assign rights, to borrow, or to receive cash value in return for a surrender of rights under any of the following:

(i) Life insurance policies, plans, or benefits.

(ii) Annuity policies, plans, or benefits.

(iii) Mutual fund and other dividend investment plans.

(iv) Retirement, profit sharing, and employee welfare plans and benefits.

(8) Exercising the right of the conservatee to elect to take under or against a will.

(9) Exercising the right of the conservatee to ~~renounce or disclaim any interest acquired by testate or intestate succession or by inter vivos transfer, including exercising the right of the conservatee to surrender the right to revoke a revocable trust that may be disclaimed under Division 2.5 (commencing with Section 260).~~

(10) Exercising the right of the conservatee (i) to revoke a revocable trust or (ii) to surrender the right to revoke a revocable trust, but the court shall not authorize or require the conservator to exercise the right to revoke a revocable trust if the instrument governing the trust ~~(A)~~ (i) evidences an intent to reserve the right of revocation exclusively to the conservatee, ~~(B)~~ (ii) provides expressly that a conservator may not revoke the trust, or ~~(C)~~ (iii) otherwise evidences an intent that would be inconsistent with authorizing or requiring the conservator to exercise the right to revoke the trust.

(11) Making an election or an election and agreement referred to in Section 202.

Comment. Section 2580 is amended to correct the reference in subdivision (b) (9), to transfer a portion of subdivision (b) (9) (relating to revoking revocable trusts) to subdivision (b) (10), and to make other nonsubstantive revisions.

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