

STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

**RECOMMENDATIONS**

relating to

**Probate Law**

**No Contest Clauses**

**120-Hour Survival Requirement**

**Hiring and Paying Attorneys, Advisors and Others**

**Compensation of Personal Representative**

**Multiple-Party Accounts in Financial Institutions**

**Notice to Creditors in Probate Proceedings**

**February 1989**

**CALIFORNIA LAW REVISION COMMISSION**

**4000 Middlefield Road, Suite D-2**

**Palo Alto, California 94303-4739**

# THE CALIFORNIA LAW REVISION COMMISSION

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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 20 of the Commission's *Reports, Recommendations and Studies* which is scheduled to be published late in 1990.

Cite this pamphlet as *Recommendations Relating To Probate Law*, 20 Cal. L. Revision Comm'n Reports 1 (1990).

STATE OF CALIFORNIA

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## **PREFACE**

This publication contains five recommendations of the Law Revision Commission relating to Probate Law. The recommended legislation is included in bills introduced in the 1989 session of the California Legislature. The five recommendations are listed in the following table of contents.

This publication does not include an index, but a cross-reference table showing where background material may be found on each section in the bills as introduced is printed at the very end of this report. This table facilitates ready access to the particular recommendation in this publication that supports a given section in the bills introduced.



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STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

**RECOMMENDATION**

relating to

**No Contest Clauses**

January 1989

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

**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 No Contest Clauses*, 20 Cal. L. Revision Comm'n Reports 7 (1990).

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

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December 1, 1988

To: The Honorable George Deukmejian  
*Governor of California*  
and  
The Legislature of California

This recommendation proposes legislation that codifies, clarifies, and makes uniform the California law governing no contest (or in terrorem) clauses in wills, trusts, and other donative transfer instruments. A key feature of the codification is to preserve existing California law that precludes enforcement of a no contest clause where the challenge affects a gift to an interested witness. The recommended legislation would extend this rule to challenges that affect gifts to persons who draft or transcribe the instrument or who give directions concerning dispositive or other substantive provisions of the instrument; these persons are in an even more sensitive position than witnesses.

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

Respectfully submitted,

Forrest A. Plant  
*Chairperson*





## RECOMMENDATION

A will, trust, or other instrument may contain a no contest, or *in terrorem*, clause to the effect that a person who contests or attacks the instrument or any of its provisions takes nothing under the instrument or takes a reduced share. Such a clause is designed to reduce litigation by persons whose expectations are frustrated by the donative scheme of the instrument.<sup>1</sup>

While some jurisdictions refuse to recognize the validity of a no contest clause,<sup>2</sup> and most allow the clause to be given effect only against a person who makes a contest without probable cause,<sup>3</sup> California continues to follow the traditional, and now minority, rule to allow enforcement of the clause regardless of the beneficiary's probable cause in making the contest.<sup>4</sup>

In the course of its study of probate law and procedure the California Law Revision Commission has reexamined the policies involved in enforcement of no contest clauses. In favor of a probable cause exception are the policy of the law to facilitate full access of the courts to all relevant information concerning the validity and effect of a will, trust, or other instrument, and to avoid forfeiture.<sup>5</sup> Opposed to a probable cause exception are the policy of the law to honor the intent of the donor and to discourage litigation.<sup>6</sup> The Commission believes that the balance between these conflicting policies achieved

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1. For a general discussion of no contest clauses, see Leavitt, *Scope and Effectiveness of No-Contest Clauses in Last Wills and Testaments*, 15 *Hastings L.J.* 45 (1963).

2. See, e.g., Fla. Stat. § 732.517 (1976); Ind. Code § 29-1-6-2 (1979).

3. See, e.g., Uniform Probate Code § 3-905 (1982); Restatement (Second) of Property: Donative Transfers § 9.1 (1983).

4. See, e.g., Estate of Hite, 155 Cal. 436, 101 P. 443 (1909).

5. See, e.g., Selvin, *Comment: Terror in Probate*, 16 *Stan. L. Rev.* 355 (1964).

6. See, e.g., N.Y. Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates, Report No. 8.2.6A (1965).

by existing California law is basically sound. The no contest clause is effective to deter unmeritorious litigation but does not hinder a contest or an appropriate settlement in cases where the grounds for contest are strong. On the other hand, a probable cause exception would encourage litigation and would shift the balance unduly in favor of contestants. The existing law gives the donor some assurance that the donor's estate plan will be honored.

For these reasons, the Commission recommends codification of existing California law governing enforcement of no contest clauses. The Commission also recommends a number of significant changes to improve the existing law.

A major concern with the application of existing California law is that a beneficiary cannot predict with any consistency when an activity will be held to fall within the proscription of a particular no contest clause.<sup>7</sup> To increase predictability, the proposed law recognizes that a no contest clause is to be strictly construed in determining the donor's intent. This is consistent with the public policy to avoid a forfeiture absent the donor's clear intent. The law also makes clear that a request by a beneficiary for declaratory relief<sup>8</sup> in the form of a petition for construction of the instrument to determine whether a particular activity would violate a no contest clause does not itself trigger operation of the clause.

Under existing law, a no contest clause is not enforceable against a person who, in good faith, contests a will on

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7. See, e.g., discussion in Garb, *The In Terrorem Clause: Challenging California Wills*, 6 Orange County B.J. 259 (1979).

8. Section 21305 of the proposed law expressly authorizes a petition for construction of an instrument under the Probate Code. Only such a petition, and not an independent proceeding under Code of Civil Procedure Section 1060, is given express immunity by the proposed law.

the ground of forgery or revocation by execution of a subsequent will.<sup>9</sup> The basis of this exception is that it furthers, rather than contravenes, the testator's intent. This exception is applicable regardless of the manner in which a particular no contest clause is phrased or construed, and therefor should be codified.<sup>10</sup>

Existing California law precludes enforcement of a no contest clause where the challenge is to a gift to an interested witness to a will.<sup>11</sup> This limitation is appropriate because of the danger of fraud or undue influence where a devise is made to a person involved in the execution of the will itself.<sup>12</sup> The rule should be extended beyond witnesses to other persons who prepare or participate in the preparation of an instrument, specifically persons who draft or transcribe the instrument or who give directions concerning dispositive or other substantive provisions of the instrument. These persons are in an even more sensitive position than a witness to a will.

The proposed statutory exceptions to enforcement of a no contest clause are based on strong public policy grounds. Therefore, the proposed statute also makes clear that the no contest clause may not by its terms override the exceptions.

Although much of the development of the law governing no contest clauses has occurred in relation to wills and will contests, in recent years trusts and other donative transfer instruments have become important estate

9. See, e.g., *Estate of Lewy*, 39 Cal. App. 3d 729, 113 Cal. Rptr. 674 (1974) (forgery); *Estate of Bergland*, 180 Cal. 629, 182 P. 277 (1919) (revocation by subsequent will).

10. Cf. N.Y. Est. Powers & Trusts Law § 3-3.5(b)(1) (McKinney 1981). The proposed law extends this rule to revocation by any means, whether by execution of a subsequent instrument or otherwise.

11. Prob. Code § 6112(d).

12. See *Tentative Recommendation Relating to Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301, 2321-22 (1982).

planning devices and may also include no contest clauses. The issues involved are the same for all such instruments, and the proposed statute applies the rules governing no contest clauses uniformly to trusts and other instruments as well as to wills.

## PROPOSED LEGISLATION

The Commission's recommendations would be effectuated by enactment of the following provisions.

### **Probate Code § 6112 (amended). Witnesses to wills**

6112. (a) Any person generally competent to be a witness may act as a witness to a will.

(b) A will or any provision thereof is not invalid because the will is signed by an interested witness.

(c) Unless there are at least two other **subscribing** witnesses to the will who are disinterested witnesses, the fact that the will makes a devise to a **subscribing** witness creates a presumption that the witness procured the devise by duress, menace, fraud, or undue influence. This presumption is a presumption affecting the burden of proof. *This presumption does not apply where the witness is a person to whom the devise is made solely in a fiduciary capacity.*

(~~e~~) (*d*) If a devise made by the will to an interested witness fails because the presumption established by subdivision (~~b~~) (*c*) applies to the devise and the witness fails to rebut the presumption, the interested witness shall take such proportion of the devise made to the witness in the will as does not exceed the share of the estate which would be distributed to the witness if the will were not established. Nothing in this subdivision affects the law that applies where it is established that the witness procured a devise by duress, menace, fraud, or undue influence.

~~(d) A provision in a will that a person who contests or attacks the will or any of its provisions takes nothing under the will or takes a reduced share does not apply to a contest or attack on a provision of the will that benefits a witness to the will.~~

**Comment.** New subdivision (c) of Section 6112 is amended to make clear that, where the will is witnessed by a person to whom a devise is made in a fiduciary capacity, the presumption of undue influence does not apply. This is consistent with *Estate of Tkachuk*, 73 Cal. App. 3d 14, 139 Cal. Rptr. 55 (1977). Even though fraud or undue influence is not presumed in such a case, it may still be proven as a question of fact. See new subdivision (d) (last sentence).

The references to a “subscribing” witness are deleted from new subdivision (c) in recognition of the fact that a will need not be signed at the end.

Former subdivision (d), relating to no contest clauses, is deleted. This matter is dealt with comprehensively in Sections 21300 to 21307.

## **Probate Code §§ 21300-21307 (added).**

### **PART 3. NO CONTEST CLAUSE**

#### **§ 21300. Definitions**

21300. As used in this part:

(a) “Contest” means an attack in a proceeding on an instrument or on a provision in an instrument.

(b) “No contest clause” means a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary if the beneficiary brings a contest.

**Comment.** Section 21300 is intended for drafting convenience.

Under subdivision (a), an “attack” may initiate a proceeding (e.g., a contest by petition to revoke probate of a will) or may occur as an objection in a proceeding (e.g., a contest by objection to probate of a will).

Subdivision (b) uses the term “no contest clause”. This term has been used in the literature, as well as the term “in terrorem clause”, to describe a provision of the type defined in this section.

Section 21300 supersedes a portion of former subdivision (d) of Section 6112 (“a provision in a will that a person who contests or attacks the will or any of its provisions takes nothing under the will or takes a reduced share”). Unlike the former provision, this part governs trusts and other donative transfers as well as wills. See Section 21101 (application of division); see also Sections 24 (“beneficiary” defined) and 45 (“instrument” defined).

### **§ 21301. Application of part**

21301. This part is not intended as a complete codification of the law governing enforcement of a no contest clause. The common law governs enforcement of a no contest clause to the extent this part does not apply.

**Comment.** Section 21301 makes clear that this part is not a comprehensive treatment of the law governing no contest clauses. The section preserves the common law in matters not expressly addressed by this part. This is a special application of the rule stated in Civil Code Section 22.2 (common law as rule of decision in California courts). As used in this section, the “common law” does not refer to the common law as it existed in 1850 when the predecessor of Civil Code Section 22.2 was enacted; rather, the reference is to the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and to changing conditions. Such issues, for example, as whether a contest that is later abandoned violates a no contest clause, whether an attack on the jurisdiction of the court violates the clause, and whether proceedings in estate administration other than a direct contest (including proceedings to set aside a small estate or probate homestead, to establish a family allowance, or to take as a pretermitted heir) violate the clause, continue to be governed by relevant case law except to the extent this part deals directly with the issue. The resolution of these matters is determined, in part, by the terms of the no contest clause and the character of the beneficiary’s contest. See also Section 21304 (construction of no contest clause).

### **§ 21302. Instrument may not make contrary provision**

21302. This part applies notwithstanding a contrary provision in the instrument.

**Comment.** Section 21302 is new. An instrument may not vary the rules provided in this part, since the rules are intended to implement the public policy of ensuring judicial access to information necessary for the proper administration of justice.

### § 21303. Validity of no contest clause

21303. Except to the extent otherwise provided in this part, a no contest clause is enforceable against a beneficiary who brings a contest within the terms of the no contest clause.

**Comment.** Section 21303 is new. It codifies the existing California law recognizing the validity of a no contest clause. See, e.g., *Estate of Hite*, 155 Cal. 436, 101 P. 433 (1909). A no contest clause is strictly construed. Section 21304 (construction of no contest clause). See also Sections 21301 (application of part) and 21302 (instrument may not make contrary provision).

### § 21304. Construction of no contest clause

21304. In determining the intent of the transferor, a no contest clause shall be strictly construed.

**Comment.** Section 21304 is new. In the interest of predictability, it resolves a conflict in the case law in favor of strict construction. *Cf. Garb, The In Terrorem Clause: Challenging California Wills*, 6 Orange County B.J. 259 (1979). Strict construction is consistent with the public policy to avoid a forfeiture. *Cf. Selvin, Comment: Terror in Probate*, 16 Stan. L. Rev. 355 (1964). As used in this section, the "transferor" is the testator, settlor, grantor, owner, or other person who executes an instrument. See Section 81 ("transferor" defined).

### § 21305. Declaratory relief

21305. (a) A beneficiary may petition for construction of an instrument to determine whether a particular act by the beneficiary would be a contest within the terms of a no contest clause.

(b) A no contest clause is not enforceable against a beneficiary to the extent a petition by the beneficiary is limited to the procedure and purpose described in subdivision (a).

**Comment.** Subdivision (a) of Section 21305 is new. It authorizes a petition for construction of an instrument under the Probate Code. An action for declaratory relief under Code of Civil Procedure Section 1060 would not qualify for protection under subdivision (b), which is limited to a petition for construction of the instrument.

Subdivision (b) is new. It avoids the conflict in the case law concerning whether proceedings for declaratory relief may be held to violate a no contest clause by providing a "safe harbor" for a beneficiary who satisfies the requirements of subdivision (a). *Cf. Garb, The In Terrorem Clause: Challenging California Wills*, 6 Orange County B.J. 259 (1979). Under subdivision (b), if a beneficiary petitions for construction of an instrument to determine whether a particular act would be considered "an attack in a proceeding on an instrument or on a provision in an instrument" within the meaning of the no contest clause, the petition cannot itself be considered an attack on the instrument or provision if made under subdivision (a). Subdivision (b) is not intended to enable a determination of the merits of an attack, but only whether a particular act would be considered an attack. Subdivision (b) is not intended as a complete listing of acts that may be held exempt from enforcement of a no contest clause. See Section 21301 (application of part).

### **§ 21306. Forgery or revocation**

21306. A no contest clause is not enforceable against a beneficiary to the extent the beneficiary, with probable cause, brings a contest that is limited to either or both of the following grounds:

- (a) Forgery.
- (b) Revocation.

**Comment.** Section 21306 is new. It codifies existing case law. See, e.g., *Estate of Lewy*, 39 Cal. App. 3d 729, 113 Cal. Rptr. 674 (1974) (forgery); *Estate of Bergland*, 180 Cal. 629, 182 P. 277 (1919) (revocation by subsequent will). This section is not intended as a complete listing of acts that may be held exempt from enforcement of a no contest clause. See Section 21301 (application of part).

### **§ 21307. Interested participant**

21307. A no contest clause is not enforceable against a beneficiary to the extent the beneficiary, with probable



cause, contests a provision that benefits any of the following persons:

(a) A person who drafted or transcribed the instrument.

(b) A person who gave directions concerning dispositive or other substantive provisions of the instrument or who directed inclusion of the no contest clause in the instrument.

(c) A person who acted as a witness to the instrument.

**Comment.** Section 21307 adds a probable cause limitation to, and expands and generalizes former subdivision (d) of, Section 6112, which provided that a no contest clause does not apply to a contest or attack on a provision of the will that benefits a witness to the will. As used in subdivision (b), a person who gave directions concerning dispositive or other substantive provisions of an instrument does not include a person who merely provided information such as birthdates, the spelling of names, and the like. This section is not intended as a complete listing of acts that may be held exempt from enforcement of a no contest clause. See Section 21301 (application of part).



STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

RECOMMENDATION

relating to

## **120-Hour Survival Requirement**

February 1989

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

**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 120-Hour Survival Requirement*, 20 Cal. L. Revision Comm'n Reports 21 (1990).

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

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VAUGHN R. WALKER

February 10, 1988

To: The Honorable George Deukmejian  
*Governor of California*  
and  
The Legislature of California

This recommendation proposes to enact the Uniform Probate Code requirement that a potential heir must live at least 120 hours longer than a decedent who dies without a will in order to inherit property from that decedent. This is to provide a more just result where a husband and wife each have children of a prior marriage and are both killed in the same accident.

Without the 120-hour survival rule, if one spouse survives the other by a fraction of a second, that spouse's children will inherit all the community property and a disproportionate share of the separate property. With the 120-hour survival rule, the separate property of each spouse and half the community property passes to that spouse's heirs, a result more consistent with what the spouses probably would have wanted.

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

Respectfully submitted,

Forrest A. Plant  
*Chairperson*



## RECOMMENDATION

If a husband and wife each have children of a prior marriage and are killed in an accident, the property each child will take by intestate succession depends on which spouse died first.

The following examples illustrate how existing California law operates in a relatively simple case. Assume that the husband has three children by a former marriage and that the wife has one child by a former marriage. Assume that they have \$500,000 of community property, that the husband has \$300,000 of separate property, and that the wife has \$100,000 of separate property.

**Example 1. Intestate succession rule—wife survives husband by five minutes.** Wife inherits from husband his half of the community property (\$250,000)<sup>1</sup> and one-third of his separate property (\$100,000).<sup>2</sup> Wife dies. Her child receives \$700,000, consisting of the following:

- (1) All of the community property (\$500,000) (the wife's half and the half she inherited from her husband).
- (2) All of the wife's separate property (\$100,000).
- (3) The share of the husband's separate property inherited by the wife (\$100,000).

The three children of the husband each receive \$66,666.67 (a one-third share of \$200,000, the portion of the husband's separate property not passing to the wife).

**Example 2. Intestate succession rule—husband survives wife by five minutes.** Husband inherits from wife her half of the community property (\$250,000)<sup>3</sup> and one-half of her separate property (\$50,000).<sup>4</sup> Husband dies. Each of his children receives a one-third share of \$850,000 (\$283,333.33), consisting of the following:

- (1) All of the community property (\$500,000) (the husband's half and the half he inherited from his wife).

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1. Prob. Code §6401(a).

2. Prob. Code §6401(c)(3)(A).

3. Prob. Code §6401(a).

4. Prob. Code §6401(c)(2)(A).

(2) All of the husband's separate property (\$300,000).

(3) The share of the wife's separate property inherited by the husband (\$50,000).

The child of the wife receives \$50,000 (the share of the wife's separate property not passing to the husband).

These examples show the drastic difference in the amounts received by the children, depending on the wholly fortuitous event of which spouse died first. If the wife dies before the husband, her child receives \$50,000; but, if the wife dies after her husband, her child receives \$700,000. If the husband dies before his wife, his children each receive \$66,666.67. But if the husband dies after his wife, his children each receive \$283,333.33. It is apparent that the existing California intestate succession rule operates in an arbitrary manner, contrary to what the spouses would have wanted if they had an opportunity to indicate their desires.

Where one or both of the spouses who die in a common accident have no children, the California intestate succession rule is difficult to determine and apply, and operates in a manner contrary to what the spouses would have desired.<sup>5</sup>

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5. Existing law is very difficult to determine and apply. This is because the so called in-law inheritance statute (Prob. Code §6402.5) may apply. For example, suppose a husband is childless but has a brother, the wife has a child by a former marriage, they do not have wills, and they are killed in an accident but do not die simultaneously. If the husband dies first, his property will pass to his wife. When the wife dies, both her property and property she received from her husband that is not subject to the in-law inheritance statute will pass to her heirs to the exclusion of her husband's heirs. The brother of the husband will take property subject to the in-law inheritance statute (Prob. Code § 6402.5). Property is not subject to the in-law inheritance statute unless it consists of property "attributable to" (received from) the decedent's predeceased spouse (1) who died not more than 15 years before the decedent in the case of real property or (2) who died not more than five years before the decedent in the case of personal property. Subject to this limitation, if one spouse inherits from the other by intestate succession, property subject to the in-law inheritance statute consists of (1) all real property which was separate property of the first spouse to die and his or her half of community real property, and (2) all the personal property of the first spouse to die (his or her separate personal property and his or her half of community personal property) for which there



The California Uniform Simultaneous Death Act<sup>6</sup> deals with the situation where the parties have died simultaneously. If it cannot be established by clear and convincing evidence that one survived the other, the property of each person is dealt with as if that person had survived the other.<sup>7</sup> Thus, the husband's half of the community property and his separate property will go to his heirs. The wife's half of the community property and her separate property will go to her heirs.

If the rule of the California Uniform Simultaneous Death Act is applied to the examples set out above, the following are the results:

**Example 3. Simultaneous death rule—wife survives husband by five minutes.** Child of the wife as her sole heir inherits \$350,000, consisting of the wife's separate property (\$100,000) and the wife's one-half share of the community property (\$250,000).

Each child of the husband inherits \$183,333.33, a one-third share of \$550,000, consisting of the following:

(1) The husband's share one-half share of the community property (\$250,000).

(2) The husband's separate property (\$300,000).

**Example 4. Simultaneous death rule—husband survives wife by five minutes.** Same results as in Example 3.

These are the results the spouses probably would have wanted. However, the California Uniform Simultaneous Death Act is only a partial solution. If there is clear and convincing evidence that one spouse survived the other, even if only for a tiny fraction of a

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is a written record of title or ownership if the aggregate value is \$10,000 or more. *Id.* All other property passes according to the usual rules of intestate succession. See Prob. Code §6402.

6. Prob. Code §§220-234.

7. Prob. Code §§103, 220. See also Prob. Code §6403.

second, then the Uniform Simultaneous Death Act does not apply.<sup>8</sup>

The Uniform Probate Code provides a more complete solution to this problem by requiring that a potential heir survive the decedent by at least 120 hours in order to take by intestacy from the decedent. If the heir fails to survive for that period, the heir is treated as having predeceased the decedent.<sup>9</sup> Thus, in the common accident situation where the husband and wife die within 120 hours of each other, the UPC achieves the same result as the Uniform Simultaneous Death Act: The half of the community property and the separate property of the spouse passes to his or her heirs.

Intestate succession law should dispose of the decedent's property in a manner consistent with what the decedent would have wanted if the decedent had a will. Survivorship provisions are commonly found in wills.<sup>10</sup> Twenty states require some period of survival to take from the decedent by intestate succession: Seventeen states use the 120-hour period of the UPC,<sup>11</sup> one requires

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8. In one extreme case, the court held that the act did not apply because there was testimony that one accident victim survived the other by 1/150,000th of a second. *Estate of Rowley*, 257 Cal. App. 2d 324, 65 Cal. Rptr. 139 (1967). The clear and convincing evidence requirement was added to avoid this kind of speculation as to the time of death. See *Tentative Recommendation Relating to Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301, 2345-46 (1982).

9. Uniform Probate Code §2-104 (1982).

10. See King, *Outright Testamentary Gifts*, in California Will Drafting Practice §8.21, at 349 (Cal. Cont. Ed. Bar 1982).

11. Ala. Code §43-8-43 (1982); Alaska Stat. §13.11.020 (1988); Ariz. Rev. Stat. Ann. §14-2104 (1975); Colo. Rev. Stat. §15-11-104 (1987); Del. Code Ann. tit. 12, §504 (1987); Idaho Code §15-2-104 (1979); Me. Rev. Stat. Ann. tit. 18A, §2-1C4 (1981); Mich. Stat. Ann. §27.5107 (1980); Mont. Code Ann. §72-2-205 (1987); Neb. Rev. Stat. §30-2304 (1985); N.J. Stat. Ann. §3B:5-1 (West 1983); N.M. Stat. Ann. §45-2-104 (1978); N.D. Cent. Code §30.1-04-04 (1976); Or. Rev. Stat. §112.085 (1987); S.C. Code Ann. §62-2-104 (Law. Co-op. 1987); Tex. Prob. Code Ann. §47 (Vernon 1980); Utah Code Ann. §75-2-104 (1978).

survival for 72 hours,<sup>12</sup> and two require survival for 30 days.<sup>13</sup> In 1973, the California State Bar endorsed the 120-hour survival requirement for intestate succession in Section 2-104 of the Uniform Probate Code.<sup>14</sup>

Five days (120-hours) is an appropriate survival period. Most fatalities occur within the first five days after an accident, so the 120-hour test will provide an equitable rule to cover the usual case of death caused by a common disaster. Yet the 120-hour survival period is short enough not to delay administration of the estate or to interfere with the ability of the survivor to deal with the property.

The Commission recommends adoption of the Uniform Probate Code rule requiring that a potential heir must survive the decedent by at least 120 hours to take by intestate succession from the decedent.<sup>15</sup>

## PROPOSED LEGISLATION

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

### **Probate Code §6403 (amended). Requirement that heir survive decedent**

6403. (a) A person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for the purpose of intestate succession, and the heirs are determined accordingly. If it cannot be established by clear and convincing evidence that a person who would

12. Wis. Stat. Ann. §852.01 (West Supp. 1988).

13. Md. Est. & Trusts Code Ann. §3-110 (1974) (limited to descendants, ancestors, or descendants of an ancestor of the decedent); Ohio Rev. Code Ann. §2105.21 (Page 1976).

14. State Bar of California, *The Uniform Probate Code: Analysis and Critique* 30 (1973). The State Bar thought the 120-hour survival requirement for wills in Section 2-601 of the Uniform Probate Code was unnecessary because the testator may provide for survivorship in the will. *Id.* at 51.

15. For a previous Commission recommendation on this subject, see 17 Cal. L. Revision Comm'n Reports 443-60 (1984).

otherwise be an heir has survived the decedent by 120 hours, it is deemed that the person failed to survive ~~the decedent~~ *for the required period. The requirement of this section that a person who survives the decedent must survive the decedent by 120 hours does not apply if the application of the 120-hour survival requirement would result in the escheat of property to the state .*

*(b) The amendment made to this section by the act that added this subdivision does not apply where any of the persons upon whose time of death the disposition of property depends died before January 1, 1990. Where the amendment does not apply, the case continues to be governed by the law applicable before January 1, 1990.*

**Comment.** Section 6403 is amended to provide a 120-hour survival rule. As amended, Section 6403 is the same in substance as Section 2-104 of the Uniform Probate Code (1982) insofar as that section relates to taking by intestate succession. Where Section 6403 applies, the 120-hour survival requirement is used to determine whether one person survived another for the purposes of Sections 103 (simultaneous death of husband and wife) and 234 (proceedings to determine survival).

STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

RECOMMENDATIONS

relating to

## **Probate Law**

**Hiring and Paying Attorneys, Advisors, and Others  
Compensation of Personal Representative**

February 1989

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

**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 *Recommendations Relating to Probate Law*, 20 Cal. L. Revision Comm'n Reports 31 (1990).

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

**CALIFORNIA LAW REVISION COMMISSION**

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VAUGHN R. WALKER

February 9, 1989

To: The Honorable George Deukmejian  
*Governor of California*  
and  
The Legislature of California

In 1980, the Legislature directed the Commission to study whether “the California Probate Code should be revised, including but not limited to whether California should adopt, in whole or in part, the Uniform Probate Code.” 1980 Cal. Stat. res. ch. 37. The Legislature took this action at the request of persons who believed that the California statutory fee schedule for estate attorneys should be replaced by the “agreed fee” system of the Uniform Probate Code.

After extensive study, the Commission recommends:

(1) The substance of the Uniform Probate Code system for the compensation of the estate attorney should be substituted for the California statutory fee schedule. Under this system, the personal representative and estate attorney agree on the attorney’s compensation. The compensation is subject to review by the court on petition of an interested person.

(2) The existing statutory percentage fee provisions for the personal representative should be kept, along with existing provisions which permit the testator to provide some other method of compensation in the will. The existing provision which permits the personal representative to renounce the compensation provided in the will and

to take the statutory percentage fee instead should not be continued. The compensation provision in the will should be given effect unless the court determines that it would be in the best interest of the estate and of interested persons to allow the personal representative an amount greater than the amount provided in the will.

In preparing this recommendation, the Commission had the benefit of a comprehensive background study (unpublished) prepared by the Commission's staff. In addition, the Commission distributed a questionnaire to lawyers, judges, probate commissioners, probate referees, and others who had indicated an interest in the Commission's probate law study. Two hundred forty-five persons responded to the questionnaire. A majority (53 percent) preferred that no change be made in the manner of determining probate attorneys' fees. Almost one-fourth (24 percent) preferred the Uniform Probate Code scheme for fixing probate attorneys' fees.

Although most probate practitioners prefer the existing California system to the Uniform Probate Code system for determining probate attorneys' fees, at least three important organizations representing the probate bar have advised the Commission that they do not object to the general concept of the Commission's recommendation. They are the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar, the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association, and the Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association. In addition, representatives of consumer groups appeared before the Commission and strongly supported the general concept of the Commission's recommendation. These included Deborah Chalfie for the national organization of HALT, representatives of several local chapters of HALT, representatives of the California State Legislative Committee of the American Association of Retired Persons, and others.

In October 1988, the Commission distributed a tentative recommendation to interested persons for review and comment. The tentative recommendation proposed that the statutory percentage fee be kept in California, both for the estate attorney and for the personal representative, that the statutory fee be slightly reduced, and that the attorney be required to disclose to the personal representative that a lower fee could be negotiated.



Most probate practitioners who commented on the tentative recommendation approved it, but many urged that the statutory fee for small estates be increased. The Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar opposed the tentative recommendation, taking the position that the existing law concerning probate attorney fees should be retained without change or, if a change was to be made, that the Uniform Probate Code agreed fee system should be adopted for attorneys. The Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association took the same view, a view that is shared by some prestigious probate practitioners who commented on the tentative recommendation. HALT and the American Association of Retired Persons also urged the Commission to adopt an agreed fee system for attorneys in place of the statutory fee schedule which the tentative recommendation proposed to keep.

The Commission gave careful consideration to the comments of interested persons and organizations on the tentative recommendation. As a result of this consideration, the Commission now recommends that the agreed fee approach of the Uniform Probate Code be adopted in California for the estate attorney.

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

Respectfully submitted,

Forrest A. Plant  
*Chairperson*



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## INTRODUCTION

Although this recommendation has a broader scope, its major impact is on the existing California provisions dealing with attorney fees in formal probate proceedings. These provisions present the most important policy issue involved in the Commission's study of California probate law. The considerations that influenced the Commission in making its recommendation concerning this issue are outlined below.

In California, compensation of the estate attorney for conducting "ordinary probate proceedings" is determined using a statutory fee schedule.<sup>1</sup> In addition to this statutory fee for ordinary services, the attorney is entitled to "such further amount as the court may deem just and reasonable for extraordinary services."<sup>2</sup>

The statutory fee schedule sets the attorney's fee as percentages of the "estate accounted for" by the personal representative,<sup>3</sup> with higher percentages payable for

1. See Prob. Code §910 (incorporating Probate Code Section 901 relating to compensation of personal representatives). The fee schedule applies only where there is a formal probate proceeding. Where there is no formal probate proceeding, the fee is determined by agreement between the parties and is not subject to court approval.

The decedent's will may provide for compensation of the attorney. The compensation provided by the will is "a full compensation" for the attorney's services unless by written instrument, filed with the court, the attorney renounces the compensation provided for in the will. If the attorney renounces the compensation provided in the will, the attorney is entitled to receive compensation as provided by statute. See Prob. Code §910 (incorporating Probate Code Sections 900 and 901 relating to compensation of personal representatives).

The personal representative who is an attorney may receive the personal representative's compensation but not the attorney fee. In re Estate of Parker, 200 Cal. 132, 251 P. 907 (1926); Estate of Downing, 134 Cal. App. 3d 256, 184 Cal. Rptr. 511 (1982). However, where expressly authorized by the decedent's will, dual compensation may be paid to one person acting in both capacities. Estate of Thompson, 50 Cal. 2d 613, 328 P.2d 1 (1958).

2. See Prob. Code §910.

3. See Prob. Code §910 (incorporating Prob. Code §901). The "estate accounted for" is based on the fair market value of the real and personal property of the estate without subtracting any encumbrances on the property. See Prob. Code §901 ("estate accounted for" is "the total amount of the inventory plus gains over appraisal value on sales, plus receipts, less losses on

smaller estates.<sup>4</sup> The attorney is entitled to the statutory fee unless the attorney agrees to accept a lower fee.<sup>5</sup>

Consumers view the statutory fee system as “generally a ripoff.”<sup>6</sup> The California statutory fee system has been criticized on a number of grounds:

(1) A percentage fee is not necessarily related to the amount and difficulty of the legal work required for the particular estate.<sup>7</sup> Thus, a percentage fee may undercharge an estate that presents difficult legal problems and overcharge an estate that does not, and a percentage fee often results in overcharging a large estate<sup>8</sup> and undercharging a small estate.

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sales, without reference to encumbrances or other obligations on property in the estate” whether or not a sale of property has taken place during probate). For a discussion of the property or values included in determining the “estate accounted for,” see Feinfeld, *Fees and Commissions*, in 2 California Decedent Estate Practice §§20.16-20.24 (Cal. Cont. Ed. Bar 1986 and 1987 update).

The setting of the attorney fee using the statutory rate schedule is within the “state action exemption” of the Sherman Antitrust Act and does not violate federal antitrust laws. *Estate of Effron*, 117 Cal. App. 3d 915, 173 Cal. Rptr. 93, appeal dismissed, 454 U.S. 1070 (1981).

4. See Prob. Code §901. Section 901 provides that the attorney shall receive compensation upon the value of the estate accounted for, as follows:

- Four percent on the first \$15,000.
- Three percent on the next \$85,000.
- Two percent on the next \$900,000.
- One percent on the next 9 million dollars.
- One-half of one percent on the next 15 million dollars.
- For all above 25 million dollars, a reasonable amount to be determined by the court.

5. *Estate of Getty*, 143 Cal. App. 3d 455, 191 Cal. Rptr. 897 (1983). See generally *Estate of Effron*, 117 Cal. App. 3d 915, 173 Cal. Rptr. 93, appeal dismissed, 454 U.S. 1070 (1981). The right to receive the statutory fee is subject to Probate Code Section 12205, which permits the court to reduce the fee if the time taken for administration of the estate exceeds the time set forth by statute or prescribed by the court and the court finds that the delay in closing the estate was caused by factors within the attorney’s control and was not in the best interests of the estate.

6. *Estate of Effron*, 117 Cal. App. 3d 915, 926, 173 Cal. Rptr. 93, appeal dismissed, 454 U.S. 1070 (1981).

7. Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107, 1175 (1984).

8. See, e.g., *Estate of Getty*, 143 Cal. App. 3d 455, 191 Cal. Rptr. 897 (1983). The attorney and personal representative can, of course, agree on a fee lower than the statutory fee, but many personal representatives appear to be unaware that the fee can be negotiated.

(2) The percentage fee is only for “ordinary” services to the estate. The court may award additional fees for “extraordinary” services. Thus, if the estate is easy there is no discount, but if the estate is difficult the attorney may get more.

(3) Since the percentage fee may not provide the attorney with adequate compensation for the legal work needed to probate a small estate, it may be difficult to obtain a competent attorney to handle a small estate.

(4) The California statutory fee system imposes a significant burden on the courts in hearing and ruling on petitions for fees for extraordinary services,<sup>9</sup> since the court must review and fix such fees, even when no one objects.<sup>10</sup>

(5) The statutory fee system is inconsistent with the general practice of fixing legal fees by private agreement. Not only are fees for other legal services fixed by agreement, but it is probable that in most cases where a person dies in California the fee for legal services is fixed by agreement.<sup>11</sup>

9. See Report of Ad Hoc Committee on Attorney Fees in Probate (May 15, 1985), reprinted as appendix to Los Angeles County Probate Policy Memorandum in California Local Probate Rules (9th ed. Cal. Cont. Ed. Bar 1988), at 19-89 (“A tremendous amount of the Probate Court’s time is spent dealing with disputes over attorney’s fees”).

10. Under existing law, the court must consider and fix fees for extraordinary services, whether or not there is a dispute. See Prob. Code §910. A survey of probate practitioners conducted by the Commission indicates that most attorneys request extraordinary fees in a third or more of their probate estates.

11. In a significant number of cases where a person dies, no probate proceeding is required in California because all of the decedent’s property is governed after death by the terms of a living trust or consists of joint tenancies, assets transferred upon death under pay-on-death provisions or under beneficiary designations in life insurance policies and employee benefit plans, and similar assets. If the services of an attorney are used in connection with these nonprobate transfers, the fee is determined by agreement and is not approved or reviewed by the court.

When one spouse dies and the surviving spouse takes all of the property of the deceased spouse, no formal probate proceeding is required in California. See Prob. Code §§13650-13660. The attorney fee in this situation is determined by private agreement between the attorney and client and is not subject to approval by the court. See Prob. Code §13660.

California is one of a small minority of states that uses a statutory fee schedule to fix the fee of the estate attorney.<sup>12</sup> The great majority of states use an agreed or reasonable fee system to fix the compensation of the estate attorney.

Seventeen states use the Uniform Probate Code system which authorizes the personal representative to fix the fee by agreement with the estate attorney.<sup>13</sup> In these 17

Formal probate proceedings can also be avoided for small estates. See Prob. Code §§13100-13115 (affidavit procedure to collect or transfer decedent's personal property); Prob. Code §§13150-13157 (summary procedure to obtain court order determining succession to real property); Prob. Code §§13200-13209 (procedure to make real property title records reflect transfer of property to decedent's heirs or beneficiaries). If one of these procedures is used, the attorney fee is determined by agreement between the attorney and client and is not subject to court approval.

12. California, Hawaii, and Wyoming use a statutory fee schedule to fix the fee of the estate attorney for ordinary services, without court discretion to vary the fee. See Cal. Prob. Code §§901, 910; Hawaii Rev. Stat. §§560:3-719, 560:3-721 (1985); Wyo. Stat. §§2-7-803, 2-7-804 (Supp. 1987).

Six states use a statutory fee schedule with considerable court discretion in fixing the fee. Four of these states compute the estate attorney's fee using what is essentially a reasonable fee system combined with a percentage fee schedule: Arkansas prescribes a "just and reasonable" fee, not to exceed a sliding percentage from three to ten percent of estate value. Ark. Stat. Ann. §28-48-108 (1987). Iowa prescribes a reasonable fee, not to exceed a sliding percentage from two to six percent of the gross estate. Iowa Code Ann. §§633.197, 633.198 (West 1964). Missouri prescribes a sliding minimum percentage, but no maximum, from two to five percent of personal property and proceeds of real property sold. Mo. Ann. Stat. §473.153 (Vernon Supp. 1989). Montana prescribes a reasonable fee, not to exceed a sliding percentage from two to three percent of the estate, but not less than the smaller of \$100 or the value of the gross estate. Mont. Code Ann. §72-3-631 (1985).

New Mexico prescribes a fee of not more than a sliding percentage from one to ten percent of the estate, unless otherwise ordered by the court. N.M. Stat. Ann. §§45-3-719, 45-3-720 (1984). Delaware uses a fee schedule established by court rule, subject to increase or decrease by the court. Del. Ch. Ct. R. 192 (1987).

13. Uniform Probate Code §3-715(21) (1982). The 17 states are Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Idaho, Maine, Minnesota, Montana, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, Utah, and Wisconsin. Alaska Stat. §13.16.440 (1985); Ariz. Rev. Stat. Ann. §14-3721 (1975); Ark. Stat. Ann. §28-48-108 (1987); Colo. Rev. Stat. §15-12-721 (1987); Conn. Gen. Stat. Ann. §45-100e (1981); Fla. Stat. Ann. §733.617 (West Supp. 1988); Idaho Code §15-3-721 (1979); Me. Rev. Stat. Ann. tit. 18-A, §3-721 (1981); Minn. Stat. Ann. §524.3-721 (West 1975); Mont. Code Ann. §§72-3-631, 72-3-633 (1985); Neb. Rev. Stat. §30-2482 (1985); Nev. Rev. Stat. §150.060



states, the fee agreement is not reviewed or approved by the court unless an interested person requests court review of the reasonableness of the attorney's compensation.<sup>14</sup> In another 14 states, the court determines what constitutes reasonable compensation for the estate attorney.<sup>15</sup>

The Commission has concluded that the California statutory fee system should be abandoned in favor of the agreed fee system of the Uniform Probate Code. As under the Uniform Probate Code, court review of the

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(1986); *Lightner v. Boone*, 221 N.C. 78, 19 S.E.2d 144 (1942) (administrator must pay counsel fees as a personal expense and, if proper, will be allowed on settlement of accounts); N.D. Cent. Code §30.1-18-21 (1976); S.C. Code Ann. §62-3-721 (Law. Co-op. 1987); Utah Code Ann. §75-3-718 (Supp. 1988); Wis. Stat. Ann. §851.40 (West Supp. 1987).

14. Uniform Probate Code §3-721 (1982). It is not clear whether states that have adopted the UPC fee system have, in the aggregate, achieved significant reductions of attorneys' fees in probate. See Kinsey, *A Contrast of Trends in Administrative Costs in Decedents' Estates in a Uniform Probate Code State (Idaho) and a Non-Uniform Probate Code State (North Dakota)*, 50 N.D.L. Rev. 523 (1974); Crapo, *The Uniform Probate Code — Does It Really Work?*, 1976 B.Y.U.L. Rev. 395; Spelvin, *Of Wills and Probate*, Sylvia Porter's Personal Finance, June 1984, at 84.

15. These 14 states are Alabama, Illinois, Indiana, Kansas, Maryland, Massachusetts, Michigan, Mississippi, New Jersey, New York, Ohio, Oregon, Texas, and Washington. Ala. Code §43-2-682 (1982); Ill. Ann. Stat. ch. 110 1/2, §27-2 (Smith-Hurd 1978); *In re Estate of Grabow*, 74 Ill. App. 3d 336, 392 N.E.2d 980 (1979) (determination of reasonable attorney fee solely in court's discretion); Ind. Code Ann. §29-1-10-13 (West 1979); Kan. Stat. Ann. §59-1717 (1983); *In re Estate of Murdock*, 213 Kan. 837, 519 P.2d 108 (1974) (reasonableness of attorney fee is for court determination); Md. Est. & Trusts Code Ann. §7-602 (1974); Mass. Ann. Laws ch. 206, §16 (Michie/Law Co-op. 1981); *id.* ch. 215, §§39-39B; Mich. Stat. Ann. §27.5543 (Callaghan 1988); *In re Estate of Weaver*, 119 Mich. App. 796, 327 N.W.2d 366 (1982); Miss. Code Ann. §91-7-281 (1973); *In re Read's Estate*, 24 N.J. Misc. 305, 49 A.2d 138 (1946); N.Y. Surr. Ct. Proc. Act §2110 (McKinney 1967); *In re Hickok's Estate*, 159 Ohio St. 282, 111 N.E.2d 925 (1953) (judicial determination is required to fix reasonable attorney fee); Or. Rev. Stat. §116.183 (1987); *Morton's Estate v. Ferguson*, 45 S.W.2d 419 (1932) (reasonableness of attorney fee is for court to determine, not personal representative); Wash. Rev. Code Ann. §11.48.210 (1987).

agreed fee should be limited to cases where there is an actual dispute.<sup>16</sup>

## RECOMMENDATIONS

### HIRING AND PAYING ATTORNEYS, ADVISORS, AND OTHERS

#### **Authority to Hire and Fix Compensation**

Existing law authorizes the personal representative to hire tax assistants and pay them out of estate funds.<sup>17</sup> Although there is no statutory authority for the personal representative to hire and pay assistants for other than tax matters, the courts have approved the hiring of a wide variety of assistants by the personal representative.<sup>18</sup> The Commission recommends that this authority be codified, drawing on the Uniform Probate Code provision that authorizes the personal representative to hire persons to advise or assist in estate administration.<sup>19</sup>

Specifically, the Commission recommends that the personal representative be given express authority to hire persons to advise or assist in the administration of the estate, and that the compensation of these persons be determined by agreement between the personal representative and the person hired. This authority would permit the personal representative, "acting

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16. The Commission has considered whether in every case the court should be required to fix a reasonable fee for the estate attorney. The Commission has concluded that it would waste judicial resources to require the court to review and fix the fee in a case where no one interested in the estate objects to the fee as agreed between the personal representative and the attorney.

17. See Prob. Code §902.

18. E.g., *Estate of McMillin*, 46 Cal. 2d 121, 131, 292 P.2d 881 (1956) (carpenters, painters, electricians, plumbers, janitors, and others to carry on decedent's business); *Estate of Costa*, 191 Cal. App. 2d 515, 520-21, 12 Cal. Rptr. 920 (1961) (handwriting expert to analyze holographic will). See generally 3 California Decedent Estate Practice §§22.98, 23.13, 30.24 (Cal. Cont. Ed. Bar 1987 and 1988 revision).

19. See Uniform Probate Code §3-715(21) (1982).

reasonably for the benefit of the estate and in the best interest of interested persons,” to hire attorneys, accountants, auditors, technical advisors, investment advisors, or other experts or agents, even if they are associated or affiliated with the personal representative.

The hiring and compensation of these persons would not be subject to court approval or review by the court unless an interested person objects to the agreed compensation and either petitions for court review of the fee or contests the fee when shown in the accounts of the personal representative.<sup>20</sup>

The recommended legislation makes clear that an attorney may withdraw as attorney for the personal representative if the court disapproves the fee agreement between the personal representative and the attorney and lowers the compensation of the attorney.

### **Independent Administration of Estates Act**

A provision should be added to the Independent Administration of Estates Act<sup>21</sup> to permit<sup>22</sup> the personal

20. The Commission's recommendation requires the report of administration (Prob. Code §10900) to include a report of the hiring and payment of persons hired to assist the personal representative, including attorneys, accountants, auditors, technical advisors, and investment advisors, and makes clear that the court can review the hiring and payment of such persons if contested at the time of settlement of the account (Prob. Code §11001). The Commission's recommendation also adds a new provision to the list of those who may waive the account of the personal representative (Prob. Code §10954) to include an attorney in fact for a person entitled to distribution.

21. Prob. Code §§10400-10600. The Independent Administration of Estates Act permits the court to authorize the personal representative to administer a decedent's estate with a minimum of court supervision.

22. In cases where neither court supervision nor notice of proposed action is required under the Independent Administration of Estates Act, the personal representative may nonetheless give notice of proposed action. See Prob. Code §10580(b). If the personal representative exercises the option to give notice of proposed action and receives a written objection to the proposed action, the personal representative may take the proposed action only under such order as may be entered by the court. See Prob. Code §10589. A person given the notice who fails to object to the proposed action waives the right to have the court later review the action taken. See Prob. Code §10590. Under the Commission's recommendation, this scheme will apply to payment of compensation to the estate attorney by the personal representative.

representative to give a notice of proposed action with respect to the hiring and payment of the estate attorney or other person hired by the personal representative.<sup>23</sup>

The notice of proposed action should include an estimate of the amount of the compensation of the person hired. A copy of the fee contract should be attached to the notice of proposed action.<sup>24</sup> If it appears that the compensation will exceed the amount estimated in the notice of proposed action, the personal representative may give another notice with a higher estimate. If the person receiving the notice fails to object, he or she may obtain court review only to the extent the compensation is in excess of the amount of the most recent estimate.

### **Relief From Limiting Provision of Decedent's Will**

Under existing law, if the testator's will provides for the compensation of the estate attorney, the attorney may "renounce" the compensation provided in the will and receive the statutory compensation instead.<sup>25</sup> The recommended legislation does not continue the right of the attorney unilaterally to renounce the compensation provided in the will.

Under the recommended legislation, the court may make an order granting relief from a provision of the will that provides for the hiring and compensation of the estate attorney or other persons hired to assist in the administration of the estate. The court may grant relief only if the court determines that it will be in the best interest of the estate and those interested in the estate.

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23. The recommended legislation permits use of independent administration procedures for this purpose without the need to obtain authority to administer the estate under the Independent Administration of Estates Act.

24. For attorneys, a written fee contract is required by Section 6148 of the Business and Professions Code. For other assistants hired by the personal representative, a written fee contract is optional.

25. See Prob. Code §§900 and 901 (made applicable to estate attorneys by the first sentence of Probate Code Section 910).

This standard will, for example, permit the court to grant relief when, because of the passage of time, the compensation provided in the will has become so inadequate that a competent lawyer cannot be obtained to handle the estate proceeding.

### **Payment of Persons Hired Out of Funds of Estate**

The recommended legislation codifies the general rule that persons hired by the personal representative are paid out of estate funds. It continues the exception that the person hired is paid out of the personal representative's own funds (rather than out of estate funds) if the person is hired to assist the personal representative in performing duties the personal representative is expected to perform.<sup>26</sup>

### **Sanctions for Failure to Close Estate on Time**

Existing law<sup>27</sup> permits the court to reduce the compensation of the personal representative or estate attorney where the court determines all of the following:

- (1) The time taken for the administration of the estate exceeds the time allowed by law or the court.
- (2) The time taken was within the control of the person whose compensation is to be reduced.
- (3) The delay was not in the best interest of the estate or interested persons.

The recommended legislation continues the sanction that may be imposed against the personal representative for delay in closing the estate. However, since a court order allowing the compensation of the estate attorney will no longer be required, the sanction of reducing the

26. This is consistent with existing law. See *Estate of LaMotta*, 7 Cal. App. 3d 960, 86 Cal. Rptr. 880 (1970) (volunteer who found bank account of decedent not entitled to compensation because this is statutory duty of public administrator). Under the recommended legislation, the court does not review the hiring or compensation of assistants, including the estate attorney, when the assistant is paid by the personal representative out of his or her own funds.

27. See Prob. Code §12205.

compensation of the estate attorney for delay in closing the estate has not been continued. This new scheme recognizes that the personal representative is the one responsible for estate administration and emphasizes the duty of the personal representative to avoid delay in closing the estate. If the sanction is imposed against the personal representative and the estate attorney is at fault, the personal representative may have an action over against the attorney.

## **COMPENSATION OF PERSONAL REPRESENTATIVE**

### **Continuing the Existing Statutory Scheme**

The California statute determines compensation of the personal representative for ordinary services using a statutory fee schedule.<sup>28</sup> In addition, the personal representative is entitled to “such further amount as the court may deem just and reasonable for extraordinary services.”<sup>29</sup>

The statutory fee schedule sets the compensation of the personal representative as percentages of the “estate accounted for” by the personal representative,<sup>30</sup> with higher percentages payable for smaller estates.<sup>31</sup> The personal representative is entitled to the statutory compensation unless he or she waives compensation or agrees to accept less compensation.<sup>32</sup>

California is one of 26 states that use either a percentage formula, or a hybrid of the percentage formula and reasonable fee systems, to determine the compensation

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28. See Prob. Code §901. See also note 1 supra.

29. See Prob. Code §902.

30. See Prob. Code §901. See also the discussion in note 3 supra.

31. See Prob. Code §901. See also note 4 supra.

32. See note 5 supra.

of the personal representative.<sup>33</sup> This contrasts with nine states that use either a percentage formula, or a hybrid of the percentage formula and reasonable fee systems, to determine the fee of the estate attorney.<sup>34</sup>

The reasons why most states have kept the percentage or hybrid fee scheme for the personal representative's compensation appear to include the following:

(1) Where the personal representative is an individual, he or she is often both a major beneficiary of the decedent's estate and a member of the decedent's immediate family. If the compensation is to be negotiated between the personal representative and the other beneficiaries, the personal representative is put in the undesirable position of having to negotiate with other family members, creating the possibility of unpleasant intrafamily disputes.

(2) It is often difficult to put a fair value on the services of the personal representative. The services may vary

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33. Twelve states use a pure percentage formula to determine the fee of the personal representative. These are California, Hawaii, Louisiana, Nevada, New Jersey, New York, Ohio, Oklahoma, Oregon, South Dakota, Wisconsin, and Wyoming. See Cal. Prob. Code §901 (West 1987 & Supp. 1988); Hawaii Rev. Stat. §560:3-719 (1988); La. Code Civ. Proc. Ann. art. 3351 (West Supp. 1989); Nev. Rev. Stat. §150.020 (1986 & Supp. 1988); N.J. Stat. Ann. §§3B:18-13, 3B:18-14 (West 1983 & Supp. 1988); N.Y. Surr. Ct. Proc. Act §2307 (McKinney 1967 & Supp. 1989); Ohio Rev. Code Ann. §2113.35 (Page Supp. 1987); Okla. Stat. Ann. tit. 58, §527 (West 1965); Or. Rev. Stat. §116.173 (1987); S.D. Codified Laws Ann. §30-25-7 (1984); Wis. Stat. Ann. §857.05 (West Supp. 1988); Wyo. Stat. §2-7-803 (Supp. 1987). Another 14 states use a hybrid of the percentage fee and reasonable fee methods. These are Alabama, Arkansas, Delaware, Georgia, Iowa, Kentucky, Maryland, Mississippi, Missouri, Montana, New Mexico, North Carolina, South Carolina, and Texas. Ala. Code §43-2-680 (1982); Ark. Stat. Ann. §28-48-108 (1987); Del. Ch. Ct. R. 192 (1987); Ga. Code Ann. §§53-6-140, 53-6-141, 53-6-143 (1982); Iowa Code Ann. §633.197 (West 1964); Ky. Rev. Stat. Ann. §395.150 (Baldwin 1988); Md. Est. & Trusts Code Ann. §7-601 (Supp. 1988); Miss. Code Ann. §91-7-299 (1973); Mo. Ann. Stat. §473.153 (Vernon Supp. 1989); Mont. Code Ann. §72-3-631 (1985); N.M. Stat. Ann. §45-3-719 (1984); N.C. Gen. Stat. §28A-23-3 (1988); S.C. Code Ann. §62-3-719 (Law. Co-op. 1987); Tex. Prob. Code Ann. §241 (Vernon Supp. 1989).

34. See *supra* note 12.

from feeding the decedent's dog to operating a complex business.

(3) If the decedent has a will and the executor is a beneficiary under the will, the decedent can take into account the likely percentage fee of the executor when deciding what the gift to the executor will be.<sup>35</sup>

(4) The personal representative is compensated for managing the estate. The larger the estate, the greater are the responsibilities assumed by the personal representative.

(5) The public call for reform of probate fees has been concerned primarily with attorneys' fees.<sup>36</sup>

The Commission recommends keeping the substance of the existing California provisions that govern the compensation of the personal representative, including both the statutory percentage fee for ordinary services and the additional fee fixed by the court for extraordinary services.<sup>37</sup>

### Dual Compensation

Under case law, a personal representative who is an attorney may receive the personal representative's compensation, but not compensation for services as estate attorney, unless expressly authorized by the decedent's will.<sup>38</sup>

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35. See, e.g., *Estate of Getty*, 143 Cal. App. 3d 455, 461, 191 Cal. Rptr. 897 (1983).

36. See *supra* text accompanying notes 6-12.

37. Section 902 of the Probate Code contains a partial, nonexclusive list of examples of what constitutes extraordinary services. This list should be deleted. Instead, examples should be given in the official comment to the new section. This revision is not intended to make any substantive change in the law.

38. See *In re Estate of Parker*, 200 Cal. 132, 251 P. 907 (1926); *Estate of Downing*, 134 Cal. App. 3d 256, 184 Cal. Rptr. 511 (1982); *Estate of Haviside*, 102 Cal. App. 3d 365, 368-69, 162 Cal. Rptr. 393, 395 (1980); *Estate of Thompson*, 50 Cal. 2d 613, 328 P.2d 1 (1958); *Estate of Crouch*, 240 Cal. App. 2d 801, 49 Cal. Rptr. 926 (1966); Feinfeld, *Fees and Commissions*, in 2 California Decedent Estate Practice §20.10 (Cal. Cont. Ed. Bar 1986). A personal representative-attorney may not circumvent this rule by failing to



In some cases, it may be appropriate and economical for an attorney to serve both as the personal representative and the estate attorney and to be compensated for services in both capacities. So that this is not precluded where there is no express authorization in the will, the court should be authorized to make an order permitting the attorney to receive compensation for services in both capacities.

### **Relief From Limiting Provision of Decedent's Will**

Under existing law, the testator's will may provide for the method of compensation of the personal representative.<sup>39</sup> For example, the will can eliminate the distinction between ordinary and extraordinary services and can substitute an hourly rate or rates for the various services to be provided by the personal representative. The statutory compensation provisions should be default provisions that apply where the will does not provide for compensation of the personal representative. But existing law allows the personal representative to defeat the intent of the testator, because the personal representative may renounce the compensation provided in the will and receive the statutory compensation instead.<sup>40</sup>

The recommended legislation does not permit the personal representative unilaterally to renounce the compensation provided in the will. Instead, the recommended legislation permits the court to allow

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retain a separate attorney and then seeking extraordinary compensation for legal services. See *Estate of Scherer*, 58 Cal. App. 2d 133, 136 P.2d 103 (1943); *Feinfield*, supra. However, it may be that, in allowing compensation for extraordinary services by the personal representative, the court can give some weight to the personal representative's services as an attorney in conserving and preserving the estate. *Id.*

39. See Prob. Code §§900, 901.

40. See Prob. Code §§900, 901. See generally Briggs & Worth, *Executors and Their Powers*, in *California Will Drafting Practice* §13.13, at 595 (Cal. Cont. Ed. Bar 1982).

more compensation than is provided for in the decedent's will where the court determines that the additional compensation is in the best interest of the estate and those interested in the estate. This new scheme will strengthen the testator's ability to control the compensation of the personal representative. But, at the same time, it will permit the court to grant relief when, for example, the compensation provided in the will has become inadequate because of the passage of time.

### **Allowance of Compensation by Court**

The existing statute provides for a partial allowance of compensation to the personal representative,<sup>41</sup> but final compensation is governed by local court rules rather than by statute.<sup>42</sup> The recommended legislation includes provisions governing the allowance of both partial and final compensation of the personal representative.

The recommended legislation codifies a provision found in local court rules that partial compensation may be allowed before final distribution of the estate when it

41. See Prob. Code §904.

42. Alameda County Probate Policy Manual §1003; Contra Costa County Probate Policy Manual §§603, 605; Fresno County Probate Policy Memorandum §9.3; Humboldt County Probate Rules §12.15(c); Lake County Probate Rules §13.4(g); Los Angeles County Probate Policy Memorandum §§15.02, 16.01; Madera County Probate Rules §§10.14, 10.19; Marin County Rules of Probate Practice §1203; Merced County Probate Rules §§1103, 1104, 1108; Monterey County Probate Rules §4.31; Orange County Probate Policy Memorandum §8.04; Riverside County Probate Policy Memoranda §6.1004; Sacramento County Probate Policy Manual §§706, 707, 708; San Bernardino County Probate Policy Memorandum §906; San Diego County Probate Rules §§4.110, 4.111; San Francisco Probate Manual §§13.03, 13.04; San Joaquin County Probate Rules §§4-705, 4-706, 4-1001; San Mateo County Probate Rules, Rules 486, 487; Santa Barbara County Probate Rules §414(H); Santa Clara County Probate Rules §§5.6(c), 5.7(d); Santa Cruz County Probate Rules §405; Solano County Probate Rules §8.11(d); Stanislaus County Probate Policy Manual §§1003, 1004, 1008(b), 1102(e); Tuolumne County Probate Rules, Rules 12.11(e), 12.14; Ventura County Probate Rules §11.12(c); Yolo County Probate Rules §20.5; Probate Rules of Third District Superior Courts, Rules 12.12(E), 12.15.

appears likely that administration of the estate will continue for an unusually long time, where present payment will benefit the estate or beneficiaries, or where other good cause is shown.<sup>43</sup>

### **PENDING PROCEEDINGS**

The recommended legislation will not apply to any proceeding for administration of a decedent's estate commenced before January 1, 1990.<sup>44</sup>

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43. Lake County Probate Rules §13.4(g); Marin County Rules of Probate Practice §1203; Merced County Probate Rules §1108; Orange County Probate Policy Memorandum §8.04; Riverside County Probate Policy Memoranda §6.1004; Sacramento County Probate Policy Manual §708; San Bernardino County Probate Policy Memorandum §906; San Francisco Probate Manual §13.03(a); San Mateo County Probate Rules, Rule 486(a); Santa Clara County Probate Rules §5.7(d); Santa Cruz County Probate Rules §405; Stanislaus County Probate Policy Manual §1008(b); Tuolumne County Probate Rules, Rule 12.11(e); Probate Rules of Third District Superior Courts, Rule 12.12(E). Good cause for allowing partial compensation before final distribution may include, for example, a need to pay out estate income to minimize income taxes.

44. This date is based on the assumption that the recommended legislation will be enacted at the 1989 session of the Legislature, and that therefore January 1, 1990, will be its effective date.

# OUTLINE OF PROPOSED LEGISLATION

## HIRING AND PAYING ATTORNEYS, ADVISORS, AND OTHERS

### Probate Code §§9680-9686 (added)

#### Chapter 2.5. Hiring and Paying Attorneys, Advisors, and Others

- §9680. Authority to hire attorneys, advisors, and others
- §9681. Compensation determined by agreement
- §9682. Relief from limiting provision of decedent's will
- §9683. Payment out of funds of estate
- §9684. Court review of employment and compensation
- §9685. Attorney's right to decline employment
- §9686. Application of chapter

### INDEPENDENT ADMINISTRATION OF ESTATES ACT

Probate Code §10404.5 (added). Hiring and paying attorney and others authorized whether or not independent administration authority granted

Probate Code §10406 (amended). Application of provisions for independent administration

Probate Code §10501 (amended). Matters requiring court supervision

Probate Code §10565 (added). Hiring and paying attorneys, advisors, and others

Probate Code §10585.5 (added). Estimated amount of compensation to be included in notice of proposed action; copy of contract

### COMPENSATION OF PERSONAL REPRESENTATIVE

#### Probate Code §§10800-10850 (added)

#### PART 7. COMPENSATION OF PERSONAL REPRESENTATIVE

##### Chapter 1. Amount of Compensation

- §10800. Compensation for ordinary services
- §10801. Additional compensation for extraordinary services
- §10802. Compensation provided by decedent's will
- §10803. Agreement for higher compensation void
- §10804. No compensation as estate attorney unless authorized by will or court order
- §10805. Apportionment of compensation

##### Chapter 2. Allowance of Compensation by Court

- §10830. Partial allowance of compensation
- §10831. Final compensation
- §10832. Limitation on allowance of compensation for extraordinary services

##### Chapter 3. Application of Part

- §10850. Application of provisions of this part

### CONFORMING REVISIONS

Probate Code §7623 (technical amendment). Additional compensation of public administrator

Probate Code §7666 (technical amendment). Compensation of public administrator

Probate Code §8547 (technical amendment). Compensation of special administrator

Probate Code §9651 (technical amendment). Taking possession of property of the estate; delivery of property to person entitled thereto

Probate Code §10900 (amended). Contents of account

Probate Code §10954 (amended). When account not required

Probate Code §11003 (technical amendment). Litigation expenses

Probate Code §12205 (amended). Sanction for failure timely to close estate

Uncodified Transitional Provision

## **HIRING AND PAYING ATTORNEYS, ADVISORS, AND OTHERS**

### **Probate Code §§9680-9686 (added)**

SEC. Chapter 2.5 (commencing with Section 9680) is added to Part 5 of Division 7 of the Probate Code, to read:

#### **CHAPTER 2.5. HIRING AND PAYING ATTORNEYS, ADVISORS, AND OTHERS**

### **§9680. Authority to hire attorneys, advisors, and others**

9680. Except as restricted or otherwise provided by the will or by court order and subject to Section 10804, the personal representative, acting reasonably for the benefit of the estate and in the best interest of interested persons, may hire persons to advise or assist the personal representative in the administration of the estate, including attorneys, accountants, auditors, technical advisors, investment advisors, or other experts or agents, even if they are associated or affiliated with the personal representative.

**Comment.** Section 9680 is a new provision drawn from paragraph (21) of Section 3-715 of the Uniform Probate Code (1982) and from California trust law (Section 16247). The broad authority granted by Section 9680 covers all aspects of estate administration from opening estate administration to closing estate administration, including but not limited to tax work. The authority may be exercised by the personal representative without prior court authorization (Section 9610), unless otherwise provided by the will or by court order. As to the right of an interested person to obtain court review of the reasonableness of the hiring and compensation, see Section 9684 and the Comment to that section.

The notice of proposed action procedure under the Independent Administration of Estates Act may be used for the hiring and payment of persons under Section 9680. See Sections 10404.5, 10550, 10565, and 10580(b) (notice of proposed action permitted but not required) and Sections 10585.5 and 10590 (effect of giving notice of proposed action).

The introductory clause of Section 9680 makes clear that the personal representative must act reasonably in exercising the power granted. The reference to Section 10804 in the introductory clause makes clear that the right of the personal representative who is an attorney to receive compensation for services as the estate attorney as well as the personal representative is governed by Section 10804. The introductory clause also recognizes that the authority granted by Section 9680 may be restricted or otherwise modified by the testator's will or by court order. However, the court may grant relief from a limiting provision of the decedent's will. See Section 9682.

Section 9680 merely deals with the authority of the personal representative to employ persons to advise or assist in the administration of the estate. The question of whether the person hired is to be paid out of estate funds or out of the personal representative's own funds is governed by Section 9683.

As to the law applicable to a proceeding commenced before January 1, 1990, see Section 9686. See also Section 10406(d).

### **§9681. Compensation determined by agreement**

9681. (a) The compensation of persons hired under Section 9680, including the attorney for the personal representative, shall be determined by agreement between the personal representative and the person hired, and, except as provided in Section 9684 and in Chapter 3 (commencing with Section 11000) of Part 8, is not subject to approval or review by the court.

(b) Subject to Section 9682, if the decedent's will makes provision for the compensation of a person hired under Section 9680, including the attorney for the personal representative, the compensation provided by the will shall be the full and only compensation for the services of that person.

**Comment.** Subdivision (a) of Section 9681 is a new provision that makes clear that the compensation of persons hired under Section 9680, including the attorney for the personal representative, is determined by agreement between the personal representative and the person hired. The policy reflected in subdivision (a) is consistent with Sections 13157 (court order determining succession

to real property) and 13660 (confirming property to surviving spouse).

Subdivision (b) recognizes that the decedent's will may fix the compensation or provide the manner for determining the compensation. If this is the case, the person hired is entitled to the compensation provided in the will or compensation determined as provided in the will, as the case may be, and the court may not reduce the compensation so determined. But see Section 9682 (relief from limiting provision of decedent's will).

Subdivision (b) supersedes a portion of former Section 900 and a portion of the first sentence of former Section 901 insofar as those provisions were made applicable to estate attorneys by the first sentence of former Section 910.

As to the right of an interested person to obtain court review of the reasonableness of the hiring and compensation of the person, see Section 9684 and the Comment to that section. See also Section 9685 (right of attorney to decline to be the attorney for the personal representative; right of attorney to withdraw as the attorney for the personal representative).

The notice of proposed action procedure under the Independent Administration of Estates Act may be used. See Sections 10404.5, 10550, 10565, and 10580(b) (notice of proposed action permitted but not required) and Sections 10585.5 and 10590 (effect of giving notice of proposed action).

As to the law applicable to a proceeding commenced before January 1, 1990, see Section 9686.

### **§9682. Relief from limiting provision of decedent's will**

9682. (a) The personal representative or a person hired under Section 9680, including the attorney for the personal representative, may petition the court to be relieved from a provision of the decedent's will that provides for the compensation of a person hired under Section 9680 or for relief from some other restriction or other limiting provision of the will on the hiring of persons by the personal representative.

(b) Notice of the hearing on the petition shall be given as provided in Section 1220 to all of the following persons:

(1) Each person listed in Section 1220.

(2) Each known heir whose interest in the estate is affected by the petition.

(3) Each known devisee whose interest in the estate is affected by the petition.

(4) The Attorney General, by mail at the office of the Attorney General in Sacramento, if any portion of the estate is to escheat to the state and its interest in the estate is affected by the petition.

(c) If the court determines that it is in the best interest of the estate and of those interested in the estate, the court may make an order:

(1) Granting relief from the restriction or other limiting provision of the will upon the terms and conditions the court specifies in the order.

(2) Authorizing compensation for the person hired under Section 9680 in an amount greater than provided in the will.

**Comment.** Section 9682 is a new provision that is similar in concept to the authority given the court under Section 10002 (order relieving personal representative of duty to comply with directions given in will as to the mode of selling property or the particular property to be sold). For a comparable provision applicable to personal representatives, see Section 10802.

The court may make an order granting relief from a provision of the will fixing the compensation of the estate attorney, for example, because the passage of time has made the compensation provided in the will so inadequate that a competent lawyer can not be obtained to handle the estate proceeding. If the attorney is dissatisfied with the ruling of the court, the attorney may withdraw as estate attorney. See Section 9685 (right of attorney to decline to be the attorney for the personal representative; right of attorney to withdraw as the attorney for the personal representative).

Notice of hearing under this section is subject to general provisions governing notice under this code. See, e.g., Sections 1201 (notice not required to be given to oneself or persons joining in petition), 1202 (additional notice on court order), 1206 (notice



to known heirs or devisees), 1215-1217 (mailing in general), 1260-1265 (proof of giving notice). The court for good cause may dispense with the notice otherwise required to be given pursuant to this section. See Section 1220(f).

Section 9682 supersedes the portions of former Sections 900 and 901, made applicable to estate attorneys by the first sentence of former Section 910, that permitted the estate attorney to renounce the compensation provided by the will and to receive the statutory compensation. Instead, Section 9682 imposes a requirement that court approval be obtained before the estate attorney may be relieved from provisions of the will governing compensation.

As to the law applicable to a proceeding commenced before January 1, 1990, see Section 9686.

### **§9683. Payment out of funds of estate**

9683. (a) Except as otherwise provided in this section, the personal representative may pay persons hired under Section 9680 out of funds of the estate.

(b) If a person, including an attorney, is hired to assist the personal representative in the performance of the services of the personal representative for which the personal representative is compensated under Part 7 (commencing with Section 10800), the person hired shall be paid out of the personal representative's own funds and not out of the funds of the estate, except that, at the request of the personal representative, the court may order payment out of the estate directly to the person assisting the personal representative in the performance of these services, the payment to be charged against and deducted from the compensation that otherwise would be paid to the personal representative.

(c) Nothing in subdivision (b) limits the authority of the personal representative to pay out of funds of the estate for services of tax counsel, tax auditors, accountants, or other tax experts hired for the providing of services in the computation, reporting, or making of

tax returns, or in negotiations which may be necessary for the final determination and payment of taxes.

**Comment.** Subdivision (a) of Section 9683 states the general rule that persons hired by the personal representative are paid out of estate funds. Subdivision (b) states an exception to this rule where the person is hired to assist the personal representative in performing the duties the personal representative is expected to perform.

Subdivision (c) makes clear that a tax expert hired under Section 9680 is paid out of funds of the estate; the compensation to which the personal representative is entitled under Sections 10800-10805 is not reduced because the tax expert is employed to assist the personal representative to perform duties in connection with taxes. Subdivision (c) restates without substantive change the second sentence of former Section 902.

Subdivision (b) codifies a distinction that existed under prior law. If the personal representative hires another person (including the estate attorney) to assist the personal representative in performing the duties the personal representative is expected to perform, the person hired is paid out of the personal representative's own funds. See *Estate of LaMotta*, 7 Cal. App. 3d 960, 86 Cal. Rptr. 880 (1970) (volunteer who found bank account of decedent not entitled to compensation out of funds of the estate because this is statutory duty of public administrator). On the other hand, if the search for estate assets had required an extraordinary effort, Section 9683 would permit the personal representative to pay the investigator out of estate funds. Likewise, the duty to prepare the accounts is a service for which the personal representative is compensated. If the personal representative hires another to keep the accounts, the personal representative must pay that person out of the personal representative's own funds. However, to the extent that the nature of the estate presents exceptionally complex accounting requirements, the person keeping the accounts may be paid out of funds of the estate. The personal representative also may pay out of the funds of the estate persons hired to assist in the operation of a business of the estate. As to court review of the propriety of paying a person hired under Section 9683 out of funds of the estate, see Section 9684 and the Comment to that section.

The estate attorney is paid out of funds of the estate except to the extent that the attorney is hired to perform the duties the

personal representative is expected to perform. The authority to make an agreement with the estate attorney to assist the personal representative in performing the duties the personal representative is expected to perform was recognized under prior practice. See Fresno County Probate Policy Memoranda §9.4(c), reprinted in California Local Probate Rules (9th ed., Cal. Cont. Ed. Bar 1988); Los Angeles Superior Court Guidelines on Attorney Fees in Decedents' Estates, Part E, §11.1, reprinted in California Local Probate Rules, *supra*.

The court does not review the hiring or compensation when the person hired (including the estate attorney) is paid by the personal representative from the personal representative's own funds. See Section 9684 (court review limited to cases where the person hired has been or is to be paid out of estate funds). This changes the former practice in at least one court. See Fresno County Probate Policy Memoranda §9.4(c), reprinted in California Local Probate Rules, *supra* (court approval of contract required). Compare Los Angeles Superior Court Guidelines on Attorney Fees in Decedents' Estates, Part E, §11.1, reprinted in California Local Probate Rules, *supra*.

#### **§9684. Court review of employment and compensation**

9684. (a) On petition of the personal representative or an interested person, the court may review the following:

(1) The propriety of employment by the personal representative of any person under Section 9680 who has been or is to be paid out of funds of the estate.

(2) The reasonableness of the agreed compensation under subdivision (a) of Section 9681 of any person who has been or is to be paid out of funds of the estate.

(b) Notice of the hearing on the petition shall be given as provided in Section 1220 to all of the following persons:

(1) The person whose employment or compensation is in question.

(2) Each person listed in Section 1220.

(3) Each known heir whose interest in the estate is affected by the petition.

(4) Each known devisee whose interest in the estate is affected by the petition.

(5) The Attorney General, by mail at the office of the Attorney General in Sacramento, if any portion of the estate is to escheat to the state and its interest in the estate is affected by the petition.

(c) If the court determines that the agreed compensation is unreasonable, the court shall fix a reasonable amount as compensation and may order the person who has received excessive compensation to make an appropriate refund.

(d) Except as provided in subdivision (e), nothing in this section limits the right to contest the account of the personal representative under Chapter 3 (commencing with Section 11000) of Part 8.

(e) The petitioner and all persons to whom notice of the hearing on the petition was given pursuant to subdivision (b) are bound by the determination of the court under this section.

**Comment.** Section 9684 is drawn in part from Section 3-721 of the Uniform Probate Code (1982). In determining whether the compensation for the estate attorney is unreasonable, the court may consider any relevant factors, including but not limited to those set out in Rule 4-200 of the Rules of Professional Conduct of the State Bar of California (fees for legal services). The last clause of subdivision (c) avoids the need for a separate action or proceeding to recover an excess payment of compensation, thus providing a quick and efficient remedy.

Notice of hearing under this section is subject to general provisions governing notice under this code. See, e.g., Sections 1201 (notice not required to be given to oneself or persons joining in petition), 1202 (additional notice on court order), 1206 (notice to known heirs or devisees), 1215-1217 (mailing in general), 1260-1265 (proof of giving notice). The court for good cause may dispense with the notice otherwise required to be given pursuant to this section. See Section 1220(f).

The right of an interested person to obtain court review of the reasonableness of the hiring and compensation of the person may

be limited by use of the notice of proposed action procedure under the Independent Administration of Estates Act. See Sections 10404.5, 10550, 10565, and 10580(b) (notice of proposed action permitted but not required) and Sections 10585.5 and 10590 (effect of giving notice of proposed action).

Section 11001 provides an alternative procedure to the procedure provided in Section 9684. Under Section 11001, the court may review, in a contest on settlement of the final account, the propriety of employment and reasonableness of compensation of any person employed under Section 9680, including the estate attorney. But see subdivision (e) of Section 9684. See also Section 10900 (report of administration to show hiring and payment of persons hired under Section 9680).

If the attorney is dissatisfied with the ruling of the court, the attorney may withdraw as estate attorney. See Section 9685 (right of attorney to decline to be the attorney for the personal representative; right of attorney to withdraw as the attorney for the personal representative).

As to the law applicable to a proceeding commenced before January 1, 1990, see Section 9686.

### **§9685. Attorney's right to decline employment**

9685. Nothing in this chapter limits the right of an attorney to decline to be the attorney for the personal representative or the right of an attorney to withdraw as the attorney for the personal representative.

**Comment.** Section 9685 is a new provision that makes clear, for example, that an attorney may withdraw as attorney for the personal representative if the court disapproves the written fee contract between the attorney and the personal representative and lowers the compensation of the attorney. As to the law applicable to a proceeding commenced before January 1, 1990, see Section 9686.

### **§9686. Application of chapter**

9686. (a) This chapter does not apply in any proceeding for administration of a decedent's estate commenced before January 1, 1990.

(b) The applicable law in effect before January 1, 1990, governing the subject matter of this chapter continues

to apply in any proceeding for administration of a decedent's estate commenced before January 1, 1990, notwithstanding its repeal by the act that enacted this section.

**Comment.** Section 9686 is a new provision that limits the application of this chapter to proceedings commenced on or after January 1, 1990. Thus, for example, the allowance of attorney fees in a proceeding commenced before January 1, 1990, is governed by the applicable law in effect before January 1, 1990. See former Probate Code §§900-911 (commission of personal representative and fees of estate attorney).

## INDEPENDENT ADMINISTRATION OF ESTATES ACT

**Probate Code §10404.5 (added). Hiring and paying attorney and others authorized whether or not independent administration authority granted 10404.5.** Notwithstanding any provision of the decedent's will, the personal representative is authorized to exercise under the provisions of this part the power granted by Section 10565, whether or not the personal representative has been granted authority to administer the estate under this part.

**Comment.** Section 10404.5 is a new provision that permits the notice of proposed action procedure to be used with respect to the hiring and compensation of persons hired under Section 10565, even though the personal representative has not been granted authority to administer the estate under this part. This section avoids the need to petition for authority to administer the estate under this part, or to obtain such authority, in order to use the procedure under this part for the exercise of the power granted by Section 10565. The section does not apply in a proceeding commenced before January 1, 1990. See Section 10406(d).

Section 10550 permits the exercise of the power granted by Section 10565 without giving notice of proposed action under Chapter 4 (commencing with Section 10580). However, subdivision (b) of Section 10580 permits a personal representative to use the notice of proposed action procedure provided in Chapter 4 with respect to the exercise of that power even though the action is not

one for which notice of proposed action is required. If the procedure provided by Chapter 4 is used with respect to the proposed exercise of the power granted by Section 10565, a person who fails to object to the proposed action waives the right to have the court later review the action taken. See Section 10590 and the Comment to that section. See also Section 10589(b) and the Comment to that section. Use of the notice of proposed action procedure avoids the need to petition the court under Section 9684 for approval of the hiring and the contract in order to preclude a later challenge to the accounts of the personal representative. See also Section 10585.5 (estimated amount of compensation to be included in notice of proposed action; copy of contract governing hiring and compensation to be attached to notice of proposed action).

**Probate Code §10406 (amended). Application of provisions for independent administration**

10406. (a) Subject to subdivision (c), this part applies in all of the following cases:

(1) Where authority to administer the estate is granted under this part.

(2) Where authority to administer the estate was granted under former Sections 591.1 to 591.9, inclusive, of the Probate Code on a petition filed after January 1, 1985.

(3) Where authority was granted prior to January 1, 1985, to administer the estate under the Independent Administration of Estates Act and one of the following requirements is satisfied:

(A) A petition was filed under former Section 591.1 of the Probate Code after January 1, 1985, requesting that the personal representative be authorized to administer the estate under the Independent Administration of Estates Act in effect at the time the petition was filed, and the petition was granted.

(B) A petition is filed under this part requesting that the personal representative be authorized to administer the estate under this part, and the petition is granted.

(b) Except as provided in paragraph (3) of subdivision (a), a personal representative who was granted authority prior to January 1, 1985, to administer the estate under the Independent Administration of Estates Act shall continue to administer the estate under the provisions of the Independent Administration of Estates Act that were applicable at the time the petition was granted.

(c) If the personal representative was granted independent administration authority prior to July 1, 1988, the personal representative may use that existing authority on and after July 1, 1988, to borrow money on a loan secured by an encumbrance upon real property, whether or not that existing authority includes the authority to sell real property.

*(d) Sections 10404.5, 10565, and 10585.5 as enacted by the act that added this subdivision, and Section 10501 as amended by the act that added this subdivision, do not apply in any proceeding for administration of a decedent's estate commenced before January 1, 1990. Section 10501, as that section existed prior to its amendment by the act that added this subdivision, continues to apply in any proceeding for administration of a decedent's estate commenced before January 1, 1990, notwithstanding its amendment by the act that added this subdivision.*

**Comment.** Section 10406 is amended to add subdivision (d). This subdivision limits the use of independent administration for attorney's fees to proceedings commenced on or after January 1, 1990. Thus, independent administration procedures cannot be used for the allowance of attorney fees in a proceeding commenced before January 1, 1990. The allowance of attorney fees in a proceeding commenced before January 1, 1990, is governed by the applicable law in effect before January 1, 1990. See former Probate Code §§900-911 (commission of personal representative and fees of estate attorney).



**Probate Code §10501 (amended). Matters requiring court supervision**

10501. (a) Notwithstanding any other provision of this part, whether the personal representative has been granted full authority or limited authority, a personal representative who has obtained authority to administer the estate under this part is required to obtain court supervision, in the manner provided in this code, for any of the following actions:

(1) Allowance of the personal representative's ~~commissions~~ *compensation*.

~~(2) Allowance of attorney's fees.~~

~~(3) (2) Settlement of accountings.~~

~~(4) (3) Preliminary and final distributions and discharge.~~

~~(5) (4) Sale of property of the estate to the personal representative or to the attorney for the personal representative.~~

~~(6) (5) Exchange of property of the estate for property of the personal representative or for property of the attorney for the personal representative.~~

~~(7) (6) Grant of an option to purchase property of the estate to the personal representative or to the attorney for the personal representative.~~

~~(8) (7) Allow, pay, or compromise a claim of the personal representative, or the attorney for the personal representative, against the estate.~~

~~(9) (8) Compromise or settle a claim, action, or proceeding by the estate against the personal representative or against the attorney for the personal representative.~~

~~(10) (9) Extend, renew, or modify the terms of a debt or other obligation of the personal representative, or the attorney for the personal representative, owing to or in favor of the decedent or the estate.~~

(b) Notwithstanding any other provision of this part, a personal representative who has obtained only limited authority to administer the estate under this part is required to obtain court supervision, in the manner provided in this code, for any of the following actions:

- (1) Sale of real property.
- (2) Exchange of real property.
- (3) Grant of an option to purchase real property.
- (4) Borrow money with the loan secured by an encumbrance upon real property.

(c) Paragraphs ~~(5)~~ (4) to ~~(10)~~ (9), inclusive, of subdivision (a) do not apply to a transaction between the personal representative as such and the personal representative as an individual where all of the following requirements are satisfied:

(1) Either (A) the personal representative is the sole beneficiary of the estate or (B) all the known heirs or devisees have consented to the transaction.

(2) The period for filing creditor's claims has expired.

(3) No request for special notice is on file or all persons who filed a request for special notice have consented to the transaction.

(4) The claim of each creditor who filed a claim has been paid, settled, or withdrawn, or the creditor has consented to the transaction.

**Comment.** Section 10501 is amended to delete from subdivision (a) the former requirement that court supervision be obtained for allowance of attorney's fees. This is consistent with the new provision in supervised administration that compensation of the attorney for the personal representative is fixed by private agreement and that court approval is not required. See Section 9681. See also Section 9684 and the Comment to that section (court review of compensation of attorney). Independent administration procedures cannot be used for the allowance of attorney fees in a proceeding commenced before January 1, 1990. See Section 10406(d).

Section 10501 also is amended to substitute “compensation” for “commission” in paragraph (1) of subdivision (a). This conforms to the language used in the provisions relating to compensation of the personal representative. See Sections 10800-10805.

**Probate Code §10565 (added). Hiring and paying attorneys, advisors, and others**

10565. (a) Subject to Section 10804, the personal representative has the power to hire persons to advise or assist in the administration of the estate, including attorneys, accountants, auditors, technical advisors, investment advisors, or other experts or agents, even if they are associated or affiliated with the personal representative.

(b) The personal representative has the power to agree to and pay the compensation of the persons described in subdivision (a) out of funds of the estate unless the person is hired to assist the personal representative in the performance of services of the personal representative for which the personal representative is compensated under Part 7 (commencing with Section 10800).

**Comment.** Section 10565 is a new provision. The power granted by this section may be exercised whether or not independent administration authority is granted to the personal representative. See Section 10404.5. Section 10565 does not apply in any proceeding commenced before January 1, 1990. See Section 10406(d). For the comparable provisions under supervised administration, see Sections 9680-9684. Concerning the exercise of the powers described in this chapter, see Sections 10502 and 10550 and the Comments to those sections. Notice of proposed action is not required to exercise the power granted by Section 10565. See Section 10550. But the personal representative may use the notice of proposed action procedure if the personal representative so desires. See Section 10580(b) and the Comment to Section 10550. If notice of proposed action is given to a person who fails to object to the proposed action, that person waives the right to have the court later review the action. Section 10590. But

see Section 10585.5 (another notice of proposed action required if compensation exceeds estimate in notice of proposed action).

**Probate Code §10585.5 (added). Estimated amount of compensation to be included in notice of proposed action; copy of contract**

10585.5. (a) If, pursuant to subdivision (b) of Section 10580, the personal representative gives notice of proposed action with respect to the exercise of the powers granted by Section 10565 (hiring and paying attorneys, advisors, and others to advise or assist in the administration of the estate):

(1) The notice of proposed action shall include, in addition to the information required by Section 10585, an estimate of the total amount of compensation to be paid to the person hired.

(2) If the person hired is an attorney, a copy of the written fee contract made pursuant to Section 6148 of the Business and Professions Code shall be attached to the notice of proposed action.

(3) If the person hired is not an attorney, a copy of the written contract, if any, governing the hiring and compensation shall be attached to the notice of proposed action.

(b) If it appears that the total amount of compensation to be paid to the person hired will exceed the amount of the last previous estimate given in a notice of proposed action, the personal representative may give another notice of proposed action stating a new estimate of the total amount of compensation to be paid to the person.

(c) Section 10590 does not apply to the extent that the compensation paid or to be paid exceeds the amount of the estimate contained in the notice of proposed action most recently given.

**Comment.** Section 10585.5 is a new provision governing the permissive notice of proposed action under Section 10565 with

respect to the hiring and paying of attorneys, advisors, and others to advise or assist in the administration of the estate. The section requires that the notice of proposed action contain the information required by Section 10585 and, in addition, the information required by Section 10585.5. Section 10585.5 is designed to give the person receiving notice of proposed action sufficient information so that the person can determine whether or not to object to the proposed action. The section does not apply in a proceeding commenced before January 1, 1990. See Section 10406(d).

The notice of proposed action must include an estimate of the total amount of compensation to be paid to the person hired. Another notice of proposed action may be given if it appears that the total amount of compensation may exceed the amount estimated in a previous notice of proposed action. The provisions of Section 10590 that preclude court review of the hiring and paying of the agreed compensation will apply so long as the compensation does not exceed the amount estimated in the latest notice of proposed action. However, to the extent that the compensation paid or to be paid exceeds the amount estimated in the latest notice of proposed action, Section 10590 does not apply and the court may review the excess to determine whether it is reasonable.

Section 10585.5 also requires that a copy of the contract be attached to the notice. In the case of an attorney, a copy of the written fee contract required by Section 6148 of the Business and Professions Code must be attached to the notice of proposed action.

## **COMPENSATION OF PERSONAL REPRESENTATIVE**

### **Probate Code §§10800-10850 (added)**

SEC. \_\_\_. Part 7 (commencing with Section 10800) is added to Division 7 of the Probate Code to read:

### **PART 7. COMPENSATION OF PERSONAL REPRESENTATIVE**

#### **CHAPTER 1. AMOUNT OF COMPENSATION**

#### **§10800. Compensation for ordinary services**

10800. (a) Subject to the provisions of this part, for ordinary services the personal representative shall

receive compensation based on the value of the estate accounted for by the personal representative, as follows:

(1) Four percent on the first fifteen thousand dollars (\$15,000).

(2) Three percent on the next eighty-five thousand dollars (\$85,000).

(3) Two percent on the next nine hundred thousand dollars (\$900,000).

(4) One percent on the next nine million dollars (\$9,000,000).

(5) One-half of one percent on the next fifteen million dollars (\$15,000,000).

(6) For all above twenty-five million dollars (\$25,000,000), a reasonable amount to be determined by the court.

(b) For the purposes of this section, the value of the estate accounted for by the personal representative is the total amount of the appraisal of property in the inventory, plus gains over the appraisal value on sales, plus receipts, less losses from the appraisal value on sales, without reference to encumbrances or other obligations on estate property.

**Comment.** Subdivision (a) of Section 10800 restates the first sentence of former Section 901 without substantive change. Subdivision (b) restates the first sentence of the second paragraph of former Section 901 without substantive change. As to the law applicable to a proceeding commenced before January 1, 1990, see Section 10850.

Compensation is computed using the total amount of the appraisal of property in the inventory (see Sections 8800-8802, 8850, 8900), plus gains over the appraisal value on sales, plus receipts, less losses from the appraisal value on sales, without reference to encumbrances or other obligations on estate property. Property is appraised at its fair market value at the time of the decedent's death. See Section 8802. The amount of any liens or encumbrances on the property is not subtracted from the fair market value used for the purpose of computing the compensation under this section.

The last sentence of former Section 901 is not continued. Before 1965, the usual practice was to use gross value of real property to calculate the statutory fee unless the property was sold during probate, in which case only the decedent's equity in the property was used. Under the 1965 revision to former Section 901, gross value was used, whether or not a sale had taken place. See *Review of Selected 1965 Code Legislation*, at 222 (Cal. Cont. Ed. Bar 1965). Subdivision (b) of Section 10800 continues the substance of the 1965 revision. The last sentence of former Section 901 was included in 1965 to make clear that the former practice was being changed; it is no longer necessary to continue this sentence.

A court order allowing the compensation to the personal representative is required before the compensation may be paid, and the compensation allowed is paid out of funds of the estate. See Sections 10830 and 10831. As to allowing a portion of the compensation of the personal representative (on account of services rendered up to the time of allowance), see Section 10830. See also Section 12205 (reduction of compensation for delay in closing estate administration).

The personal representative may employ or retain experts, technical advisors, and others to assist in the performance of the duties of the office. As to when these persons may be paid out of funds of the estate and when they must be paid out of the personal representative's own funds, see Section 9683. As to the right of an attorney to receive dual compensation for services as personal representative and as estate attorney, see Section 10804.

Under the introductory clause of Section 10800, the section is subject to Section 10802. Section 10802 provides that, if the decedent's will makes provision for the compensation of the personal representative and the court does not relieve the personal representative from those provisions, the compensation provided by the will shall be the full and only compensation for the services of the personal representative. See also the discussion in the Comment to Section 10802.

### **§10801. Additional compensation for extraordinary services**

10801. Subject to the provisions of this part, in addition to the compensation provided by Section 10800, the court may allow additional compensation for

extraordinary services by the personal representative in an amount the court determines is just and reasonable.

**Comment.** Section 10801 restates the first sentence of former Section 902 without substantive change. See also Section 12205 (reduction of compensation for delay in closing estate administration). As to the law applicable to a proceeding commenced before January 1, 1990, see Section 10850.

Even though services are extraordinary, the court has discretion whether or not to award compensation for them. *Estate of Walker*, 221 Cal. App. 2d 792, 795-96, 34 Cal. Rptr. 832 (1963) (extraordinary services by executor and estate attorney).

The listing in former Section 902 of examples of what constitutes extraordinary services is not continued. The former list was incomplete. See *Estate of Buchman*, 138 Cal. App. 2d 228, 236, 291 P.2d 547 (1955) (special administrator and estate attorney). Omission of the list is not intended to change the law. Under Sections 10800 and 10801, the following services by the personal representative may be considered as extraordinary:

(1) Sales or mortgages of real or personal property. *Estate of McSweeney*, 123 Cal. App. 2d 787, 798, 268 P.2d 107 (1954) (extraordinary fees of executor and estate attorney).

(2) Carrying on decedent's business. *Estate of King*, 19 Cal. 2d 354, 358-60, 121 P.2d 716 (1942) (extraordinary fees of executrix); *Estate of Scherer*, 58 Cal. App. 2d 133, 136 P.2d 103 (1943) (extraordinary fees of executor); *In re Estate of Allen*, 42 Cal. App. 2d 346, 353, 108 P.2d 973 (1941) (extraordinary fees of administratrix and estate attorney).

(3) Court proceedings to determine testator's intention concerning undisclosed beneficiaries. *Estate of Feldman*, 78 Cal. App. 2d 778, 793-94, 178 P.2d 498 (1947) (extraordinary fees of executor and estate attorney).

(4) Defense of personal representative's account (answering interrogatories; attending depositions; conferring with attorneys to prepare for depositions, interrogatories, and trial; attending trial). *Estate of Beach*, 15 Cal. 3d 623, 644, 542 P.2d 994, 125 Cal. Rptr. 570 (1975) (extraordinary fees of executor and estate attorney).

(5) Securing a loan to pay debts of the estate. *In re Estate of O'Connor*, 200 Cal. 646, 651, 254 P. 269 (1927) (extraordinary fees of executor and estate attorney).

The foregoing is not an exhaustive list. Other extraordinary services may be added to this list by case law or court rule. See



generally Feinfeld, *Fees and Commissions*, in 2 California Decedent Estate Practice §20.28 (Cal. Cont. Ed. Bar 1987); Los Angeles County Probate Policy Memorandum §15.08, reprinted in California Local Probate Rules (9th ed., Cal. Cont. Ed. Bar 1988).

Under the introductory clause of Section 10801, the section is subject to Section 10802. Section 10802 provides that, if the decedent's will makes provision for the compensation of the personal representative and the court does not relieve the personal representative from those provisions, the compensation provided by the will shall be the full and only compensation for the services of the personal representative. See also the discussion in the Comment to Section 10802.

### **§10802. Compensation provided by decedent's will**

10802. (a) Except as otherwise provided in this section, if the decedent's will makes provision for the compensation of the personal representative, the compensation provided by the will shall be the full and only compensation for the services of the personal representative.

(b) The personal representative may petition the court to be relieved from a provision of the will that provides for the compensation of the personal representative.

(c) Notice of the hearing on the petition shall be given as provided in Section 1220 to all of the following persons:

(1) Each person listed in Section 1220.

(2) Each known heir whose interest in the estate is affected by the petition.

(3) Each known devisee whose interest in the estate is affected by the petition.

(4) The Attorney General, by mail at the office of the Attorney General in Sacramento, if any portion of the estate is to escheat to the state and its interest in the estate is affected by the petition.

(d) If the court determines that it is in the best interest of the estate and of those interested in the estate, the court may make an order authorizing compensation for the personal representative in an amount greater than provided in the will.

**Comment.** Section 10802 supersedes former Section 900 and a portion of the first sentence of former Section 901. As to the law applicable to a proceeding commenced before January 1, 1990, see Section 10850.

Subdivision (a) gives the testator the ability to provide for alternative methods of compensation in the will. For example, the will can eliminate the distinction between ordinary and extraordinary services and substitute an hourly rate or rates for the various services to be provided by the personal representative. The statutory compensation provisions are thus default provisions that apply where the will does not make provision for the compensation of the personal representative. Subdivision (a) also permits the personal representative to receive a greater amount of compensation than the statutory compensation if the decedent's will makes provision for the greater amount of compensation. Cf. *Estate of Van Every*, 67 Cal. App. 2d 164, 153 P.2d 614 (1944) (\$4,000 bequest to attorney in lieu of \$1,696.33 statutory fee). Subdivision (a) restates a portion of former Section 900 without substantive change.

The remainder of the section is comparable to Section 9682 (compensation of persons hired by personal representative) and supersedes the portions of former Sections 900 and 901 that permitted the personal representative to renounce the compensation provided by the will. The former ability to renounce the compensation provided by the will is replaced by a new requirement that court approval be obtained for the personal representative to receive greater compensation than provided under the will. See also the Comment to Section 9682.

Notice of hearing under this section is subject to general provisions governing notice under this code. See, e.g., Sections 1201 (notice not required to be given to oneself or persons joining in petition), 1202 (additional notice on court order), 1206 (notice to known heirs or devisees), 1215-1217 (mailing in general), 1260-1265 (proof of giving notice). The court for good cause may dispense with the notice otherwise required to be given pursuant to this section. See Section 1220(f).

**§10803. Agreement for higher compensation void**

10803. An agreement between the personal representative and an heir or devisee for higher compensation than that provided by this part is void.

**Comment.** Section 10803 restates former Section 903 without substantive change. This section applies to compensation for both ordinary and extraordinary services. Nothing prevents the personal representative from waiving all compensation or agreeing to take less than the statutory compensation. See *In re Estate of Marshall*, 118 Cal. 379, 381, 50 P. 540 (1897) (statutory compensation allowed when evidence of alleged agreement for lower compensation was insufficient). See also Feinfeld, *Fees and Commissions*, in 2 California Decedent Estate Practice §20.5 (Cal. Cont. Ed. Bar 1987). As to the law applicable to a proceeding commenced before January 1, 1990, see Section 10850.

**§10804. No compensation as estate attorney unless authorized by will or court order**

10804. Unless expressly authorized by the decedent's will or by court order, a personal representative who is an attorney may receive the personal representative's compensation but not compensation for services as the estate attorney.

**Comment.** Section 10804 codifies the general case law rule that the personal representative cannot serve as the estate attorney and receive dual compensation. See *In re Estate of Parker*, 200 Cal. 132, 251 P. 907 (1926); *Estate of Downing*, 134 Cal. App. 3d 256, 184 Cal. Rptr. 511 (1982); *Estate of Haviside*, 102 Cal. App. 3d 365, 368-69, 162 Cal. Rptr. 393, 395 (1980). The provision that dual compensation may be paid if expressly authorized by the decedent's will also codifies case law. See *Estate of Thompson*, 50 Cal. 2d 613, 328 P.2d 1 (1958); *Estate of Crouch*, 240 Cal. App. 2d 801, 49 Cal. Rptr. 926 (1966). See generally Feinfeld, *Fees and Commissions*, in 2 California Decedent Estate Practice §20.10-20.12 (Cal. Cont. Ed. Bar 1987). The provision that the court may authorize dual compensation by court order is new. As to the law applicable to a proceeding commenced before January 1, 1990, see Section 10850.

**§10805. Apportionment of compensation**

10805. If there are two or more personal representatives, the personal representative's compensation shall be apportioned among the personal representatives by the court according to the services actually rendered by each personal representative or as agreed to by the personal representatives.

**Comment.** Section 10805 restates the second sentence of former Section 901 without substantive change, with the addition of the reference to an agreement between the personal representatives concerning apportionment of their compensation. The added language is drawn from Section 8547 (division of compensation between special administrator and general personal representative). As to the law applicable to a proceeding commenced before January 1, 1990, see Section 10850.

**CHAPTER 2. ALLOWANCE OF COMPENSATION  
BY COURT****§10830. Partial allowance of compensation**

10830. (a) At any time after four months from the issuance of letters, the personal representative may file a petition requesting an allowance on the compensation of the personal representative.

(b) Notice of the hearing on the petition shall be given as provided in Section 1220 to all of the following:

(1) Each person listed in Section 1220.

(2) Each known heir whose interest in the estate is affected by the payment of the compensation.

(3) Each known devisee whose interest in the estate is affected by the payment of the compensation.

(4) The Attorney General, by mail at the office of the Attorney General in Sacramento, if any portion of the estate is to escheat to the state and its interest in the estate is affected by the payment of the compensation.

(c) On the hearing, the court may make an order allowing the portion of the compensation of the personal representative, on account of services rendered up to

that time, that the court determines is proper. The order shall authorize the personal representative to charge against the estate the amount allowed.

**Comment.** Section 10830 restates the substance of former Section 904. As to the priority for payment, see Section 11420. As to the law applicable to a proceeding commenced before January 1, 1990, see Section 10850.

The court for good cause may dispense with the notice otherwise required to be given to a person under Section 10830. See Section 1220(f). Nothing in Section 10830 excuses compliance with the requirements for notice to a person who has requested special notice. See Section 1220(e). The court may require further or additional notice, including a longer period of notice. See Section 1202. The court may, for good cause, shorten the time for giving notice. See Section 1203. For additional provisions relating to notice, see Sections 1200 to 1265. For a limitation on the court's authority to award a partial allowance of fees for extraordinary services, see Section 10832. See also Sections 8547 (compensation of special administrator), 10954(c) (final report to show compensation), and 12205 (reduction of compensation for delay in closing estate administration). See also Section 52 (defining "letters").

### **§10831. Final compensation**

10831. (a) At the time of the filing of the final account and petition for an order for final distribution, the personal representative may petition the court for an order fixing and allowing the personal representative's compensation for all services rendered in the estate proceeding.

(b) The request for compensation may be included in the final account or the petition for final distribution or may be made in a separate petition.

(c) Notice of the hearing on the petition shall be given as provided in Section 1220 to all of the following:

- (1) Each person listed in Section 1220.
- (2) Each known heir whose interest in the estate is affected by the payment of the compensation.

(3) Each known devisee whose interest in the estate is affected by the payment of the compensation.

(4) The Attorney General, by mail at the office of the Attorney General in Sacramento, if any portion of the estate is to escheat to the state and its interest in the estate is affected by the payment of the compensation.

(d) On the hearing, the court shall make an order fixing and allowing the compensation for all services rendered in the estate proceeding by the personal representative. The order shall authorize the personal representative to charge against the estate the amount allowed, less any amount previously charged against the estate pursuant to Section 10830.

**Comment.** Section 10831 is a new provision drawn from Section 10830. Final compensation is not to be paid until there is a final account or a final distribution. As to the priority for payment, see Section 11420. Section 10831 is in accord with existing practice. See Feinfeld, *Fees and Commissions*, in 2 California Decedent Estate Practice §20.34 (Cal. Cont. Ed. Bar 1987). As to the law applicable to a proceeding commenced before January 1, 1990, see Section 10850.

The court for good cause may dispense with the notice otherwise required to be given to a person under Section 10831. See Section 1220(f). Nothing in Section 10831 excuses compliance with the requirements for notice to a person who has requested special notice. See Section 1220(e). The court may require further or additional notice, including a longer period of notice. See Section 1202. The court may, for good cause, shorten the time for giving notice. See Section 1203. For additional provisions relating to notice, see Sections 1200 to 1265. See also Sections 8547 (compensation of special administrator), 10954(c) (final report to show compensation), and 12205 (reduction of compensation for delay in closing estate administration).

### **§10832. Limitation on allowance of compensation for extraordinary services**

10832. Notwithstanding Sections 10830 and 10831, the court may allow compensation to the personal representative for extraordinary services before final

distribution when any of the following requirements is satisfied:

(a) It appears likely that administration of the estate will continue, whether due to litigation or otherwise, for an unusually long time.

(b) Present payment will benefit the estate or the beneficiaries of the estate.

(c) Other good cause is shown.

**Comment.** Section 10832 is a new provision drawn from local court rules. In many cases, present payment will benefit the estate; compensation will be allowed near the end of a tax year to absorb estate income so that the income will not be taxable. As to the law applicable to a proceeding commenced before January 1, 1990, see Section 10850.

**Note.** For the local court rules from which Section 10832 is drawn, see Lake County Probate Rules §13.4(g); Marin County Rules of Probate Practice §1203; Merced County Probate Rules §1108; Orange County Probate Policy Memorandum §8.04; Riverside County Probate Policy Memoranda §6.1004; Sacramento County Probate Policy Manual §708; San Bernardino County Probate Policy Memorandum §906; San Francisco Probate Manual §13.03(a); San Mateo County Probate Rules, Rule 486(a); Santa Clara County Probate Rules §5.7(d); Santa Cruz County Probate Rules §405; Stanislaus County Probate Policy Manual §1008(b); Tuolumne County Probate Rules, Rule 12.11(e); Probate Rules of Third District Superior Courts, Rule 12.12(E).

### **CHAPTER 3. APPLICATION OF PART**

#### **§10850. Application of provisions of this part**

10850. (a) This part does not apply in any proceeding for administration of a decedent's estate commenced before January 1, 1990.

(b) The applicable law in effect before January 1, 1990, governing the subject matter of this part continues to apply in any proceeding for administration of a decedent's estate commenced before January 1, 1990, notwithstanding its repeal by the act that enacted this section.

**Comment.** Section 10850 limits the application of this part to proceedings commenced on or after January 1, 1990. Thus, for example, the allowance of compensation of the personal representative in a proceeding commenced before January 1, 1990, is governed by the applicable law in effect before January 1, 1990. See former Probate Code §§900-904 (compensation of personal representative).

## CONFORMING REVISIONS

### **Probate Code §7623 (technical amendment). Additional compensation of public administrator**

7623. (a) As used in this section, “additional compensation” means the difference between the reasonable ~~cost of the administration of an~~ *compensation of the public administrator in administering the estate* and the ~~commission~~ *compensation awarded the public administrator under Sections 901 and 902 Chapter 1 (commencing with Section 10800) of Part 7.*

(b) The public administrator may be awarded additional compensation if any of the following conditions are satisfied:

(1) A person having priority for appointment as personal representative has been given notice under Section 8110 of the public administrator’s petition for appointment, and the person has not petitioned for appointment in preference to the public administrator.

(2) The public administrator has been appointed after the resignation or removal of a personal representative.

**Comment.** Section 7623 is amended to substitute a reference to the chapter that replaced repealed Sections 901 and 902 and to make other nonsubstantive, clarifying revisions.

### **Probate Code §7666 (technical amendment). Compensation of public administrator**

7666. (a) Except as provided in subdivision (b), the ~~commissions~~ *compensation* payable to the public



administrator ~~and the attorney, if any,~~ for the filing of an application pursuant to this article and for performance of any duty or service connected therewith, ~~are those is that~~ set out in Sections 901, 902, and 910 Part 7 (commencing with Section 10800) .

(b) The public administrator is entitled to a minimum ~~commission~~ *compensation* of three hundred fifty dollars (\$350).

**Comment.** Section 7666 is amended to delete the reference to compensation of the attorney for the personal representative (this matter being covered by Section 9681), to change "commission" to "compensation," consistent with the terminology used in Part 7 (commencing with Section 10800) (compensation of personal representative), and to substitute a reference to that part which superseded the former provisions for determining compensation of the personal representative.

### **Probate Code §8547 (technical amendment).**

#### **Compensation of special administrator**

8547. (a) Subject to the limitations of this section, the court shall fix the ~~commission and allowances~~ *compensation* of the special administrator ~~and the fees of the attorney of the special administrator.~~

(b) The ~~commission~~ *compensation* of the special administrator shall not be allowed until the close of administration, unless the general personal representative joins in the petition for allowance of the special administrator's ~~commission~~ *compensation* or the court in its discretion so allows. ~~Extra allowances~~ *Compensation for extraordinary services* of a special administrator may be allowed on settlement of the final account of the special administrator. The total ~~commission~~ *compensation* paid ~~and extra allowances~~ *made* to the special administrator and general personal representative shall not, together, exceed the sums provided in ~~this code~~ Part 7 (commencing with Section 10800) for ~~commission and extra allowances~~

*compensation* for the *ordinary and extraordinary* services of a personal representative. If the same person does not act as both special administrator and general personal representative, the ~~commission and allowances~~ *compensation* shall be divided in such proportions as the court ~~deems~~ *determines to be just* or as may be agreed to by the special administrator and general personal representative.

~~(c) The total fees paid to the attorneys both of the special administrator and the general personal representative shall not, together, exceed the sums provided in this code as compensation for the ordinary and extraordinary services of attorneys for personal representatives. When the same attorney does not act for both the special administrator and general personal representative, the fees shall be divided between the attorneys in such proportions as the court deems just or as agreed to by the attorneys.~~

~~(d) Fees of an attorney for extraordinary services to a special administrator may be awarded in the same manner and subject to the same standards as for extraordinary services to a general personal representative, except that the award of fees to the attorney may be made on settlement of the final account of the special administrator.~~

**Comment.** Section 8547 is amended to change “commission and allowances” to “compensation”, consistent with the terminology used in Part 7 (commencing with Section 10800) (compensation of personal representative), and to delete subdivisions (c) and (d) which concerned attorneys’ compensation. Attorneys’ compensation is now governed by Sections 9681-9686.

### **Probate Code §9651 (technical amendment).**

#### **Taking possession of property of estate; delivery of property to person entitled thereto**

9651. (a) A personal representative who in good faith takes into his or her possession real or personal property,

and reasonably believes that the property is part of the estate of the decedent, is not:

(1) Criminally liable for so doing.

(2) Civilly liable to any person for so doing.

(b) The personal representative shall make reasonable efforts to determine the true nature of, and title to, the property so taken into possession.

(c) During his or her possession, the personal representative is entitled to receive all rents, issues, and profits of the property. If the property is later determined not to be part of the estate of the decedent, the personal representative shall deliver the property, or cause it to be delivered, to the person legally entitled to it, together with all rents, issues, and profits of the property received by the personal representative, less any expenses incurred in protecting and maintaining the property and in collecting rents, issues, and profits. The personal representative may request court approval before delivering the property pursuant to this subdivision.

(d) The court may ~~award~~ *allow* the personal representative ~~and the personal representative's attorney~~ reasonable compensation for services rendered in connection with the duties specified in this section as to property later determined not to be part of the estate of the decedent, if the court makes one of the following findings:

(1) ~~That the~~ *The services were of benefit to the estate. In such case If the court makes this finding , the compensation and the expenses and costs of litigation, including attorney's fees of the attorney retained by the personal representative to handle the matter, shall be* are a proper expense of administration.

(2) ~~That the~~ *The services were essential to preserve, protect, and maintain the property. In such case If the*

*court makes this finding* , the court shall award compensation *and the expenses and costs of litigation, including attorney's fees of the attorney retained by the personal representative to handle the matter*, as an expense deductible from the rents, issues, and profits received by the personal representative, or, if these are insufficient, as a lien against the property.

**Comment.** Section 9651 is amended to make it consistent with the new provisions relating to compensation of the estate attorney and to make nonsubstantive improvements in the language of the section. See Sections 9681-9686.

**Probate Code §10900 (amended). Contents of account**

10900. (a) An account shall include both a financial statement as provided in subdivision (b) and a report of administration as provided in subdivision (c).

(b) The financial statement shall include a summary statement, together with supporting schedules, of:

- (1) Property in all inventories.
- (2) Receipts, excluding property listed in an inventory.
- (3) Gains on sales.
- (4) Other acquisitions of property.
- (5) Disbursements.
- (6) Losses on sales.
- (7) Other dispositions of property.
- (8) Property remaining on hand.

(c) The report of administration shall state the liabilities of the estate, including creditor claims, *the hiring and payment of any persons under Section 9680 who have been or are to be paid out of funds of the estate*, and all other matters necessary to show the condition of the estate. The statement of liabilities shall include the following information:

- (1) Whether notice to creditors was given under Section 9050.

(2) Creditor claims filed, including the date of filing the claim, the name of the claimant, the amount of the claim, and the action taken on the claim.

(3) Creditor claims not paid, satisfied, or adequately provided for. As to each such claim, the statement shall indicate whether the claim is due and the date due, the date any notice of rejection was given, and whether the creditor has brought an action on the claim. The statement shall identify any real or personal property that is security for the claim, whether by mortgage, deed of trust, lien, or other encumbrance.

**Comment.** Subdivision (c) of Section 10900 is amended to require the report of administration to include a report concerning the hiring and payment of any persons hired under Section 9680 (persons hired to assist personal representative, including attorneys, accountants, auditors, technical advisors, and investment advisors).

**Probate Code §10954 (amended). When account not required**

10954. (a) Notwithstanding any other provision of this part, the personal representative is not required to file an account if any of the following conditions is satisfied as to each person entitled to distribution from the estate:

(1) The person has executed and filed a written waiver of account or a written acknowledgment that the person's interest has been satisfied.

(2) Adequate provision has been made for satisfaction in full of the person's interest. This paragraph does not apply to a residuary devisee or a devisee whose interest in the estate is subject to abatement, payment of expenses, or accrual of interest or income.

(b) A waiver or acknowledgment under subdivision (a) shall be executed as follows:

(1) If the person entitled to distribution is an adult and competent, by that person.

(2) If the person entitled to distribution is a minor, by a person authorized to receive money or property belonging to the minor. If the waiver or acknowledgment is executed by a guardian of the estate of the minor, the waiver or acknowledgment may be executed without the need to obtain approval of the court in which the guardianship proceeding is pending.

(3) If the person entitled to distribution is a conservatee, by the conservator of the estate of the conservatee. The waiver or acknowledgment may be executed without the need to obtain approval of the court in which the conservatorship proceeding is pending.

(4) If the person entitled to distribution is a trust, by the trustee, but only if the named trustee's written acceptance of the trust is filed with the court. In the case of a trust that is subject to the continuing jurisdiction of the court pursuant to Chapter 4 (commencing with Section 17300) of Part 5 of Division 9, the waiver or acknowledgment may be executed without the need to obtain approval of the court.

(5) If the person entitled to distribution is an estate, by the personal representative of the estate. The waiver or acknowledgment may be executed without the need to obtain approval of the court in which the estate is being administered.

(6) If the person entitled to distribution is incapacitated, unborn, unascertained, or is a person whose identity or address is unknown, or is a designated class of persons who are not ascertained or are not in being, and there is a guardian ad litem appointed to represent the person entitled to distribution, by the guardian ad litem.

*(7) If the person entitled to distribution has designated an attorney in fact who has the power under the power of attorney to execute the waiver or acknowledgment, by either of the following:*

*(A) The person entitled to distribution if an adult and competent.*

*(B) The attorney in fact.*

(c) Notwithstanding subdivision (a):

(1) The personal representative shall file a final report of administration at the time the final account would otherwise have been required. The final report shall include the amount of ~~fees and commissions~~ *compensation* paid or payable to the personal representative ~~and to the attorney~~ and shall set forth the basis for determining the amount.

(2) A creditor whose interest has not been satisfied may petition under Section 10950 for an account.

**Comment.** Section 10954 is amended to make the following revisions:

(1) Paragraph (7) of subdivision (b) is added to recognize the authority of an attorney in fact to execute a waiver or acknowledgment under Section 10954.

(2) The reference to the fees and commissions paid or payable to the attorney is deleted, and "fees and commissions" is changed to "compensation," consistent with the terminology used in Part 7 (commencing with Section 10800) (compensation of personal representative).

### **Probate Code §11003 (technical amendment).**

#### **Litigation expenses**

11003. (a) If the court determines that the contest was without reasonable cause and in bad faith, the court may award against the contestant the ~~fees, commissions,~~ *compensation* and costs of the personal representative and other expenses and costs of litigation, including attorney's fees, incurred to defend the account. The amount awarded is a charge against any interest of the contestant in the estate and the contestant is personally liable for any amount that remains unsatisfied.

(b) If the court determines that the opposition to the contest was without reasonable cause and in bad faith,

the court may award the contestant the costs of the contestant and other expenses and costs of litigation, including attorney's fees, incurred to contest the account. The amount awarded is a charge against the ~~fees and commission~~ *compensation* or other interest of the personal representative in the estate and the personal representative is liable personally and on the bond, if any, for any amount that remains unsatisfied.

**Comment.** Section 11003 is amended to change "fees" and "commissions" to "compensation," consistent with the terminology used in Part 7 (commencing with Section 10800) (compensation of personal representative).

**Probate Code §12205 (amended). Sanction for failure timely to close estate**

12205. If the time taken for administration of the estate exceeds the time required by this chapter or prescribed by the court, the court may, on the hearing for final distribution or for an allowance on the ~~commissions~~ *compensation* of the personal representative ~~or on the fees of the attorney~~, reduce the ~~commissions or fees~~ *compensation* by an amount the court ~~deems~~ *determines to be* appropriate, regardless of whether the ~~commissions or fees~~ *compensation* otherwise allowable under ~~the provisions of Sections 901 and 910~~ *Part 7 (commencing with Section 10800)* would be reasonable compensation for the services rendered, if the court determines that the time taken was within the control of the personal representative ~~or attorney~~ and *that the delay* was not in the best interest of the estate or interested persons. In making a determination under this section, the court shall take into account any action taken under Section 12202 as a result of a previous delay.

**Comment.** Section 12205 is amended to delete the reference to compensation of the attorney for the personal representative (this



matter being covered by Section 9681), to change "commissions" to "compensation," consistent with the terminology used in Part 7 (commencing with Section 10800) (compensation of personal representative), to substitute a reference to Part 7 which superseded former Section 901, and to add the clarifying words "that the delay."

### **Uncodified Transitional Provision**

**SEC. .** (a) The following sections, as amended by the act that enacted this section, do not apply in any proceeding for administration of a decedent's estate commenced before January 1, 1990:

- (1) Section 7623.
- (2) Section 7666.
- (3) Section 8547.
- (4) Section 9651.
- (5) Section 10900.
- (6) Section 10954.
- (7) Section 11003.
- (8) Section 12205.

(b) The sections listed in subdivision (a), as those sections existed prior to their amendment by the act that enacted this section, continue to apply in any proceeding for administration of a decedent's estate commenced before January 1, 1990, notwithstanding their amendment by the act that enacted this section.

(c) Sections 900, 901, 902, 903, 904, 910 and 911 of the Probate Code continue to apply in any proceeding for administration of a decedent's estate commenced before January 1, 1990, notwithstanding their repeal by the act that enacted this section.

**Comment.** This section makes clear that the conforming revisions made in the sections listed in the section do not apply to proceedings commenced before January 1, 1990. This is consistent with Sections 9686, 10406(d), and 10850, which provide the same rule for the substantive provisions of this act.

## COMMENTS TO REPEALED PROBATE CODE SECTIONS

### **§900 (repealed). Personal representative's compensation; renunciation of compensation provided by will**

**Comment.** Former Section 900 is superseded by Section 10802.

### **§901 (repealed). Percentage compensation; apportionment**

**Comment.** The first sentence of former Section 901 is superseded by subdivision (a) of Section 10800 and by Section 10802. The second sentence is restated in Section 10805 without substantive change with the addition of a reference to an agreement between the personal representatives concerning apportionment of their compensation. The third sentence is restated in subdivision (b) of Section 10800 without substantive change.

The last sentence of former Section 901 is not continued. Before 1965, the usual practice was to use gross value of real property to calculate the statutory fee unless the property was sold during probate, in which case only the decedent's equity in the property was used. Under the 1965 revision to former Section 901, gross value was used, whether or not a sale had taken place. See Review of Selected 1965 Code Legislation, at 222 (Cal. Cont. Ed. Bar 1965). The last sentence of former Section 901 was included in 1965 to make clear that the former practice was being changed; it is no longer necessary to continue this sentence.

### **§902 (repealed). Extraordinary services; employment of tax specialists**

**Comment.** The first sentence of former Section 902 is restated in Section 10801 without substantive change. The listing in former Section 902 of examples of what constitutes extraordinary services is not continued. The former list was incomplete. See Estate of Buchman, 138 Cal. App. 2d 228, 291 P.2d 547 (1955). Omission of the list is not intended to change the law, but rather to recognize that case law is well developed in this area. See the Comment to Section 10801.

The second sentence of former Section 902 is restated in subdivision (c) of Section 9683 without substantive change.

### **§903 (repealed). Contract for higher compensation void**

**Comment.** Former Section 903 is restated in Section 10803 without substantive change.

**§904 (repealed). Petition for allowance on compensation; notice**

**Comment.** Former Section 904 is restated in Section 10830 without substantive change.

**§910 (repealed). Attorney's compensation; services by paralegal**

**Comment.** Former Section 901 is superseded by Section 9681.

**§911 (repealed). Petition for allowance on compensation; notice**

**Comment.** Former Section 911 is superseded by Section 9681.



STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

RECOMMENDATION

relating to

**Multiple-Party  
Accounts In Financial Institutions**

February 1989

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

**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 Multiple-Party Accounts In Financial Institutions*, 20 Cal. L. Revision Comm'n Reports 95 (1990).

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

**CALIFORNIA LAW REVISION COMMISSION**

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February 10, 1989

To: The Honorable George Deukmejian  
*Governor of California*  
and  
The Legislature of California

The existing California Multiple-Party Accounts Law (Probate Code Sections 5100-5407) applies only to accounts held by credit unions and industrial loan companies. This recommendation proposes that coverage of the multiple-party accounts law be extended to include accounts held by banks and savings and loan associations.

Present law applicable to banks and savings and loan associations presumes that funds in a joint account belong equally to the parties during their lifetimes, without regard to how much each contributed to the account. The multiple-party accounts law conforms to the common understanding of depositors by presuming that funds in a joint account belong to the parties during lifetime in proportion to their net contributions.

A recent Court of Appeal decision held that a joint tenant of a bank account could not sever the joint tenancy without the consent of the other joint tenant. The court held that property purchased with the funds withdrawn from the account was subject to the survivorship right of the nonconsenting joint tenant. The multiple-party accounts law gives the opposite result; it permits a person having the present

right of withdrawal to sever the joint tenancy by withdrawing the funds from the account. Withdrawal of the funds does not, however, affect the ownership rights of the parties to the funds withdrawn.

When married persons deposit community funds in a joint tenancy bank or savings and loan association account, confusion arises whether the funds continue to be community property or are converted into a true common law joint tenancy. The multiple-party accounts law provides a rebuttable presumption that funds deposited by married persons in a joint tenancy account are presumed to be their community property.

The recommended legislation will provide a uniform body of law to apply to accounts held in all types of financial institutions. It will improve the law applicable to banks and savings and loan associations by adopting the better rules of the California Multiple-Party Accounts Law. In addition, it will make other improvements in the California Multiple-Party Accounts Law.

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

Respectfully submitted,

Forrest A. Plant  
*Chairperson*



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## INTRODUCTION

The California Multiple-Party Accounts Law (CAM-PAL) was enacted in 1983.<sup>1</sup> CAM-PAL improved and clarified the law governing rights between parties to a multiple-party account<sup>2</sup> and protects the financial institution from liability when it makes payment according to the terms of the account.<sup>3</sup> CAM-PAL enacted the substance of Part 1 of Article VI of the Uniform Probate Code.<sup>4</sup> At least 26 states have enacted legislation drawn from this article of the Uniform Probate Code.<sup>5</sup>

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1. Prob. Code §§5100-5407, enacted by 1983 Cal. Stat. ch. 92.

2. Prob. Code §§5301-5306. The statute recognizes three types of multiple-party accounts:

(1) The joint account. This is an account payable on request to one or more of two or more parties.

(2) The P.O.D. account. This is an account payable on request (i) to one person during lifetime and on the death of that person to one or more P.O.D. payees or (ii) to one or more persons during their lifetimes and on the death of all of them to one or more P.O.D. payees.

(3) The Totten trust account. This is an account in the name of one or more persons as trustee for one or more beneficiaries where (i) the relationship is established by the form of the account and the deposit agreement with the financial institution and (ii) there is no subject of the trust other than the sums on deposit in the account.

3. Prob. Code §§5401-5407.

4. Uniform Probate Code §§6-101 to 6-113 (1982). The California statute omits Section 6-107 of the Uniform Probate Code (rights of creditors) and adds a new provision (Prob. Code §5305) creating a community property presumption when community property is deposited by married persons. Although the Commission believes that the rule stated in UPC Section 6-107 is a desirable one, the section is not included in this recommendation. The Commission is giving further study to creditors' rights against nonprobate assets of the decedent, how liability for debts may be allocated fairly among such assets, and what the procedure should be for creditors to reach them.

5. Alaska Stat. §§13.31.005 to 13.31.070 (1988); Ariz. Rev. Stat. Ann. §§14-6101 to 14-6201 (1975); Cal. Prob. Code §§5100 to 5407 (West Supp. 1988); Colo. Rev. Stat. §§15-15-101 to 15-15-201 (1987); Ga. Code Ann. §§7-1-810 to 7-1-821 (1982); Hawaii Rev. Stat. §§560:6-101 to 560:6-113 (1988); Idaho Code §§15-6-101 to 15-6-201 (1979); Ind. Code Ann. §§32-4-1.5-1 to 32-4-1.5-14 (West 1979); Ky. Rev. Stat. §§391.300 to 391.360 (1988); Me. Rev. Stat. tit. 18-A, §§6-101 to 6-201 (1981); Mich. Stat. Ann. §§23.510(1) to 23.510(14) (1983) (limited to credit unions); Minn. Stat. Ann. §§528.01 to 528.14 (West 1975 & Supp. 1989); Neb. Rev. Stat. §§30-2701 to 30-2714 (1985); Nev. Rev. Stat. §§678.570-678.650 (1986) (limited to credit unions); N.J. Stat. Ann. §§17:16I-1 to 17:16I-17 (West

CAM-PAL was enacted upon recommendation of the California Law Revision Commission.<sup>6</sup> The bill that proposed CAM-PAL would have applied the statute to multiple-party accounts in all California financial institutions. But the bill was amended to make the statute apply only to credit unions and industrial loan companies.<sup>7</sup>

A 1988 California court of appeal decision demonstrated the need to include banks and savings and loan associations under CAM-PAL. In *Estate of Propst*,<sup>8</sup> the court held that one joint tenant could not sever a joint tenancy bank account without the consent of the other joint tenant. The court held that property purchased with funds withdrawn from the joint tenancy bank

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1984 & Supp. 1988); 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 & Supp. 1987); Or. Rev. Stat. §§708.600 to 708.656 (1987); 20 Pa. Cons. Stat. Ann. tit. 20, §§6301 to 6306 (Purdon Supp. 1988); S.C. Code Ann. §§62-6-101 to 62-6-201 (Law. Co-op. 1987 & Supp. 1988); S.D. Codified Laws Ann. §§30-23-43 to 30-23-55 (Supp. 1988); Tex. Prob. Code Ann. §§436 to 450 (Vernon 1980 & Supp. 1989); Utah Code Ann. §§75-6-101 to 75-6-201 (1978 & Supp. 1988); Va. Code §§6.1-125.1 to 6.1-125.16 (1988); Wash. Rev. Code Ann. §§30.22.010-30.22-220 (West 1986 & Supp. 1989); Wis. Stat. Ann. §§705.01 to 705.08 (West 1981 & Supp. 1988). Two of these states—South Carolina and South Dakota—enacted their statutes after the California Multiple-Party Accounts Law was enacted in 1983. A Multiple Party Accounts Law will be proposed by the Missouri Bar for enactment at the 1989 session of the Missouri Legislature. The bill is a result of a more than three-year study by The Missouri Bar Probate and Trust Committee.

6. See *Recommendation Relating to Nonprobate Transfers*, 16 Cal. L. Revision Comm'n Reports 129 (1982). An earlier study of the Uniform Probate Code by the State Bar of California reached the following conclusion: "The provisions of Part 1 of Article VI clarifying the rights and obligations of the financial institution and depositors in multiple-party accounts have considerable merit, and their addition to California's present statutory scheme would be beneficial." State Bar of California, *The Uniform Probate Code: Analysis and Critique* 188-89 (1973).

7. See Prob. Code §5101(c).

8. 203 Cal. App. 3d 993, 250 Cal. Rptr. 362 (1988) (opinion on rehearing). The court granted a rehearing in this case and refiled the same opinion after rehearing. Review by the California Supreme Court was granted (10-27-88) and was pending at the time this recommendation was published.

account was subject to the survivorship rights of the nonconsenting joint tenant.<sup>9</sup> The *Propst* decision followed a line of previously decided cases.<sup>10</sup>

Family law practitioners are concerned about the limitation on the ability of one spouse to eliminate survivorship rights in a joint account held by a married couple in a bank or savings and loan association. Where the spouses are estranged, one spouse cannot by unilateral action terminate the rights of survivorship with respect to funds in a joint account. As a result, after the death of one spouse, the surviving spouse may make a claim based on the survivorship right to funds withdrawn from a joint account by the deceased spouse

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9. See also *Cordasco v. Scalero*, 203 Cal. App. 2d 95, 105, 21 Cal. Rptr. 339 (1962) ("where community personal property or any other personal property, no matter what its original form might have been, has been changed by the parties to joint ownership during the joint lives of the owners, the funds so changed to joint tenancy, or any property acquired from the funds held in joint tenancy, will remain joint tenancy in character, unless there has been a change in the character of the property by some agreement between the parties."). The court in *Estate of Propst*, supra note 8, stated that this was the rule that prevailed in California.

10. *Fish v. Security-First Nat. Bank*, 31 Cal. 2d 378, 387, 189 P.2d 10 (1948) ("proceeds of joint tenancy property, in the absence of contrary agreement, retain the character of the property from which they are acquired"); *Estate of Drucker*, 152 Cal. App. 3d 509, 512, 199 Cal. Rptr 345 (1984) (dictum); *Cordasco v. Scalero*, 203 Cal. App. 2d 95, 105, 21 Cal. Rptr. 339 (1962); *Estate of McCoin*, 9 Cal. App. 2d 480, 50 P.2d 114 (1935). See also *Estate of Harris*, 9 Cal. 2d 649, 72 P.2d 873 (1937); *In re Kessler*, 217 Cal. 32, 35, 17 P.2d 117 (1932); *Estate of Harris*, 169 Cal. 725, 147 P. 967 (1915); *Estate of Zeisel*, 143 Cal. App. 3d 516, 523-524, 192 Cal. Rptr. 25 (1983); *Taylor v. Crocker-Citizens Nat. Bank*, 258 Cal. App. 2d 682, 688, 65 Cal. Rptr. 771 (1968); *Doran v. Hibernia Savings & Loan Soc.*, 80 Cal. App. 2d 790, 795, 182 P.2d 630 (1947); *Wallace v. Riley*, 23 Cal. App. 2d 654, 665, 74 P.2d 807 (1937). In *Bliss v. Martin*, 74 Cal. App. 2d 500, 515, 169 P.2d 61 (1946), Justice Peters, dissenting, states: "I personally believe that the rule in California is wrong. . . . If there is to be a change in that rule at this late date it should be accomplished by the Supreme Court and not by a lower appellate court."

Where it is shown that the account is a convenience account rather than a true joint tenancy account, rights of survivorship are terminated when the owner of the funds withdraws the funds from the account and deposits them in a new account. E.g., *Patterson v. Comastri*, 39 Cal. 2d 66, 244 P.2d 902 (1952).

or to property the deceased spouse acquired with those funds.

In addition, in a marriage dissolution proceeding, it is unclear whether the deposit of separate property funds in a joint account will be held to be a gift of one half of the funds to the other spouse or whether the interests of the spouses in the funds deposited in the account can be shown by tracing the funds in the account to a separate property source.<sup>11</sup>

Estate planning also is hampered by the inability of one party to a joint account in a bank or savings and loan association to eliminate survivorship rights by either changing the terms of the account or withdrawing funds from the account.<sup>12</sup> Moreover, if a joint tenant cannot eliminate the right of survivorship by withdrawing the funds from the joint account, the likelihood of litigation is increased because the joint tenant will attempt to defeat the right of survivorship by seeking to establish that the account was not a true joint tenancy account.<sup>13</sup>

For these reasons, practitioners generally agree that remedial legislation is urgently needed (1) to permit a

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11. The enactment of Civil Code Sections 4800.1 and 4800.2 in 1983 (Cal. Stat. 1983 ch. 342 §§1, 2), which apply only in case of division of property upon dissolution of marriage or legal separation, creates uncertainty whether the comprehensive rule governing multiple-party accounts stated in Probate Code Section 5305, also enacted in 1983 (1983 Cal. Stat. ch. 92 §5), applies in the case of division of property upon dissolution of marriage or legal separation. Section 5305 is not limited to disposition of property upon dissolution of marriage or legal separation, and is not consistent with Civil Code Section 4800.1 insofar as Section 5305 allows tracing to a separate property source where funds are deposited in a "joint tenancy" account. However, in view of Civil Code Section 4800.2, the result under Section 5305 is generally consistent with the result under Civil Code Sections 4800.1 and 4800.2 in the case of division of property upon dissolution of marriage or legal separation.

12. See IX CEB Estate Planning and California Probate Reporter 146 (1988).

13. If the account is a convenience account rather than a true joint tenancy account, rights of survivorship can be terminated by withdrawing the funds from the account and depositing them in another account in the name of the owner of the funds. E.g., *Patterson v. Comastri*, 39 Cal. 2d 66, 244 P.2d 902 (1952).

joint tenant having a present right of withdrawal to eliminate survivorship rights in a joint tenancy bank account without the consent of the other joint tenants and (2) to clarify the ownership of funds deposited in a joint bank account.

Extension of CAM-PAL to all banks and savings and loan associations would provide the appropriate rules governing these matters. Under CAM-PAL, the right of survivorship can be terminated by the unilateral act of a party having a present right of withdrawal from the account.<sup>14</sup> In addition, the source of the funds deposited is taken into account in determining the interests in funds deposited in or withdrawn from a joint account.<sup>15</sup>

Banks and savings and loan associations asked to be excluded from CAM-PAL in 1983 because they were concerned about possible uncertainty in applying the new law.<sup>16</sup> The Commission has reviewed the experience under CAM-PAL since its enactment in 1983. The credit unions are satisfied with the statute.<sup>17</sup> It serves credit union members well by offering several types of accounts that serve particular savings or transaction needs.<sup>18</sup> At the same time, the statute gives the credit

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14. Under CAM-PAL, rights of survivorship are determined by the form of the account at the death of a party, and a joint tenant with a present right of withdrawal can change the terms of the account to eliminate rights of survival. Prob. Code §5303.

15. See Prob. Code §5301(a). See also Prob. Code §5305. But see *supra* note 11.

16. CAM-PAL applies only to credit unions and industrial loan companies; it does not apply to banks and savings and loan associations. See Prob. Code §5101(c) (defining "financial institution").

17. Letter from Larry J. Cox, Director of Government Relations, California Credit Union League, to John H. DeMouly (Dec. 26, 1985) (on file in office of Law Revision Commission).

18. The California Multiple-Parties Account Law gives the financial institution a greater ability to provide the appropriate form of account for the parties to a multiple-party account. See letter from Larry J. Cox, Director of Government Relations, California Credit Union League, to John H. DeMouly (Dec. 26, 1985) (on file in office of Law Revision Commission).

union substantial protection when it transacts business with members who are parties to a multiple-party account.<sup>19</sup> The credit unions have had no difficulty in implementing the statute or in operating under it.

The Commission recommends that the California Multiple-Party Accounts Law be broadened to include banks and savings and loan associations. This will provide a carefully drafted solution to the problem revealed by the *Propst* case. It will make uniform the law governing rights between parties to multiple-party accounts, whether the account is held by a bank, savings and loan association, credit union, or industrial loan company. Broadening CAM-PAL to include banks and savings and loan associations would not create operational problems for these financial institutions; the CAM-PAL provisions governing rights of the parties to the account are relevant only to controversies between the parties and their creditors and other successors, and these provisions have no bearing on the duties of the financial institution.<sup>20</sup> Extending the CAM-PAL to banks and savings and loan associations will give them the same protection against liability that credit unions and industrial loan companies now have.<sup>21</sup>

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19. See Prob. Code §§5401-5407.

20. Prob. Code §5201. Section 5201 provides:

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.

21. See Prob. Code §§5401-5407.



## RIGHT OF SURVIVORSHIP

Under present law applicable to banks and savings and loan associations, the right of survivorship in a joint tenancy account cannot be terminated without the consent of the other joint tenants, and property purchased with funds withdrawn from the joint tenancy account remains subject to the survivorship rights of the nonconsenting joint tenant.<sup>22</sup> Extending CAM-PAL to banks and savings and loan associations would change this rule to permit a joint tenant having a present right of withdrawal to eliminate survivorship rights in a joint tenancy account without the consent of the other joint tenants. In addition, this extension would make applicable the provisions of CAM-PAL that govern the rights during lifetime to funds deposited in and withdrawn from a joint account.<sup>23</sup>

CAM-PAL also strengthens the right of survivorship by requiring clear and convincing evidence of a contrary intent,<sup>24</sup> and by providing that survivorship cannot be changed or defeated by a party's will.<sup>25</sup> Most people who use a joint account or Totten trust account want the survivor or survivors to have all balances remaining at death.<sup>26</sup> CAM-PAL gives effect to this intent and minimizes the likelihood that litigation will be brought to defeat the right of survivorship.

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22. See *supra* note 10.

23. See Prob. Code §§5301, 5305.

24. Prob. Code §5302. Under existing law applicable to bank and savings and loan association accounts, it is a difficult burden to overcome the presumption of survivorship intent. See, e.g., *In re Marriage of Mahone*, 123 Cal. App. 3d 17, 176 Cal. Rptr. 274 (1981); Sims, *Consequences of Depositing Separate Property in Joint Bank Accounts*, 54 Cal. St. B.J. 452 (1979).

25. Prob. Code §5302(e). If the account is expressly described as a "community property" account, the ownership and survivorship rights will be governed by the rules that apply to community property generally. See text *infra* accompanying note 47.

26. Uniform Probate Code §6-104 comment; Griffith, *Community Property in Joint Tenancy Form*, 14 Stan. L. Rev. 87, 90, 95, 108 (1961).

## RIGHTS DURING LIFETIME

Present law applicable to banks and savings and loan associations presumes that funds in a joint account belong equally to the parties during their lifetimes, without regard to how much each contributed to the account.<sup>27</sup> But a person who deposits funds in a multiple-party account normally does not intend to make an irrevocable present gift of any part of the funds deposited,<sup>28</sup> and many people believe that depositing funds in a joint account in a bank or savings and loan association has no effect on ownership of the funds until death.<sup>29</sup>

The California Multiple-Party Accounts Law conforms to the common understanding of depositors by presuming that funds in a joint account belong to the parties during lifetime in proportion to their net contributions.<sup>30</sup> This rule is consistent with the federal gift tax rule that no completed gift occurs when the account is opened; instead the gift occurs when the nondepositing party withdraws funds from the account.<sup>31</sup>

## AGENCY ACCOUNTS

All too frequently, an uninformed person will select a joint tenancy account as a convenience account. The person will deposit his or her funds in the account and make a friend or relative a joint tenant so that the friend or relative will be able to make withdrawals from the account for the use or benefit of the person making the deposit. A well advised person will open an account in

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27. See *Wallace v. Riley*, 23 Cal. App. 2d 654, 664, 74 P.2d 807 (1937).

28. Uniform Probate Code §6-103 comment.

29. State Bar of California, *The Uniform Probate Code: Analysis and Critique* 184-85 (1973). See generally Griffith, *Community Property in Joint Tenancy Form*, 14 Stan. L. Rev. 87 (1961).

30. Prob. Code §5301(a). The presumption may be overcome by clear and convincing evidence that the parties had some other intention. *Id.*

31. Treas. Reg. §25.2511-1 (1958).

his or her own name and give the friend or relative a power of attorney to make withdrawals from the account. This avoids giving the attorney-in-fact (agent) an apparent ownership right to the funds in the account, but permits the agent to make any necessary transactions with respect to the account. To encourage use of an agency account where appropriate, the proposed legislation adds to CAM-PAL a provision for a special power of attorney for account transactions.<sup>32</sup> This provision will not affect or limit the use of other powers of attorney in connection with accounts in financial institutions.

### TENANCY IN COMMON ACCOUNTS

Under existing law, if a joint account was established as a "tenancy in common" account before the operative date of the California Multiple-Party Accounts Law, no right of survivorship arises from the terms of the account or under the provisions of the law.<sup>33</sup> This is consistent with common law, under which a tenancy in common did not include a right of survivorship.<sup>34</sup>

However, if a tenancy in common account is established after the operative date of the California Multiple-Party Accounts Law,<sup>35</sup> it is subject to the rule that a joint account carries with it a right of survivorship unless

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32. Other states have added a similar provision to their version of this portion of the Uniform Probate Code. E.g., Minn. Stat. Ann. §§523.01 et seq. (West 1975 & Supp. 1989); Or. Rev. Stat. §708.661 (1987); Utah Code Ann. §76-6-115 (1978 & Supp. 1987); Wash. Rev. Code Ann. §30.22.170 (1988); Wis. Stat. Ann. §705.05 (West 1981 & Supp. 1987).

33. Prob. Code §5306.

34. Cf. 4 B. Witkin, Summary of California Law *Real Property* §262, at 463-64 (9th ed. 1987) (real property).

35. The standard account card form used by credit unions under the California Multiple-Party Accounts Law does not use the technical "tenancy in common" language. Instead the standard form indicates whether the depositor wants an account "[w]ith right of survivorship (all shares shall pass to the surviving parties on the account)," or that "[u]pon the death of a party, that party's interest shall be paid to his/her designated beneficiary." Since there is

there is clear and convincing evidence of a different intention.<sup>36</sup> It is not clear whether establishment of the account as a "tenancy in common" account is clear and convincing evidence of an intention not to have survivorship.

The Commission recommends that a "tenancy in common" account be treated as a nonsurvivorship account, whether established before or after the operative date of the California Multiple-Party Accounts Law (July 1, 1984), unless the terms of the account or deposit agreement expressly provide for survivorship. Thus, the decedent's share of the account will be paid to the decedent's designated P.O.D. payees or, absent such designation, into the decedent's estate to be administered with the decedent's other property. This is probably consistent with what the depositors intend when they establish a "tenancy in common" account.

## **COMMUNITY PROPERTY**

### **Community Property Funds Deposited in Joint Account**

Married persons may deposit community funds in a joint account, Totten trust account, or P.O.D. account in a financial institution. Under existing California law, if the account is held by a bank or savings and loan association, a presumption arises that the deposit of community funds in a joint account transmutes the

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no need to use "tenancy in common" language under the California Multiple-Party Accounts Law, the banks and savings and loan associations may follow the sound credit union practice of using clear, lay language to dispose of account funds at death. If so, the "tenancy in common" account will become a relic of history. The proposed law does not, however, preclude a bank or savings and loan association from continuing to offer "tenancy in common" accounts, so there may be tenancy in common accounts established after the proposed law goes into effect.

36. Prob. Code §5302(a).

funds into a true common law joint tenancy.<sup>37</sup> However, 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.<sup>38</sup> Litigation may be necessary to determine whether the funds in the account are true common law joint tenancy funds or community property in joint tenancy form.

Extending CAM-PAL to joint accounts held by married persons in a bank or savings and loan association would make it easier for married persons simultaneously to have the advantages of community property and the survivorship feature of joint tenancy property as they generally intend. The extension would eliminate the unrealistic presumption of transmutation that now applies to bank and savings and loan association accounts. This presumption would be replaced with a rebuttable<sup>39</sup> presumption that funds of married persons in a joint

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37. See *Estate of McCoin*, 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). But see Civil Code §§4800.1 and 4800.2 (division of property upon dissolution of marriage or legal separation).

38. 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. *Id.* at 93-94. However, the property does not lose all the characteristics of joint tenancy since a bona fide purchaser is protected. See *id.* at 94.

39. Under the California Multiple-Party Accounts Law (Prob. Code §5305), 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).

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.

Extending CAM-PAL to joint accounts of married persons in banks and savings and loan associations also would make clear that a right of survivorship arising from the express terms of the account or by virtue of the statute cannot be changed by will.<sup>40</sup> Existing law applicable to banks and savings and loan associations permits one spouse to dispose by will of half of the community property funds in a joint account, thereby defeating the right of the other spouse to take the funds by survivorship.<sup>41</sup> CAM-PAL protects the right of the survivor by providing that survivorship rights to funds in a joint account cannot be changed or defeated by will.<sup>42</sup> Adopting this rule for accounts held by banks and savings and loan associations will conform to the intent of most married persons: Married persons who deposit community funds in a survivorship account, whether a joint, P.O.D., or Totten trust account, generally want to keep the benefits of community property during their

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40. This provision—Prob. Code §5305(c)—is consistent with the general rule under the California Multiple-Party Accounts Law 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. Prob. Code §5302(e).

41. Under present law applicable to banks and savings and loan associations, the right of survivorship in a joint account or Totten trust account may be overcome by evidence that the depositor intended some other disposition of the funds. See *supra* note 23. Under the law applicable to banks and savings and loan associations, if it is shown that the funds on deposit are community property despite the joint, Totten trust, or P.O.D. form of the account, each spouse may dispose of his or her half by will. See Prob. Code §6101(b); *Brucks v. Home Federal Savings & Loan Ass'n*, 36 Cal. 2d 845, 852-53, 228 P.2d 545 (1951) (testamentary plan wholly inconsistent with terms of Totten trust revokes the trust).

42. Prob. Code §5305(c).

lifetimes and to pass the funds at death to the survivor with a minimum of delay and expense.<sup>43</sup>

The Commission also recommends that it be made clear that an agreement between the spouses that funds in a joint account traceable to separate property are instead community property must be in writing.<sup>44</sup> This is consistent with the requirement that an agreement that the funds are not community property must be in writing,<sup>45</sup> and with the general requirement that transmutation agreements must be in writing.<sup>46</sup>

### **Account Expressly Described as "Community Property" Account**

Married persons may deposit funds in an account expressly described in the terms of the account or in the deposit agreement as a "community property" account. CAM-PAL does not specifically cover this type of account. The Commission recommends that a provision be added to CAM-PAL to make clear that an account expressly described as a "community property" account is governed by the rules that apply to community property generally.<sup>47</sup> This provision will effectuate the intent of the parties in selecting this type of account.

## **PAYMENTS TO MINORS**

On death of a trustee of a Totten trust account, a bank may pay account funds directly to a minor beneficiary.<sup>48</sup>

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43. See Griffith, *Community Property in Joint Tenancy Form*, 14 Stan. L. Rev. 87, 90, 95, 108 (1961).

44. This rule will prevail over the rule stated in Civil Code Sections 4800.1 and 4800.2 (division of property upon dissolution of marriage or legal separation).

45. Prob. Code §5305.

46. Civ. Code §5110.730.

47. This provision will apply to accounts specifically designated as "community property" accounts, whether established before or after the revision of CAM-PAL becomes operative. As to the rules applicable to an account specifically designated as a "community property" account, see *supra* note 38. See also Civ. Code §§4800.1, 4800.2.

48. Fin. Code §853.

CAM-PAL does not permit payment directly to a minor beneficiary; it requires that payment be made to the minor's parent or guardian or be deposited in a court-controlled account.<sup>49</sup> The law will be improved by making the CAM-PAL rule applicable to banks.<sup>50</sup> That rule is the better rule and one that is consistent with general California law concerning payment to a minor.<sup>51</sup>

### **TRANSITIONAL PROVISIONS**

So that the extension of CAM-PAL will impose no significant financial burden on banks and savings and loan associations, the proposed legislation includes a transitional provision that makes clear that a financial institution has no duty to inform depositors and others of the enactment of the proposed legislation. A similar provision was included in CAM-PAL when it was enacted in 1983.<sup>52</sup> The recommended legislation will apply to accounts in existence on January 1, 1990, and to accounts thereafter established.

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49. Prob. Code §5407.

50. The recommended legislation also revises the California Multiple-Party Accounts Law to authorize payment to a custodian pursuant to the California Uniform Transfers to Minors Act (Prob. Code §§3900-3925).

51. See Prob. Code §§3400-3413.

52. 1983 Cal. Stat. ch. 92, §6.



**OUTLINE OF PROPOSED LEGISLATION  
REVISION OF THE CALIFORNIA MULTIPLE-PARTY ACCOUNTS  
LAW**

**(All sections in Probate Code)**

§5101 (repealed). Definitions

§§5120-5152 (added). Definitions

§5120. Application of definitions

§5122. Account

§5124. Agent

§5126. Beneficiary

§5128. Financial institution

§5130. Joint account

§5132. Multiple-party account

§5134. Net contribution

§5136. Party

§5138. Payment

§5139. P.O.D.

§5140. P.O.D. account

§5142. P.O.D. payee

§5144. Proof of death

§5146. Receives

§5148. Request

§5150. Sums on deposit

§5152. Withdrawal

§5203 (added). Creation of multiple-party relationship

§5204 (added). Special power of attorney for account transactions

§5301 (amended). Ownership during lifetime

§5302 (amended). Right of survivorship

§5303 (amended). Rights of survivorship determined by form of account at time of death; methods for change of terms of account

§5305 (amended). Presumption that sums on deposit are community property

§5306 (amended). Account expressly described as "tenancy in common" account

§5307 (added). Account expressly described as "community property" account

§5401 (amended). Multiple-party accounts; terms; requirements

§5404 (amended). Payment of Totten trust account

§5406 (technical amendment). Payment of account held in trust form where financial institution has no notice that account is not a "Totten trust account"

§5407 (amended). Payment to minor

**CONFORMING REVISIONS**

Civil Code §683 (amended). Joint tenancy

Financial Code §852 (repealed). Joint bank accounts

Financial Code §852 (added). Multiple-party accounts

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

Financial Code §853 (repealed). Trust accounts

Financial Code §6661 (technical amendment). Notice of adverse claim to savings account or personal property

Financial Code §6800 (repealed). Joint tenants

Financial Code §6800 (added). Multiple-party accounts

Financial Code §6801 (repealed). Payments to joint tenants  
 Financial Code §6802 (repealed). Conclusive evidence of ownership  
 Financial Code §6803 (repealed). Multiple signatures; discharge of association  
 Financial Code §6804 (technical amendment). Nonliability for taxes  
 Financial Code §6853 (repealed). Totten trust account  
 Financial Code §6854 (repealed). Pay-on-death accounts  
 Financial Code §6855 (technical amendment). Nonliability for taxes  
 Financial Code §14854.5 (repealed). Pay-on-death accounts  
 Financial Code §14868 (added). Current address of Totten trust beneficiary  
 Financial Code §18318.5 (repealed). Pay-on-death accounts  
 Financial Code §18318.5 (added). Multiple-party accounts  
 Probate Code §20 (amended). Application of definitions  
 Probate Code §269 (technical amendment). P.O.D. account  
 Probate Code §6600 (technical amendment). Decedent's estate defined  
 Probate Code §13050 (technical amendment). Property excluded in determining  
 property or estate of decedent or its value

#### TRANSITIONAL PROVISIONS

No duty to inform persons of enactment of act  
 Application to existing accounts

## REVISION OF THE CALIFORNIA MULTIPLE-PARTY ACCOUNTS LAW

### Probate Code §5100 (article heading added)

SEC. \_\_\_\_\_. An article heading is added immediately preceding Section 5100 of the Probate Code, to read:

Article 1. Short Title

### Probate Code §5101 (repealed). 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:~~

~~(1) Any organization authorized to do business under state or federal laws relating to credit unions.~~

~~(2) Any industrial loan company as defined in Section 18003 of the Financial Code.~~

~~(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 it 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. The deposit agreement shall indicate the current address of any beneficiary. 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.** The introductory portion of former Section 5101 is restated without substantive change in Section 5120 (application of definitions). Subdivision (a) is restated without substantive change in Section 5122 ("account" defined). Subdivision (b) is restated in Section 5126 ("beneficiary" defined) without substantive change.

Subdivision (c) is superseded by Section 5128. Subdivision (c) defined "financial institution" to mean a credit union or industrial loan company. Under new Section 5128, "financial institution" also includes a bank, savings and loan association, and other like organization. See the Comment to Section 5128.

Subdivision (d) is continued without change in Section 5130. The first sentence of subdivision (e) is restated in Section 5132

without substantive change. The second sentence of subdivision (e) is restated without substantive change in subdivision (b) of Section 5122. Subdivision (f) is restated in Section 5134 without substantive change. Subdivision (g) is restated without substantive change in Section 5136 except that the second sentence is not continued, this sentence being superseded by Section 5122(b)(4) ("account" does not include an account established for the deposit of funds of the estate of a ward, conservatee, or decedent). Subdivision (h) is restated in Section 5138 without substantive change. Subdivision (i) is continued without change in Section 5140. Subdivision (j) is continued without change in Section 5142. Subdivision (k) is continued without change in Section 5144. Subdivision (l) is continued without change in Section 5146. Subdivision (m) is restated in Section 5148 without substantive change. Subdivision (n) is restated in Section 5150 without substantive change. The first, second, and fourth sentences of subdivision (o) are omitted as unnecessary in view of the general definition of "Totten trust account" in Section 80 and the substitution of "Totten trust account" for "trust account" where appropriate in this part. The substance of the third sentence of subdivision (o) (added by 1987 Cal. Stat. ch. 1045) is continued in Section 14868 of the Financial Code. Subdivision (p) is restated in Section 5152 without substantive change.

## **Probate Code §§5120-5152 (added). Definitions**

### **Article 2. Definitions**

#### **§5120. Application of definitions**

5120. Unless the provision or context otherwise requires, the definitions in this article govern the construction of this part.

**Comment.** Section 5120 restates without substantive change the introductory portion of former Section 5101. Section 5120 is consistent with the introductory clause of Uniform Probate Code Section 6-101 (1982).

#### **§5122. Account**

5122. (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) "Account" does not include:

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

(2) An account 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 deposit agreement.

(4) An account established for the deposit of funds of the estate of a ward, conservatee, or decedent.

**Comment.** Subdivision (a) of Section 5122 restates subdivision (a) of former Section 5101 without change and is the same in substance as subsection (1) of Section 6-101 of the Uniform Probate Code (1982). Paragraphs (1)-(3) of subdivision (b) of Section 5122 restate the second sentence of subdivision (e) of former Section 5101 without substantive change and are the same in substance as the second sentence of subsection (5) of Section 6-101 of the Uniform Probate Code (1982). Paragraph (4) of subdivision (b) is new. The new paragraph makes clear that the rules applicable to an account established for funds of a guardianship, conservatorship, or decedent's estate are not affected by this part.

#### **§5124. Agent**

5124. "Agent" means a person who has a present right, subject to request, to payment from an account as an attorney in fact under a power of attorney.

**Comment.** Section 5124 is a new provision. See also Section 5204 (power of attorney with respect to accounts at financial institutions).

#### **§5126. Beneficiary**

5126. "Beneficiary" means a person named in a Totten trust account as one for whom a party to the account is named as trustee.

**Comment.** Section 5126 restates subdivision (b) of former Section 5101 without substantive change and is the same in substance as subsection (2) of Section 6-101 of the Uniform Probate Code (1982). See Section 80 defining “Totten trust account.” As used in this part, “trustee” means the trustee of a Totten trust account.

### **§5128. Financial institution**

5128. “Financial institution” includes:

(a) A financial institution as defined in Section 40.

(b) An industrial loan company as defined in Section 18003 of the Financial Code.

**Comment.** Section 5128 supersedes subdivision (c) of former Section 5101. The term “financial institution” as defined in subdivision (c) of former Section 5101 was limited to credit unions and industrial loan companies. The new definition in Section 5128 applies as well to banks, savings and loan associations, and other like organizations. See Section 40 (“financial institution” defined).

Subdivision (a) of Section 5128 is comparable to subsection (3) of Section 6-101 of the Uniform Probate Code (1982). Subdivision (b) of Section 5128 continues a portion of subdivision (c) of former Section 5101.

### **§5130. Joint account**

5130. “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.

**Comment.** Section 5130 continues subdivision (d) of former Section 5101 without change and is the same in substance as subsection (4) of Section 6-101 of the Uniform Probate Code (1982).

The definition of “joint account” embraces all of the following:

(1) *Joint account with right of survivorship.* See Sections 5301(a) and 5302(a).

(2) *Joint account without right of survivorship.* This is a special type of joint account where there is clear and convincing evidence of an intent not to have survivorship. The terms of the account may include an express statement making clear that there is no survivorship right (see subdivision (a) of Section 5302) or the account may be designated as a “tenancy in common” account (see Section 5306).



(3) *Joint account held by a husband and wife with right of survivorship that can not be changed by will.* This is a joint account held by a husband and wife that is not specifically designated in the account agreement as a “community property” account where there is no clear and convincing evidence of an intent that there be no survivorship right. The statute creates a presumption that if the 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. See Section 5305. The rules stated in Section 5301(a) and 5302(a) apply to this type of joint account, including a rule that the right of survivorship of the surviving spouse cannot be changed by will. However, if the deposit agreement or the terms of the account *clearly indicates an intent that there be no survivorship right*, either spouse can designate one or more P.O.D payees (or Totten trust beneficiaries) to take that spouse’s share of the account upon the death of that spouse and, absent such a designation, the share of the deceased spouse becomes a part of the estate of the deceased spouse.

(4) *Joint account held by husband and wife that is specifically designated as a “community property” account.* This is a joint account held by a husband and wife that is specifically designated in the account agreement as a “community property” account. Section 5307 provides that this type of account is governed by the rules that apply to community property generally. Accordingly, unless the parties have agreed otherwise, the right of survivorship of the surviving spouse can be changed by will (deceased spouse by will devises his or her one-half share of the account to a person other than the surviving spouse). Also, the deposit agreement or the terms of the account can include, for example, a provision that the one-half share of a spouse will pass on the death of that spouse to one or more P.O.D payees (or Totten trust beneficiaries) upon the death of that spouse. On the other hand, absent a contrary agreement or a contrary disposition, the surviving spouse will take the one-half share of the deceased spouse as community property.

### **§5132. Multiple-party account**

5132. A “multiple-party account” is any of the following types of account:

- (a) A joint account.

(b) A P.O.D. account.

(c) A Totten trust account.

**Comment.** Section 5132 restates the first sentence of subdivision (e) of former Section 5101 without substantive change, and is the same in substance as the first sentence of subsection (5) of Section 6-101 of the Uniform Probate Code (1982). See also Section 5204 (agency account). As to types of joint accounts, see the Comment to Section 5130.

### **§5134. Net contribution**

5134. (a) “Net contribution” of a party to an account as of any given time is the sum of all of the following:

(1) 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.

(2) A pro rata share of any interest or dividends earned, whether or not included in the current balance.

(3) Any proceeds of deposit life insurance added to the account by reason of the death of the party whose net contribution is in question.

(b) In the absence of proof otherwise:

(1) Only parties who have a present right of withdrawal shall be considered as having a net contribution.

(2) The net contribution of each of the parties having a present right of withdrawal is deemed to be an equal amount.

**Comment.** Section 5134 restates the substance of subdivision (f) of former Section 5101 with the substitution of “whether or not included in the current balance” for the former phrase “included in the current balance.”

Subdivision (a) of Section 5134 is the same in substance as subsection (6) of Section 6-101 of the Uniform Probate Code (1982). As may be seen from examination of the provisions of this part, “net contribution” as defined in Section 5134 has no application to the financial institution-depositor relationship. Rather, it is relevant only to controversies that may arise between parties to a multiple-party account.

Subdivision (b) of Section 5134 is not found in the Uniform Probate Code. This subdivision provides a clear rule concerning

the amount of “net contribution” in the absence of proof of a different amount.

### **§5136. Party**

5136. (a) “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 other than as an agent.

(b) A P.O.D. payee is a party, by reason of being a P.O.D. payee, only after the account becomes payable to the payee by reason of surviving all persons named as original payees.

(c) A beneficiary of a Totten trust account is a party, by reason of being a beneficiary, only after the account becomes payable to the beneficiary by reason of surviving all persons named as trustees.

**Comment.** Section 5136 restates the substance of subdivision (g) of former Section 5101 without substantive change, and is the same in substance as subsection (7) of Section 6-101 of the Uniform Probate Code (1982), with the following revisions:

(1) Section 5136 omits the third sentence of former subdivision (g) (defining “party” to include a guardian, conservator, personal representative, or assignee, including a levying creditor, of a party). This part does not apply to an account established for the deposit of funds of the estate of a ward, conservatee, or decedent. See Section 5122(b)(4).

(2) Section 5136 omits the portion of the last sentence of former subdivision (g) relating to “a person identified as a trustee of an account for another whether or not a beneficiary is named,” this portion being unnecessary. Insofar as this language applied to the trustee of a Totten trust account, it is unnecessary in view of subdivision (a) of Section 5136. Insofar as this language applied to a regular trust account under a testamentary trust or a trust agreement that has significance apart from the account, it is unnecessary because this statute does not apply to such a trustee. See Section 5122(b)(3). See also Section 80 (defining “Totten trust account”).

(3) Section 5136 revises the remaining portion of the last sentence of former subdivision (g) to conform to the language used in subdivision (b) of Section 5136.

The phrase "other than as an agent" in the first sentence of subdivision (b) makes clear that the person named as an agent (attorney in fact under a power of attorney) is not a "party" for the purposes of the statute. See Section 5124 (defining "agent"). A P.O.D. payee or a Totten trust beneficiary is a party under subdivision (a) if the payee or beneficiary has, by the terms of the account, a present right, subject to request, to payment from the account other than as an agent.

### **§5138. Payment**

5138. "Payment" of sums on deposit includes all of the following:

(a) A withdrawal, including payment on check or other directive of a party.

(b) A pledge of sums on deposit.

(c) A set-off, reduction, or other disposition of all or part of an account pursuant to a pledge.

**Comment.** Section 5138 continues subdivision (h) of former Section 5101 without substantive change and is the same in substance as subsection (8) of Section 6-101 of the Uniform Probate Code (1982).

### **§5139. P.O.D.**

5139. "P.O.D." means pay on death.

**Comment.** Section 5139 is a new provision that makes clear the meaning of the abbreviation "P.O.D." See also Sections 5140 ("P.O.D. account"), 5142 ("P.O.D. payee"). No comparable provision is found in the Uniform Probate Code (1982).

### **§5140. P.O.D. account**

5140. "P.O.D. account" means any of the following:

(a) 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.

(b) An account payable on request to one or more persons during their lifetimes and on the death of all of them to one or more P.O.D. payees.

**Comment.** Section 5140 continues subdivision (i) of former Section 5101 without substantive change and is the same in

substance as subsection (10) of Section 6-101 of the Uniform Probate Code (1982).

### **§5142. P.O.D. payee**

5142. "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.

**Comment.** Section 5142 continues subdivision (j) of former Section 5101 without change and is the same in substance as subsection (11) of Section 6-101 of the Uniform Probate Code (1982).

### **§5144. Proof of death**

5144. "Proof of death" includes any of the following:

(a) An original or attested or certified copy of a death certificate.

(b) A 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.

**Comment.** Section 5144 continues subdivision (k) of former Section 5101 without substantive change and is consistent with subsection (9) of Section 6-101 of the Uniform Probate Code (1982).

### **§5146. Receives**

5146. 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.

**Comment.** Section 5146 continues subdivision (l) of former Section 5101 without change. There is no comparable provision in the Uniform Probate Code.

### **§5148. Request**

5148. "Request" means a proper request for withdrawal, including 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.

**Comment.** Section 5148 restates subdivision (m) of former Section 5101 without substantive change and is the same in substance as subsection (12) of Section 6-101 of the Uniform Probate Code (1982). Various signature requirements may be involved in order to meet the withdrawal requirements of the account. A “request” involves compliance with these requirements. A “party” is one (other than an agent) to whom an account is presently payable without regard for whose signature may be required for a “request.”

### **§5150. Sums on deposit**

5150. “Sums on deposit” means both of the following:

(a) The balance payable on an account, including interest and dividends earned, whether or not included in the current balance.

(b) Any life insurance proceeds added to the account by reason of the death of a party.

**Comment.** Section 5150 continues subdivision (n) of former Section 5101 without substantive change and is the same in substance as subsection (13) of Section 6-101 of the Uniform Probate Code (1982). The language “whether or not included in the current balance” is added to cover the situation where interest or dividends have been earned but have not yet been credited to the account.

### **§5152. Withdrawal**

5152. “Withdrawal” includes payment to a third person pursuant to a check or other directive of a party or an agent.

**Comment.** Section 5152 continues subdivision (p) of former Section 5101 with the addition of the reference to payment to “an agent.” See Section 5124 (defining “agent”). See also Section 5204 (power of attorney with respect to accounts at financial institutions). Section 5152 is the same in substance as subsection

(15) of Section 6-101 of the Uniform Probate Code (1982), except that the UPC provision does not include the reference to payment to "an agent."

**Probate Code §5203 (added). Creation of multiple-party relationship**

5203. (a) Words in substantially the following form in a signature card, passbook, contract, or instrument evidencing an account, or words to the same effect, executed before, on, or after July 1, 1990, create the following accounts:

(1) Joint account: "This account or certificate is owned by the named parties. Upon the death of any of them, ownership passes to the survivor(s)."

(2) P.O.D. account with single party: "This account or certificate is owned by the named party. Upon the death of that party, ownership passes to the named pay-on-death payee(s)."

(3) P.O.D. account with multiple parties: "This account or certificate is owned by the named parties. Upon the death of any of them, ownership passes to the survivor(s). Upon the death of all of them, ownership passes to the named pay-on-death payee(s)."

(4) Joint account of husband and wife with right of survivorship: "This account or certificate is owned by the named parties, who are husband and wife, and is presumed to be their community property. Upon the death of either of them, ownership passes to the survivor."

(5) Community property account of husband and wife: "This account or certificate is the community property of the named parties who are husband and wife. The ownership during lifetime and after the death of a spouse is determined by the law applicable to community property generally and may be affected by a will."

(6) Tenancy in common account: "This account or certificate is owned by the named parties as tenants in

common. Upon the death of any party, the ownership interest of that party passes to the named pay-on-death payee(s) of that party or, if none, to the estate of that party.”

(b) Use of the form language provided in this section is not necessary to create an account that is governed by this part. If the contract of deposit creates substantially the same relationship between the parties as an account created using the form language provided in this section, this part applies to the same extent as if the form language had been used.

**Comment.** Section 5203 is a new provision that provides form language for multiple-party accounts, but does not require use of the form language. Accordingly, the account agreement for existing accounts need not be changed to conform to the form language provided in this section. Also, accounts may be established after this section becomes operative using forms that were used under the law in effect before this section was enacted. For the form language to establish an agency account (power of attorney for account transactions), see Section 5204(c). Section 5203 is drawn in part from Wis. Stat. Ann. §705.02 (West 1981 & Supp. 1988).

A contract of deposit that does not use the form language for a particular kind of account is nevertheless governed by this part if the contract of deposit provides for substantially the same relationship between the parties. For example, an account held by two persons as “joint tenants with right of survivorship” is treated as a joint account under this part. Likewise, an account payable on request to one or more of two or more parties is treated as a joint account under this part even though no mention is made of any right of survivorship unless the terms of the account or deposit agreement otherwise provide. See Section 5130 (“joint account” defined). An account treated as a joint account belongs to the parties in proportion to their net contributions and passes to the survivors unless there is clear and convincing evidence of a different intent. See Sections 5301 (ownership during lifetime), 5302 (right of survivorship). But see Sections 5306 (tenancy in common accounts), 5307 (account expressly described as “community property” account).



A party to a “tenancy in common” account can designate a P.O.D. beneficiary to receive that tenant’s share of the account upon the tenant’s death, and the provisions of this part are applicable with respect to the P.O.D. designation. Likewise, although the rights during lifetime and upon death of the parties to an account expressly described as a “community property” account are governed by the law applicable to community property generally, either spouse on the “community property” account can designate a P.O.D. beneficiary to receive that spouse’s one-half share of the account upon the death of that spouse, and the provisions of this part are applicable with respect to the P.O.D. designation. See also the discussion in the Comment to Section 5130.

Section 5203 does not provide form language for a Totten trust account (as defined in Section 80), since the P.O.D. account serves the same function. However, a Totten trust account is authorized and is governed by the provisions of this part that apply to Totten trust accounts.

### **Probate Code §5204 (added). Special power of attorney for account transactions**

5204. (a) In addition to a power of attorney otherwise authorized by law, a special power of attorney is authorized under this section to apply to one or more accounts at a financial institution. For the purposes of this section, “account” includes checking accounts, savings accounts, certificates of deposit, savings certificates, and any other depository relationship with the financial institution.

(b) The special power of attorney under this section shall:

(1) Be in writing.

(2) Be signed by the person or persons giving the power of attorney.

(3) Explicitly identify the attorney in fact or attorneys in fact, the financial institution, and the account or accounts subject to the power.

(c) Language in substantially the following form is sufficient to create a power of attorney under this

section: "Transactions regarding this account/certificate of deposit may be made by the named agent(s). This agency is governed by Section 5204 of the California Probate Code. Under Section 5204, (1) the agent has no present or future ownership or right of survivorship in this account, (2) the agent must keep a record of the transactions and disbursements made under the agency, and (3) the agent may make disbursements from this account only to or for the benefit of the account owner unless the account owner has authorized the disbursement in writing."

(d) The power of attorney granted under this section shall endure as between the grantor and grantee of the power until the earlier to happen of the following:

(1) Revocation by the grantor of the power.

(2) Termination of the account.

(3) Death of the grantor of the power.

(4) Appointment of a guardian or conservator of the estate of the grantor of the power.

(e) A financial institution may rely upon the validity of the power of attorney granted under this section and shall be held harmless from any liability for doing so. Payment made in reliance upon the validity of the power of attorney granted under this section discharges the financial institution from all claims for the amounts so paid. The protection provided by this subdivision does not extend to payments made after written notice is received by the financial institution as to any of the events of termination of the power under subdivision (d). No other notice or any other information shown to have been available to the financial institution shall affect its right to the protection provided by this subdivision.

(f) The attorney in fact acting under the power of attorney granted under this section shall maintain such

books or records as will permit an accounting of the acts of the attorney in fact if an accounting is requested by a legal representative of the grantor of the power.

(g) The attorney in fact acting under a power of attorney granted under this section is liable for any disbursement other than a disbursement to or for the benefit of the grantor of the power, unless the grantor has authorized the disbursement in writing.

(h) Nothing in this section limits the use or effect of any other form of power of attorney for transactions with a financial institution.

(i) Nothing in this section prevents the attorney in fact from also being designated as a P.O.D. payee.

**Comment.** Section 5204 is a new provision drawn from a Minnesota statute. See Minn. Stat. Ann. §§523.01 et seq. (West 1975 & Supp. 1989). Naming a person as agent—technically giving the person named as agent a power of attorney with respect to account transactions—is commonly used for convenience and permits the agent to make withdrawals from the account. Even though the account is presently payable to the agent, the account belongs to the parties to the account, and the power of attorney gives the agent no ownership or survivorship right in the account.

### **Probate Code §5301 (amended). Ownership during lifetime**

5301. (a) ~~A joint~~ *An* 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. In the case of a P.O.D.~~

*account, the P.O.D. payee has no rights in the sums on deposit during the lifetime of any party, 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. In the case of a Totten trust account, the beneficiary has no rights to the sums on deposit during the lifetime of any party, 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.** The amendment of Section 5301 makes no substantive change; the amendment merely simplifies the language of the section.

Where there are several parties to an account and the account is one where there is no survivorship right among the parties (as where the terms of the account specifically provide that there is no survivorship right among the parties or the account is expressly designated as a “tenancy in common” account), any party may designate a P.O.D. payee (or Totten trust beneficiary) to take that party’s share of the account upon the death of that party. The language “unless there is clear and convincing evidence of a different intent” in subdivisions (b) and (c) makes this clear. See also Sections 5305 (presumption that sum on deposit in joint account of married persons is community property), 5307 (account expressly described as “community property” account).

A party to a “community property” account may designate a P.O.D. payee to take that spouse’s one-half interest in the account when that spouse dies. Under Section 5301, unless there is clear and convincing evidence of a different intent, the P.O.D. payee has no rights to the sums on deposit during the lifetime of the spouse naming the P.O.D. beneficiary.

**Probate Code §5302 (amended). 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~~ *intent*. If there are two or more surviving parties, their respective ownerships during lifetime ~~shall be~~ *are* 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~~ *parties*, the rights to any sums remaining on deposit are governed by subdivision (a).

(2) On death of the sole ~~original payee~~ *party* or of the survivor of two or more ~~original payees~~ *parties*, (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~~ *party*, (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 *Totten* 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** *different* 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 *Totten* trust account, or a P.O.D. payee designation, cannot be changed by will.

**Comment.** Section 5302 is amended to make technical, nonsubstantive revisions in the first sentence of subdivision (a) and in subdivision (c)(2) to conform to language used in other provisions of this part.

Under subdivision (a) of Section 5303, rights of survivorship are determined by the form of the account at the death of a party. Under that section, a party having the right of withdrawal can eliminate survivorship rights, for example, by closing out the account having the survivorship rights and opening a new account without survivorship rights. See the Comment to Section 5303.

The rule stated in subdivision (d) of Section 5302 applies to an account where there is clear and convincing evidence of an intent not to have a right of survivorship and the decedent has not designated a P.O.D. payee, such as a case where the terms of the account expressly provide that there is no right of survivorship or

where the account is expressly described in the deposit agreement as a “tenancy in common” account (Section 5306). In a case where the rule stated in subdivision (d) applies, only the decedent’s interest in the account becomes a part of the decedent’s estate. A party to a “tenancy in common” account may, of course, designate a P.O.D. payee for the party’s interest in the account, in which case upon the party’s death the party’s interest in the account is paid to the P.O.D. payee rather than to the party’s estate. In the case of an account expressly designated in the deposit agreement as a “community property” account, either spouse may designate a P.O.D. payee for that spouse’s interest, thereby making clear that the other spouse has no survivorship right to that interest, or may provide expressly in the deposit agreement that there is no survivorship right or may make a disposition of the interest in his or her will, in which case the rule in subdivision (d) applies.

**Probate Code §5303 (amended). Rights of survivorship determined by form of account at time of death; methods for change of 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.

(4) As provided in subdivision (c) of Section 5405.

*(c) During the lifetime of a party, the terms of the account may be changed as provided in subdivision (b)*

*to eliminate or to add rights of survivorship. Withdrawal of funds from the account by a party with a present right of withdrawal during the lifetime of a party also eliminates rights of survivorship upon the death of that party with respect to the funds withdrawn.*

**Comment.** Section 5303 is amended to add subdivision (c), which is a clarifying, nonsubstantive provision. Under subdivision (a), rights of survivorship are determined by the form of the account at the death of a party. Subdivision (c) makes clear that the terms of the account that can be changed include terms relating to rights of survivorship. For example, under subdivision (b), a party having the right of withdrawal can eliminate survivorship rights by closing out the account having the survivorship rights and opening a new account without survivorship rights. See *Estate of Propst*, 203 Cal. App. 3d 993, 250 Cal. Rptr. 362 (1988) (opinion on rehearing). (The court granted a rehearing in this case and refiled the same opinion after rehearing. Review by the California Supreme Court was granted (10-27-88) and was pending at the time the Comment to this section was prepared.) In *Estate of Propst*, the court stated that a decedent could not unilaterally sever joint tenancies in accounts covered by Sections 5303 and 5305 by closing the accounts and reopening them in his name alone. The court noted, however, that at the time of the decision Sections 5303 and 5305 were applicable only to credit unions and industrial loan companies and not to bank or savings and loan association accounts. Accordingly, the court held that the decedent could not eliminate the rights of survivorship created by joint tenancy bank and savings and loan association accounts by closing the accounts and opening other accounts or purchasing other property with the funds withdrawn. The extension of this part to cover accounts in banks and savings and loan associations changes this holding and permits the decedent unilaterally to sever joint tenancies in accounts in bank and savings and loan associations if the decedent has the unilateral right of withdrawal from the accounts. Withdrawal of the funds from the accounts will not, however, change the other rights of the parties to the moneys withdrawn. See Section 5301 (ownership during lifetime), 5305 (presumption of community property). See also the Comment to Section 5305.

Merely changing the terms of the account to eliminate survivorship rights does not affect the right of the financial



institution to make payments in accordance with the terms of the account in effect at the time payment is made. See also Section 5405.

**Probate Code §5305 (amended). 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 remains their community property.

(b) ~~The~~ *Notwithstanding Sections 4800.1 and 4800.2 of the Civil Code*, 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~~ *a written 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)~~ *Except as provided in Section 5307*, a right of survivorship arising from the express terms of the account or under Section 5302, a beneficiary designation in a *Totten* trust account, or a P.O.D. payee designation, cannot be changed by will.

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

**Comment.** Paragraph (1) of subdivision (b) of Section 5305 is amended to require that the community property agreement be in writing. This is consistent with paragraph (2) of subdivision (b) and with Civil Code Section 5110.730. The addition of the

reference to Civil Code Sections 4800.1 and 4800.2 in the introductory clause of subdivision (b) makes clear that the rule stated in subdivision (b) prevails with respect to accounts over the rules stated in Civil Code Sections 4800.1 and 4800.2 with respect to the division of a joint account upon dissolution of marriage or legal separation. Compare Section 5307 (account expressly described as “community property” account).

During the lifetimes of the married persons, the terms of the contract of deposit may be changed as provided in Section 5303 to eliminate or to add rights of survivorship. If there is a survivorship right in the surviving spouse at the time of the other spouse’s death, the surviving spouse takes the share of the deceased spouse in the joint account by right of survivorship. See subdivision (c) of Section 5305. If there is no survivorship right in the surviving spouse at the time of the other spouse’s death and the joint account consists of community property, the will of the deceased spouse may dispose of the deceased spouse’s share of the account. See also Section 5307 (account expressly described in account agreement as a “community property” account is governed by law governing community property generally).

If a spouse has the unilateral right to withdraw funds from the joint account, that spouse may terminate all rights of survivorship by withdrawing the funds from the account and depositing them in another account that does not give the spouses rights of survivorship. Either spouse could then dispose of his or her share of the funds in the new account by will. One spouse may not, however, deprive the other spouse of community property rights by unilateral action with respect to funds in a joint account created with community property funds. For example, if a spouse withdraws community property funds from a joint account and deposits the funds withdrawn in an account in his or her name, this does not change the community property interest of the other spouse in the funds so deposited. See subdivision (d). See also Section 5307 (account expressly described in account agreement as a “community property” account is governed by law governing community property generally).

Likewise, for example, if the funds in a joint account of a married couple have their source in the separate property of the wife, the husband can eliminate survivorship rights by closing out the account and opening another account in his own name, but absent an agreement of the husband and wife this would not change the ownership interest of the wife in the funds withdrawn.

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

**Probate Code §5306 (amended). Account expressly described as “tenancy in common” account**

5306. For the purposes of this chapter, if ~~a joint account was established before July 1, 1984, and the account was established~~ *an account is expressly described in the deposit agreement as a “tenancy in common” account, no right of survivorship arises from the terms of the account or under Section 5302 unless the terms of the account or deposit agreement expressly provide for survivorship.*

**Comment.** Section 5306 is amended to make it apply to all tenancy in common accounts, whenever established, and to add an exception where the terms of the account or deposit agreement expressly provide for survivorship. For example, a party to a tenancy in common account may designate a P.O.D. beneficiary to receive that tenant’s share of the account upon the tenant’s death.

**Probate Code §5307 (added). Account expressly described as “community property” account**

5307. For the purposes of this chapter, except to the extent the terms of the account or deposit agreement expressly provide otherwise, if the parties to an account are married to each other and the account is expressly described in the account agreement as a “community property” account, the ownership of the account during lifetime and after the death of a spouse is governed by the law governing community property generally.

**Comment.** Section 5307 deals with the situation where a joint account held by a husband and wife is specifically designated in the account agreement as a “community property” account. Section 5307 makes clear that this type of account is governed by the rules that apply to community property generally. Accordingly, unless the parties have agreed otherwise, the right of survivorship of the

surviving spouse can be changed by will (deceased spouse by will devises his or her one-half share of the account to a person other than the surviving spouse). Also, the deposit agreement or the terms of the account can include, for example, a provision that the one-half share of a spouse will pass on the death of that spouse to one or more P.O.D payees (or Totten trust beneficiaries) upon the death of that spouse. On the other hand, absent a contrary agreement or a contrary disposition, the surviving spouse will take the one-half share of the deceased spouse as community property.

**Probate Code §5401 (amended). Multiple-party accounts; terms; requirements**

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 *or agents*.

(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~~ *is not* 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. Section 5401 is amended to add the reference to agents in subdivision (a). See Section 5124 (defining "agent"). See also Section 5204 (power of attorney with respect to accounts at financial institutions).

**Probate Code §5404 (amended). Payment of Totten trust account**

5404. Any *Totten* 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 *Totten* 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 amended to substitute “Totten trust account” in place of “trust account.” The definition of “Totten trust account” is found in Section 80.

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

5406. The provisions of this chapter that apply to the payment of a *Totten* 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 *in writing* that the account is not a *Totten* trust account as defined in Section ~~5101~~ 80.

**Comment.** Section 5406 is amended to substitute a reference to Section 80 in place of the former reference to Section 5101. The definition of “Totten trust account” is found in Section 80. The section also is amended to require notice that the account is not a Totten trust account to be in writing. This is consistent with a requirement formerly found in Sections 853 and 6853 of the Financial Code.

**Probate Code §5407 (amended). 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 *Totten* trust account.

(b) In cases where subdivision (a) does not apply, payment shall be made *pursuant to the California Uniform Transfers to Minors Act, Part 9 (commencing with Section 3900) of Division 4, or as provided in Chapter 2 (commencing with Section 3400) of Part 8 of Division 4.*

**Comment.** Section 5407 is amended to authorize payment by a financial institution under the Uniform Transfers to Minors Act. Under the Uniform Act, if there has been no nomination of a custodian, \$10,000 or less may be transferred to an adult member of the minor's family or to a trust company without the need for a court order. Section 3907. In addition, the court may order that all or part of the money be paid to a custodian under the Uniform Act for the benefit of the minor. See Section 3413.

**CONFORMING REVISIONS****Civil Code §683 (amended). Joint tenancy**

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 do not apply to a joint account in a financial institution if Part 1 (commencing with Section 5100) of Division 5 of the Probate Code applies to such account.

~~(c) Provisions of this section shall not restrict the creation of a joint tenancy in a bank deposit as provided for in the Bank Act.~~

**Comment.** Subdivision (c) of Section 683 is deleted to reflect the expansion of the California Multiple-Party Accounts Law to include banks, savings and loan associations, and other like organizations. See Prob. Code §5128 ("financial institution" defined). Banks are now governed by subdivision (b).

### **Financial Code §852 (repealed). Joint bank accounts**

~~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.** The first sentence of former Section 852 is superseded by Probate Code Sections 5130 ("joint account" defined), 5301 (ownership during lifetime), and 5407 (minor as party to a multiple-party account). The second sentence is superseded by Probate Code Sections 5302 (right of survivorship), 5402 (payment of joint account), and 5407 (payment to minor). The substance of the third sentence is continued in Probate Code Section 5401(b) (payment from multiple-party accounts).

The fourth and fifth sentences are superseded by Probate Code Sections 5146 ("receives" defined) and 5405(a) and (c) (payment as discharge). These provisions protect the bank from liability whether or not payment is consistent with the beneficial ownership of the account, unless the bank has been served with a court order restraining payment or has received written notice from a party that withdrawals should not be permitted. The new provisions give the bank at least as much protection as it had under former law.

### **Financial Code §852 (added). Multiple-party accounts**

852. A bank account that is a multiple-party account as defined in Section 5132 of the Probate Code is governed



by Part 1 (commencing with Section 5100) of Division 5 of the Probate Code.

**Comment.** Section 852 makes reference to the California Multiple-Party Accounts Law, which applies to banks. See also Fin. Code §102 ("bank" defined).

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

~~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.** Former Section 852.5 is repealed because the section duplicated provisions in the California Multiple-Party Accounts Law (Prob. Code §§5100-5407). Subdivision (a) of former Section 852.5 is continued in substance in Probate Code Section 5140 ("P.O.D. account" defined). Subdivision (b) is continued in substance in Probate Code Section 5304 (transfers nontestamentary). Subdivision (c) is continued in substance in Probate Code Section 5405 (payment as discharge). These sections now apply to banks. See Prob. Code §5128 ("financial institution" defined).

### **Financial Code §853 (repealed). Trust accounts**

~~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. The substance of former Section 853 is continued in Section 5406 of the Probate Code, except that Section 5407 of the Probate Code imposes restrictions on payment of multiple-party account funds to a minor.

### **Financial Code §6661 (technical amendment).**

#### **Notice of adverse claim to savings account or personal property**

6661. Notice to an association or federal association of an adverse claim to a savings account of, or to personal property held for the account of, any person shall be disregarded, and the association or federal association, notwithstanding the notice, shall honor withdrawal applications and shall pay withdrawals and interest to the person or persons to whose credit the account stands or shall deliver the property to or upon the order of the

person for whose account the property is held, without any liability on the part of the association or federal association; subject, however, to the exceptions provided in subdivisions (a) and (b):

(a) If an adverse claimant delivers to the association or federal association at the office at which the account is carried or the property held an affidavit of the claimant stating that of the claimant's own knowledge the person to whose credit the deposit stands or for whose account the property is held is a fiduciary for the adverse claimant and that the claimant has reason to believe the fiduciary is about to misappropriate the account or the property, and stating the facts upon which the claim of fiduciary relationship and the belief are founded, the association or federal association shall refuse to pay withdrawals or interest on the account and shall refuse to deliver the property for a period of not more than three court days (including the day of delivery) from the date that the association or federal association received the adverse claimant's affidavit, without liability on its part and without liability for the sufficiency or truth of the facts alleged in the affidavit.

(b) If at any time, either before, after, or in the absence of the filing of an affidavit by the adverse claimant, the adverse claimant procures and serves upon the association or federal association at the office at which the account is carried or the property held a restraining order, injunction, or other appropriate order against the association or federal association from a court of competent jurisdiction in an action in which the adverse claimant and all persons in whose names the account stands or for whose account the property is held are the parties, the association or federal association shall comply with the order or injunction, without liability on its part.

(c) The provisions of this section shall be applicable even though the name of the person appearing on the books to whose credit the account stands or for whose account the property is held is modified by a qualifying or descriptive term such as “agent,” “trustee,” or other word or phrase indicating that the person may hold the account or property in a fiduciary capacity.

*(d) Nothing in the California Multiple-Party Accounts Law, Part 1 (commencing with Section 5100) of Division 5 of the Probate Code, limits the applicability of this section.*

**Comment.** Subdivision (d) is added to Section 6661 to make clear that Section 6661 applies notwithstanding any provision of the California Multiple-Party Accounts Law.

### **Financial Code §6800 (article heading amended)**

#### Article 6. ~~Joint Tenancy~~ *Multiple-Party Accounts*

### **Financial Code §6800 (repealed). Joint tenants**

~~6800. When a savings account is maintained in any association or federal association in the names of two or more persons, whether minor or adult, in which the moneys in the account are payable to any of those persons or the survivor or survivors, the account and all additions to it shall be the property of the persons as joint tenants with rights of survivorship.~~

**Comment.** Former Section 6800 is superseded by Chapter 3 (commencing with Section 5301) of Part 1 of Division 5 of the Probate Code relating to multiple-party accounts. See also Prob. Code §5407 (payment to minor).

### **Financial Code §6800 (added). Multiple-party accounts**

6800. An account in an association or federal association that is a multiple-party account as defined in Section 5132 of the Probate Code is governed by Part 1 (commencing with Section 5100) of Division 5 of the Probate Code.

**Comment.** Section 6800 refers to the California Multiple-Party Accounts Law (Prob. Code §§5100-5407) which applies to savings and loan associations. See also Fin. Code §5102 (“association” and “federal association” defined).

### **Financial Code §6801 (repealed). Payments to joint tenants**

~~6801. The moneys in a joint tenancy account may be paid to or on the order of any one of the joint tenants 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, subject to the provisions of Section 14345 of the Revenue and Taxation Code. An association or federal association continues to have the power to change the tenancy of a joint tenancy account on the written instructions of any one of the joint tenants during their lifetimes or on the written instructions of any one of the survivors of them after the death of any one or more of them.~~

**Comment.** Former Section 6801 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 6801 is superseded by Sections 5301, 5302, 5401, 5402, and 5407 of the Probate Code. The former reference to Section 14345 of the Revenue and Taxation Code is not continued. Section 14345 of the Revenue and Taxation Code was repealed by 1982 Cal. Stat. ch. 1535, §14. The second sentence of former Section 6801 is superseded by Section 5303 of the Probate Code.

### **Financial Code §6802 (repealed). Conclusive evidence of ownership**

~~6802. The opening of a joint tenancy account shall be conclusive evidence in any action or proceeding to which either the association or federal association or the survivor or survivors is a party, of the intention of all the parties to the account to vest title to the account and the additions to it in the survivor or survivors.~~

**Comment.** Former Section 6802 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 6802 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 §6803 (repealed). Multiple signatures; discharge of association**

~~6803. (a) By written instructions given to the association or federal association at the office where the account is maintained by all the parties to a joint tenancy account, the signatures of more than one of the joint tenants 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, record change order, or withdrawal order, in which case the association or federal association shall pay the moneys in the account only in accordance with the instructions, but no instructions shall limit the right of the survivor or survivors to receive the moneys in the account.~~

~~(b) Payment of all or any of the moneys in the account as provided in this article shall discharge the association or federal association from liability with respect to the moneys so paid, prior to receipt by the association or federal association of a written notice from any one of the joint tenants directing the association or federal association not to permit withdrawals in accordance with the terms of the account or the instructions. After receipt of the notice an association or federal association may refuse, without liability, to honor any check, receipt, or withdrawal order on the account pending determination of the rights of the parties.~~

~~(c) Rights of the parties may be determined under subdivision (b) by any one of the following:~~

~~(1) Decree by a court.~~

~~(2) A written agreement signed by each of the joint tenants, setting forth their respective rights.~~

~~(3) A written revocation of the notice made under subdivision (b), signed by the joint tenant that made it.~~

**Comment.** Former Section 6803 is superseded by Division 5 (commencing with Section 5100) of the Probate Code relating to multiple-party accounts. Subdivision (a) of former Section 6803 is continued in substance in subdivision (b) of Section 5401 of the Probate Code. Subdivisions (b) and (c) are superseded by Section 5405 of the Probate Code.

### **Financial Code §6804 (technical amendment).**

#### **Nonliability for taxes**

~~6804. Except as provided under Section 14347 of the Revenue and Taxation Code, no~~ No association or federal association paying any survivor in accordance with the provisions of ~~this article~~ *Part 1 (commencing with Section 5100) of Division 5 of the Probate Code* shall, because of the payment, be liable for any estate, inheritance, or succession taxes that may be due this state.

**Comment.** Section 6804 is amended to reflect the repeal of Section 14347 of the Revenue and Taxation Code (see 1982 Cal. Stat. ch. 1535, §14), and the replacement by the California Multiple-Party Accounts Law (Prob. Code §§5100-5407) of the former provisions of this article that governed payment to a survivor.

### **Financial Code §6853 (repealed). Totten trust account**

~~6853. (a) Whenever an account is opened by any person as trustee for another and no other or further notice of the existence and terms of a valid trust has been given in writing to the association, in the event of the death of the person described as trustee, the withdrawal value of the account or any part of it,~~

~~together with the interest, may be paid to the person or persons for whom the account was opened.~~

~~(b) The payment or delivery to the beneficiary, beneficiaries, or designated person, or a receipt or acquittance signed by the beneficiary, beneficiaries, or designated person for the payment or delivery is a sufficient release of an association for the payment or delivery.~~

~~(c) An account opened under this section may be designated as a tentative or Totten trust account.~~

~~(d) The trustee of an account opened under this section shall, until death, retain the power to hold, manage, pledge, and invest the funds in the account and may revoke the tentative trust, in whole or in part, at any time by delivering to the association a request for withdrawal of all or part of the account.~~

~~(e) All unpaid interest on an account under this section shall be the property of the trustee until the death of the trustee, at which time it shall become part of the corpus of the trust.~~

~~(f) If more than one person is named as trustee under this section the tentative trust shall continue until the death of all the trustees.~~

~~(g) If no beneficiary is living at the time of the death of the trustee the association may pay the withdrawal value of the account to the estate of the trustee.~~

**Comment.** Subdivision (a) of former Section 6853 is superseded by Sections 5302, 5404, and 5406 of the Probate Code. The provision in former subdivision (a) concerning interest is superseded by Section 5150 of the Probate Code ("sums on deposit" defined). Former subdivision (b) is superseded by Section 5405 of the Probate Code. Former subdivision (c) is superseded by Section 80 of the Probate Code ("Totten trust account" defined). Former subdivision (d) is superseded by subdivision (c) of Section 5301 of the Probate Code and by Section 5303 of the Probate Code. Former subdivision (e) is continued in substance in Probate Code Sections 5150, 5301, and 5302. Former subdivision (f) is superseded



by Section 5302 of the Probate Code. Former subdivision (g) is superseded by Section 5404 of the Probate Code.

### **Financial Code §6854 (repealed). Pay-on-death accounts**

~~6854.—(a) As used in this section, “pay-on-death provision” means:~~

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

~~(2) A provision or term of a savings account which is in the name of two or more persons which provides that upon the death of all of such persons the savings 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 savings account 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) Except as provided in Section 6661, 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.~~

**Comment.** Former Section 6854 is repealed because the section duplicated provisions in the California Multiple-Party Accounts Law (Prob. Code §§5100-5407). Subdivision (a) of former Section 6854 is continued in substance in Probate Code Section 5140 (“P.O.D. account” defined). Subdivision (b) is continued

in substance in Probate Code Section 5304 (transfers nontestamentary). Subdivision (c) is continued in substance in Probate Code Section 5405 (payment as discharge). These sections now apply to savings and loan associations. See Prob. Code §5128 (“financial institution” defined).

### **Financial Code §6855 (technical amendment).**

#### **Nonliability for taxes**

~~6855. Except as provided under Section 14347 of the Revenue and Taxation Code, no~~ *No* association paying any fiduciary, beneficiary, or designated person in accordance with the provisions of this article *or of the California Multiple-Party Accounts Law, Part 1 (commencing with Section 5100) of Division 5 of the Probate Code,* shall, because of the payment, be liable for any estate, inheritance, or succession taxes that may be due this state.

**Comment.** Section 6855 is amended to reflect the repeal of Section 14347 of the Revenue and Taxation Code (see 1982 Cal. Stat. ch. 1535, §14) and the replacement by the California Multiple-Party Accounts Law (Prob. Code §§5100-5407) of some of the former provisions of this article that governed payment to a survivor. See Section 6800 (multiple-party accounts governed by California Multiple-Party Accounts Law).

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

~~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 as provided in the California Multiple Party Accounts Law, Part 1 (commencing with Section 5100) of Division 5 of the Probate Code.~~

~~(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.** Former Section 14854.5 is repealed because the section duplicated provisions in the California Multiple-Party Accounts Law (Prob. Code §§5100-5407). Subdivision (a) is continued in substance in Probate Code Section 5140 ("P.O.D. account" defined). Subdivision (b) is continued in substance in Probate Code Section 5304 (transfers nontestamentary). Subdivision (c) is continued in substance in Probate Code Section 5405 (payment as discharge).

**Financial Code §14868 (added). Current address of Totten trust beneficiary**

14868. (a) As used in this section:

(1) "Beneficiary" has the meaning given that term in Section 5126 of the Probate Code.

(2) "Totten trust account" has the meaning given that term in Section 80 of the Probate Code.

(b) In the case of a Totten trust account, the deposit agreement shall indicate the current address of each beneficiary.

**Comment.** Section 14868 continues the substance of the third sentence of former subdivision (o) of Probate Code Section 5101.

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

~~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.~~

~~(c) 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.** Former Section 18318.5 is repealed because the section duplicated provisions in the California Multiple-Party Accounts Law (Prob. Code §§5100-5407). Subdivision (a) is continued in substance in Probate Code Section 5140 ("P.O.D. account" defined). Subdivision (b) is continued in substance in Probate Code Section 5304 (transfers nontestamentary). Subdivision (c) is continued in substance in Probate Code Section 5405 (payment as discharge).

### **Financial Code §18318.5 (added). Multiple-party accounts**

18318.5. An investment or thrift certificate that is a multiple-party account as defined in Section 5132 of the Probate Code is governed by Part 1 (commencing with Section 5100) of Division 5 of the Probate Code.

**Comment.** Section 18318.5 makes reference to the California Multiple-Party Accounts Law, which applies to industrial loan companies.

### **Probate Code §20 (amended). Application of definitions**

20. (a) Unless the provision or context otherwise requires and except as provided in subdivision (b), the definitions in this part govern the construction of this code.

(b) The definitions in this part do not apply to Division 4 (commencing with Section 1400) ~~or Division 5 (commencing with Section 5100)~~ .

**Comment.** Section 20 is amended to make the general definitions in this part applicable to Division 5 (commencing with Section 5100) (California Multiple-Party Accounts Law).

### **Probate Code §269 (technical amendment). 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 has the meaning given that term in Section 5140.~~

**Comment.** Section 269 is amended to delete the former reference to Sections 852.5, 7604.5, 11203.5, 14854.5, and 18318.5 of the Financial Code which have been repealed, and to substitute the cross-reference to the definition of "P.O.D. account" in Section 5140.

**Probate Code §6600 (technical amendment).**

**Decedent's estate defined**

6600. (a) Subject to subdivision (b), for the purposes of this chapter, "decedent's estate" means all the decedent's personal property, wherever located, and all the decedent's real property located in this state.

(b) For the purposes of this chapter:

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

(2) 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 paragraph, the terms "multiple-party account," "party," "P.O.D. payee," and "beneficiary" have the same meaning as given those terms by ~~Section 5101~~ Sections 5132, 5136, 5142, and 5126, respectively.

**Comment.** Section 6600 is amended to replace the former reference to Section 5101, which has been repealed, with a reference to the new sections where the defined terms are found.

**Probate Code §13050 (technical amendment).  
Property excluded in determining property or  
estate of decedent or its value**

13050. (a) For the purposes of this part:

(1) Any property or interest or lien thereon which, at the time of the decedent's death, was held by the decedent as a joint tenant, or in which the decedent had a life or other interest terminable upon the decedent's death, or which was held by the decedent and passed to the decedent's surviving spouse pursuant to Section 13500, shall be excluded in determining the property or estate of the decedent or its value.

(2) 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 property or 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 paragraph, the terms "multiple-party account," "party," "P.O.D. payee," and "beneficiary" have the same meaning as given those terms by ~~Section 5101~~ *Sections 5132, 5136, 5142, and 5126, respectively* .

(b) For the purposes of this part, all of the following property shall be excluded in determining the property or estate of the decedent or its value:

(1) Any vehicle registered under Division 3 (commencing with Section 4000) of the Vehicle Code or titled under Division 16.5 (commencing with Section 38000) of the Vehicle Code.

(2) Any vessel numbered under Division 3.5 (commencing with Section 9840) of the Vehicle Code.

(3) Any manufactured home, mobilehome, commercial coach, truck camper, or floating home registered under

Part 2 (commencing with Section 18000) of Division 13 of the Health and Safety Code.

(c) For the purposes of this part, the value of the following property shall be excluded in determining the value of the decedent's property in this state:

(1) Any amounts due to the decedent for services in the armed forces of the United States.

(2) The amount, not exceeding five thousand dollars (\$5,000), of salary or other compensation, including compensation for unused vacation, owing to the decedent for personal services from any employment.

**Comment.** Section 13050 is amended to replace the former reference to Section 5101, which has been repealed, with a reference to the new sections where the defined terms are found.

## **TRANSITIONAL PROVISIONS**

### **No duty to inform persons of enactment of act**

SEC. \_\_\_\_\_. (a) A financial institution (as defined in Section 5128 of the Probate Code) has no duty to inform any of the following of the enactment of this act:

(1) Any depositor holding an account on the operative date of this act.

(2) Any beneficiary named in a Totten trust account on the operative date of this act.

(3) Any P.O.D. payee designated on a P.O.D. account on the operative date of this act.

(4) Any agent designated on an agency account on the operative date of this act.

(b) No liability shall be imposed on a financial institution for failing to inform any person designated in subdivision (a) of the enactment of this act.

**Comment.** This section is designed to avoid any expense to financial institutions of advising existing depositors concerning the enactment of this act. The act that enacted the California Multiple-Party Accounts Law included a comparable provision. 1983 Cal. Stat. ch. 92, §6.



**Application to existing accounts**

SEC. \_\_. This act applies to accounts in existence on January 1, 1990, and accounts thereafter established.



STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

RECOMMENDATION

relating to

**Notice to Creditors  
in Probate Proceedings**

January 1989

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

**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 to Creditors in Probate Proceedings*, 20 Cal. L. Revision Comm'n Reports 165 (1990).

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

**CALIFORNIA LAW REVISION COMMISSION**

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January 12, 1989

To: The Honorable George Deukmejian  
*Governor of California*  
and  
The Legislature of California

This recommendation deals with due process issues raised in the United States Supreme Court case of *Tulsa Professional Collection Services, Inc. v. Pope*, 108 S. Ct. 1340 (1988). It provides creditors who did not receive actual notice of probate within the claim-filing period an opportunity to file a late claim or, if the estate has already been distributed, a right to recover from distributees. These rights of the creditor are subject to an overriding statute of limitations that runs one year from the date of the decedent's death.

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

Respectfully submitted,

Forrest A. Plant  
*Chairperson*



## RECOMMENDATION

Effective July 1, 1988, California law requires a personal representative in decedent estate administration proceedings to mail actual notice of administration to known creditors of the decedent,<sup>1</sup> in addition to publication of notice to unknown creditors.<sup>2</sup> All creditors, known and unknown, thereupon have four months in which to file a claim against the estate.<sup>3</sup>

The requirement of actual notice to known creditors was enacted on recommendation of the Law Revision Commission.<sup>4</sup> The former law was inequitable and of questionable constitutionality. Developments in the United States Supreme Court and in state courts had raised the likelihood that the former scheme violated due process of law.<sup>5</sup>

The United States Supreme Court has now ruled on this issue in the case of *Tulsa Professional Collection Services, Inc. v. Pope*.<sup>6</sup> That case holds that a state cannot impose a two-month claim filing requirement on known or reasonably ascertainable creditors merely by publication of notice. Actual notice is required for a short-term claim filing requirement.

The Supreme Court cites the new California statute in support of the proposition that a few states already provide for actual notice in connection with short nonclaim statutes. However, it is clear from the rationale of the opinion that the new California statute does not

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1. Prob. Code §§ 9050-9054; enacted by 1987 Cal. Stat. ch. 923, § 93.

2. Prob. Code § 333.

3. Probate Code Section 9100 requires a creditor to file a claim within the later of four months after issuance of letters to a general personal representative or, if notice is mailed as required, within 30 days after the notice is given.

4. *Recommendation Relating to Creditor Claims Against Decedent's Estate*, 19 Cal. L. Revision Comm'n Reports 299 (1988).

5. 19 Cal. L. Revision Comm'n Reports at 303.

6. 108 S. Ct. 1340 (1988).

satisfy the announced constitutional standards in that it purports to cut off unnotified but “reasonably ascertainable” creditors with a short claim filing requirement.

To bring the California statute into conformity with constitutional requirements, the Law Revision Commission further recommends that, notwithstanding the four-month claim filing requirement, a known or reasonably ascertainable creditor who does not have actual knowledge of the administration of the estate during the four-month claim period should be permitted to petition for leave to file a late claim.<sup>7</sup> If the estate has already been distributed when the known or reasonably ascertainable creditor acquires actual knowledge of the administration proceeding, the creditor would have recourse against distributees of the estate.<sup>8</sup> The personal representative would be protected from liability for the claim unless the personal representative acts in bad faith in failing to notify known creditors.<sup>9</sup>

Although known or reasonably ascertainable creditors who have no knowledge of administration would be given remedies beyond the four month claim period, these remedies must be exercised within one year after the decedent’s death. The Commission believes that a new long term statute of limitations of one year

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7. Existing California law already authorizes such a late claim petition, but only for a creditor who was out of the state during the four month claim period and whose claim is on a nonbusiness debt. Prob. Code § 9103. Legislation enacted in the 1988 legislative session removes the out-of-state limitation effective July 1, 1989. See 1988 Cal. Stat. ch. 1199, § 84.5. The present recommendation would remove the business claim limitation.

8. This would be a limited exception to the general rule that an omitted creditor has no right to require contribution from creditors who are paid or from distributees. Prob. Code § 11429. Under the Commission’s proposal, the liability of a distributee would be joint and several with other distributees, and liability would be based on abatement principles. See Prob. Code §§ 21400-21406 (abatement) [1988 Cal. Stat. ch. 1199, § 108].

9. Cf. Prob. Code § 9053 (immunity of personal representative).



commencing with the decedent's death<sup>10</sup> will best effectuate the strong public policies of expeditious estate administration and security of title for distributees, and is consistent with the concept that a creditor has some obligation to keep informed of the status of the debtor. While the Supreme Court declined to rule on the validity of long term statutes of limitation that run from one to five years from the date of death, a one-year statute is believed to be constitutional since it is self-executing, it allows a reasonable time for the creditor to discover the decedent's death, and it is an appropriate period to afford repose and provide a reasonable cutoff for claims that soon would become stale.<sup>11</sup>

## PROPOSED LEGISLATION

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

An act to amend Section 353 of the Code of Civil Procedure, and to amend Sections 551, 9053, 9103, 9201, and 11429 of, and add Section 9392 to, the Probate Code, relating to creditors of a decedent, and declaring the urgency thereof, to take effect immediately.

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

### **Code of Civil Procedure § 353 (amended). Statute of limitations**

SECTION 1. Section 353 of the Code of Civil Procedure, as amended by Chapter 1199 of the Statutes of 1988, is amended to read:

10. It should be noted that such an absolute one-year statute of limitations creates the potential for the decedent's beneficiaries to wait for one year after death in order to bar creditor claims, and then proceed to probate the estate and distribute assets with impunity. However, if the creditor is concerned that the decedent's beneficiaries may fail to commence probate within the one-year period, the creditor may petition for appointment during that time. Prob. Code §§ 8000 (petition), 8461 (priority for appointment).

11. See, e.g., Falender, *Notice to Creditors in Estate Proceedings: What Process is Due?*, 63 N.C.L. Rev. 659, 673-77 (1985).

353. (a) If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by the person's representatives, after the expiration of that time, and within six months from the person's death.

(b) Except as provided in ~~subdivision (e)~~ *subdivisions (c) and (d)*, if a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced ~~against the person's representatives, after the expiration of that time, and~~ within one year after the date of death, *and the time otherwise limited for the commencement of the action does not apply.*

(c) If a person against whom an action may be brought died before July 1, 1988, and before the expiration of the time limited for the commencement of the action, and the cause of action survives, an action may be commenced against the person's representatives before the expiration of the later of the following times:

(1) July 1, 1989, or one year after the issuing of letters testamentary or of administration, whichever is the earlier time.

(2) The time limited for the commencement of the action.

*(d) If a person against whom an action may be brought died on or after July 1, 1988, and before the operative date of the 1989 amendment of this section, and before the expiration of the time limited for the commencement of the action, and the cause of action survives, an action may be commenced within one year after the operative date of the 1989 amendment of this section, and the time otherwise limited for the commencement of the action does not apply.*

**Comment.** Subdivision (b) of Section 353 is amended to impose a new statute of limitations on all actions against a decedent on which the statute of limitations otherwise applicable has not run at the time of death. The new statute is one year after the death of the decedent, regardless of whether the statute otherwise applicable would have expired before or after the one year period.

If a general personal representative is appointed during the one year period, the personal representative must notify known creditors, and the filing of a claim tolls the statute. Prob. Code §§ 9050 (notice required), 9352 (tolling of statute of limitations). If the creditor is concerned that the decedent's beneficiaries may not have a general personal representative appointed during the one year period, the creditor may petition for appointment during that time. Prob. Code §§ 8000 (petition), 8461 (priority for appointment); see also Prob. Code § 48 ("interested person" defined).

The reference to the decedent's "representatives" is also deleted from subdivision (b). The reference could be read to imply that the one year limitation is only applicable in actions against the decedent's personal representative. However, the one year statute of limitations is intended to apply in any action on a debt of the decedent, whether against the personal representative under Probate Code Sections 9350 to 9354 (claim on cause of action), or against another person, such as a distributee under Probate Code Section 9392 (liability of distributee), a person who takes the decedent's property and is liable for the decedent's debts under Sections 13109 (affidavit procedure for collection or transfer of personal property), 13156 (court order determining succession to real property), 13204 (affidavit procedure for real property of small value), and 13554 (passage of property to surviving spouse without administration), or a trustee.

### **Probate Code § 551 (amended). Statute of limitations**

SEC. 2. Section 551 of the Probate Code, as added by Chapter 1199 of the Statutes of 1988, is amended to read:

551. *Notwithstanding Section 353 of the Code of Civil Procedure, if the limitations period otherwise applicable to the action has not expired at the time of the decedent's death, an action under this chapter may be commenced*

within one year after the expiration of the limitations period otherwise applicable.

**Comment.** Section 551 is amended to make clear that the general one-year limitation period for commencement of an action on a cause of action against a decedent under Code of Civil Procedure Section 353 does not apply to an action under this chapter.

**Probate Code § 9053 (amended). Immunity of personal representative**

SEC. 3. Section 9053 of the Probate Code is amended to read:

9053. (a) ~~If the personal representative or attorney for the personal representative in good faith~~ believes that notice to a particular creditor is or may be required by this chapter and gives notice based on that belief, the personal representative ~~or attorney~~ is not liable to any person for giving the notice, whether or not required by this chapter.

(b) ~~If the personal representative or attorney for the personal representative in good faith~~ fails to give notice required by this chapter, the personal representative ~~or attorney~~ is not liable to any person for the failure, *unless the person establishes that the failure was in bad faith.* ~~Liability, if any, for the failure in such a case is on the estate.~~

(c) Nothing in this chapter imposes a duty on the personal representative ~~or attorney for the personal representative~~ to make a search for creditors of the decedent.

**Comment.** Section 9053 is amended to make clear that the burden of proof of bad faith of the personal representative is on the person seeking to impose liability. The personal representative is otherwise immune from liability to a known creditor who was not given notice. The liability, if any, in such a case generally follows the property in the estate. Thus, if the estate remains open, the property is reached through the late claim procedure. Section

9103 (late claims). If property has been distributed, distributees are liable to the extent of the property. Section 9392 (liability of distributee). The creditor's right to recover is subject to a one-year statute of limitations from the date of the decedent's death. Code Civ. Proc. § 353.

The section is also amended to delete the references to the attorney for the personal representative. This chapter imposes no duty on the attorney to give notice.

### **Probate Code § 9103 (amended). Late claims**

SEC. 4. Section 9103 of the Probate Code, as amended by Chapter 1199 of the Statutes of 1988, is amended to read:

9103. (a) Upon petition by a creditor and notice of hearing given as provided in Section 1220, the court may allow a claim to be filed after expiration of the time for filing a claim if the creditor establishes that either of the following conditions ~~are~~ *is* satisfied:

(1) Neither the creditor nor the attorney representing the creditor in the matter had actual knowledge of the administration of the estate ~~within~~ *more than* 15 days before expiration of the time provided in Section 9100, and the *creditor's* petition was filed within 30 days after either the creditor or the creditor's attorney had actual knowledge of the administration whichever occurred first.

(2) Neither the creditor nor the attorney representing the creditor in the matter had knowledge of the existence of the claim ~~within~~ *more than* 15 days before expiration of the time provided in Section 9100, and the *creditor's* petition was filed within 30 days after either the creditor or the creditor's attorney had knowledge of the existence of the claim whichever occurred first.

~~(b) This section applies only to a claim that relates to an action or proceeding pending against the decedent at the time of death or, if no action or proceeding is~~

~~pending, to a cause of action that does not arise out of the creditor's conduct of a trade, business, or profession in this state.~~

(e) (b) The court shall not allow a claim to be filed under this section after the earlier of the following times:

(1) The time the court makes an order for final distribution of the estate.

(2) One year after the ~~time letters are first issued to a general personal representative~~ *date of the decedent's death.*

~~(d)~~ (c) The court may condition the claim on terms that are just and equitable, and may require the appointment or reappointment of a personal representative if necessary. The court may deny the *creditor's* petition if a preliminary distribution to beneficiaries or a payment to general creditors has been made and it appears that the filing or establishment of the claim would cause or tend to cause unequal treatment among beneficiaries or creditors.

(e) (d) Regardless of whether the claim is later established in whole or in part, property distributed under court order and payments otherwise properly made before a claim is filed under this section are not subject to the claim. ~~The~~ *Except to the extent provided in Section 9392 and subject to Section 9053, the personal representative, designee distributee, or payee is not liable on account of the prior distribution or payment.*

**Comment.** Former subdivision (b) of Section 9103, limiting the types of claims eligible for late claim treatment, is deleted. It should be noted that a creditor who is omitted because the creditor had no knowledge of the administration is not limited to the remedy provided in this section. If assets have been distributed, a remedy may be available against distributees under Section 9392 (liability of distributee). If the creditor can establish that the lack of knowledge is a result of the personal representative's bad

faith failure to notify known creditors under Chapter 2 (commencing with Section 9050) (notice to creditors), recovery may be available against the personal representative personally or on the bond, if any. See Section 11429 (unpaid creditor). See also Section 9053 (immunity of personal representative).

Paragraph (b)(2) is revised to make clear that a late claim should not be permitted if the statute of limitations has run on the claim. This is the consequence of the rule stated in Section 9253 that a claim barred by the statute of limitations may not be allowed by the personal representative or approved by the court or judge. Under Code of Civil Procedure Section 353, the statute of limitations runs one year after the decedent's death.

**Probate Code § 9201 (amended). Claims governed by special statutes**

SEC. 5. Section 9201 of the Probate Code is amended to read:

9201. (a) Notwithstanding any other ~~provision of this part~~ *statute*, if a claim of a public entity arises under a law, act, or code listed in subdivision (b):

(1) The public entity may use a form as is necessary to effectively administer the law, act, or code. Where appropriate, the form may require the decedent's social security number, if known.

(2) The claim is barred only after written notice or request to the public entity and expiration of the period provided in the applicable section. If no written notice or request is made, the claim is enforceable by the remedies, and is barred at the time, otherwise provided in the law, act, or code.

(b)

Law, Act, or Code	Applicable Section
Sales and Use Tax Law (commencing with Section 6001 of the Revenue and Taxation Code)	Section 6487.1 of the Revenue and Taxation Code

Bradley-Burns Uniform Local Sales and Use Tax Law (commencing with Section 7200 of the Revenue and Taxation Code)	Section 6487.1 of the Revenue and Taxation Code
Transactions and Use Tax Law (commencing with Section 7251 of the Revenue and Taxation Code)	Section 6487.1 of the Revenue and Taxation Code
Motor Vehicle Fuel License Tax Law (commencing with Section 7301 of the Revenue and Taxation Code)	Section 7675.1 of the Revenue and Taxation Code
Use Fuel Tax Law (commencing with Section 8601 of the Revenue and Taxation Code)	Section 8782.1 of the Revenue and Taxation Code
Personal Income Tax Law (commencing with Section 17001 of the Revenue and Taxation Code)	Section 19266 of the Revenue and Taxation Code
Cigarette Tax Law (commencing with Section 30001 of the Revenue and Taxation Code)	Section 30207.1 of the Revenue and Taxation Code
Alcoholic Beverage Tax Law (commencing with Section 32001 of the Revenue and Taxation Code)	Section 32272.1 of the Revenue and Taxation Code



Unemployment Insurance Code	Section 1090 of the Unemployment Insurance Code
State Hospitals for the Mentally Disordered (commencing with Section 7200 of the Welfare and Institutions Code)	Section 7277.1 of the Welfare and Institutions Code
Medi-Cal Act (commencing with Section 14000 of the Welfare and Institutions Code)	Section 9202 of the Probate Code
Waxman-Duffy Prepaid Health Plan Act (commencing with Section 14200 of the Welfare and Institutions Code)	Section 9202 of the Probate Code

**Comment.** Subdivision (a) of Section 9201 is amended to make clear that it applies notwithstanding statutes located in places other than this part. Specifically, Section 9201 applies notwithstanding Code of Civil Procedure Section 353 (general statute of limitations running one year from the decedent's death).

**Probate Code § 9392 (added). Liability of distributee**

SEC. 6. Section 9392 is added to the Probate Code, to read:

9392. (a) Subject to subdivision (b), a person to whom property is distributed is personally liable for the claim of a creditor, without a claim first having been filed, if all of the following conditions are satisfied:

(1) The identity of the creditor was known to, or reasonably ascertainable by, a general personal representative within four months after the date letters were first issued to the personal representative, and the claim of the creditor was not merely conjectural.

(2) Notice of administration of the estate was not given to the creditor under Chapter 2 (commencing with Section 9050) and neither the creditor nor the attorney representing the creditor in the matter had actual knowledge of the administration of the estate before the time the court made an order for final distribution of the property.

(3) The statute of limitations applicable to the claim under Section 353 of the Code of Civil Procedure has not expired at the time of commencement of an action under this section.

(b) Personal liability under this section is applicable only to the extent the claim of the creditor cannot be satisfied out of the estate of the decedent and is limited to the extent of the fair market value of the property on the date of the order for distribution, less the amount of any liens and encumbrances on the property at that time. Personal liability under this section is joint and several, based on the principles stated in Part 4 (commencing with Section 21400) of Division 11 (abatement) [1988 Cal. Stat. ch. 1199, § 108].

(c) Nothing in this section affects the rights of a purchaser or encumbrancer of property in good faith and for value from a person who is personally liable under this section.

**Comment.** Section 9392 is new. It implements the rule of *Tulsa Professional Collection Services, Inc. v. Pope*, 108 S. Ct. 1340 (1988), that the claim of a known or reasonably ascertainable creditor whose claim is not merely conjectural but who is not given actual notice of administration may not be cut off by a short claim

filing requirement. Section 9392 is intended as a limited remedy to cure due process failures only, and is not intended as a general provision applicable to all creditors.

A creditor who has knowledge of estate administration must file a claim or, if the claim filing period has expired, must petition for leave to file a late claim. See Sections 9100 (time for filing claims) and 9103 (late claims). This rule applies whether the creditor's knowledge is acquired through notification under Section 9050 (notice required), by virtue of publication under Section 8120 (publication required), or otherwise.

Under Section 9392, a creditor who has no knowledge of estate administration before an order is made for distribution of property has a remedy against distributees to the extent payment cannot be obtained from the estate. There is a one year statute of limitations, commencing with the date of the decedent's death, for an action under this section by the creditor. Code Civ. Proc. § 353. Since liability of distributees under this section is joint and several, a distributee may join, or seek contribution from, other distributees. Subdivision (c) is a specific application of the general purpose of this section to subject a distributee to personal liability but not to require rescission of a distribution already made.

An omitted creditor may also have a cause of action against a personal representative who in bad faith fails to give notice to a known creditor. See Sections 9053 (immunity of personal representative) and Section 11429 (unpaid creditor).

### **Probate Code § 11429 (amended). Unpaid creditor**

SEC. 7. Section 11429 of the Probate Code is amended to read:

11429. (a) Where the accounts of the personal representative have been settled and an order made for the payment of debts and distribution of the estate, a creditor who is not paid, whether or not included in the order for payment, has no right to require contribution from creditors who are paid or from distributees, *except to the extent provided in Section 9392.*

(b) Nothing in this section precludes recovery against the personal representative personally or on the bond, if any, by a creditor who is not paid, *subject to Section 9053.*

**Comment.** Subdivision (a) of Section 11429 is amended to recognize the liability of distributees provided by Section 9392 (liability of distributee).

Subdivision (b) is amended to make specific reference to the statutory immunity of the personal representative for actions and omissions in notifying creditors. This amendment is not a change in law, but is intended for cross-referencing purposes only. The reference to the specific immunity provided in Section 9053 should not be construed to limit the availability of any other applicable defenses of the personal representative.

### **Urgency Clause**

**SEC. 8.** This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

The existing California statute governing creditor claims in probate does not satisfy constitutional standards announced by the United States Supreme Court in *Tulsa Professional Collection Services, Inc. v. Pope*, 108 S. Ct. 1340 (1988). This act revises the California statute consistent with the standards announced by the court. In order to resolve the present confusion among lawyers, courts, personal representatives, creditors, and others involved in the probate process who must work with the existing unconstitutional statute, it is necessary that this act take effect immediately.

## TABLE OF SOURCES

**Note.** The recommendations in this publication would be effectuated by enactment of Assembly Bills 156 and 158 and Senate Bill 985. The following table gives the source of background material relating to a particular section or group of sections in the recommendations in this publication. In the column of page numbers, the first number is the beginning page where the section or group of sections and comments appear. The numbers in parenthesis indicate the inclusive pages of the recommendation in which the section or group of sections appears.

<i>Code Sections</i>	<i>Bill No.</i>	<i>Page</i>
<b>Civil Code</b>		
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<b>Code of Civil Procedure</b>		
§ 353 (am) .....	AB 156 .....	171 (165-82)
<b>Financial Code</b>		
§ 852 (R) .....	SB 985 .....	145 (95-164)
§ 852 (add) .....	SB 985 .....	146 (95-164)
§ 852.5 (R) .....	SB 985 .....	147 (95-164)
§ 853 (R) .....	SB 985 .....	148 (95-164)
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