

STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

## **RECOMMENDATIONS**

relating to

## **Probate Law**

- **Debts That Are Contingent, Disputed, or Not Due**
- **Remedies of Creditor Where Personal Representative Fails to Give Notice**
- **Repeal of Civil Code Section 704 (Passage of Ownership of U.S. Bonds on Death)**
- **Disposition of Small Estate Without Probate**
- **Right of Surviving Spouse to Dispose of Community Property**
- **Litigation Involving Decedents**
- **Compensation in Guardianship and Conservatorship Proceedings**
- **Recognition of Trustees' Powers**
- **Access to Decedent's Safe Deposit Box**
- **Gifts in View of Impending Death**
- **TOD Beneficiary Designation for Vehicles and Certain Other State-Registered Property**
- **Comments to Other Provisions of 1991 General Probate Bill**
- **Comments to 1991 Probate Urgency Clean-Up Bill**

November 1990

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303-4739

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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 1991.

Cite this pamphlet as *Recommendations Relating to Probate Law*, 20 Cal. L. Revision Comm'n Reports 2701 (1990).

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## PREFACE

This publication contains 11 recommendations relating to probate law. The recommendations are listed in the Table of Contents (page 2705).

This publication also contains Comments to other provisions for which there is no separate recommendation. These provisions will be included in either the 1991 general probate bill or the 1991 probate urgency clean-up bill recommended by the Commission.

At the end of this publication is a cumulative table of sections affected by materials in this publication. For each section listed, the table indicates the recommendation or other material in this publication relating to the section.



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STATE OF CALIFORNIA

**CALIFORNIA LAW  
REVISION COMMISSION**

RECOMMENDATION

relating to

**Debts That Are Contingent,  
Disputed, or Not Due**

July 1990

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 Debts That Are Contingent, Disputed, or Not Due*, 20 Cal. L. Revision Comm'n Reports 2707 (1990).

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

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ANN E. STODDEN

July 26, 1990

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

This recommendation proposes procedures to facilitate distribution and closing of an estate while providing for unpaid debts against the estate that are contingent, disputed, or not due. Under this recommendation the court could order the estate distributed after making appropriate arrangements for the debt, such as payment into a blocked account in a financial institution subject to court order, payment to a trustee, or requirement of a bond or other security or an assumption of liability by the distributee.

This recommendation is submitted pursuant to Resolution Chapter 37 of the Statutes of 1980. The Commission wishes to acknowledge the substantial contribution of Kenneth M. Klug of Fresno, who developed some of the major concepts that serve as the basis for this recommendation.

Respectfully submitted,

Edwin K. Marzec  
*Chairperson*





## RECOMMENDATION

Ordinarily, debts of a decedent are paid during estate administration and, if there is any excess after all debts are paid, distribution is made to the beneficiaries. This standard pattern may be disrupted in a number of situations. A debt owed by the decedent may not be due and payable at the time when debts are ordinarily paid; this may occur, for example, where a loan is payable in installments, or where there is a balloon payment at a later time. The decedent's liability may be contingent and the contingency may not be resolved until much later; common examples of contingent debts include loan guarantees, deficiency liability on a secured loan, and concurrent liability with another person such as a partner or a joint maker of a promissory note. If a creditor commences an action on a debt where the personal representative denies liability, there may be substantial delay until the liability is resolved.

Keeping the estate open and not making distribution until all issues involving debts that are contingent, disputed, or not due are resolved is ordinarily not a satisfactory approach. The decedent's ultimate liability exposure on a contingent debt may be small but, until the matter is resolved, a large contingent debt can effectively tie up the estate. Likewise, there may be a disputed debt on which the alleged liability exceeds the value of the estate; in this case, no matter how unmeritorious the lawsuit appears, the full disputed amount must be held in court until the matter is resolved, which may be many years.

Estates normally have neither the ability nor right to discharge the entire indebtedness to satisfy the claim, and must therefore be kept open until the contingency which establishes the debt either occurs or fails. In these cases, the estate beneficiaries are not only deprived of enjoyment of their interests until the obligation is paid, but estate expenses

are increased by costs of complying with accounting and income tax filing requirements.

For these reasons existing law offers a few options:

(1) If a creditor whose debt is not yet due is willing to waive interest, the creditor may be paid immediately.<sup>1</sup>

(2) In the case of a contingent or installment debt, a trust fund may be set up to cover the potential liability, the trustee to pay the debt or distribute the fund to beneficiaries, as the circumstances ultimately require.<sup>2</sup>

(3) If neither of these two options is used, the full amount of a not due, contingent, or disputed debt must be paid into court and held until the liability is resolved.<sup>3</sup>

These remedies are quite limited. Other remedies should be provided that will enable the estate to be closed without compromising the rights of the creditor. The Law Revision Commission recommends enactment of procedures that will add flexibility to the remedies available to the court and help ensure that the creditor gets what is due without forcing the estate to be kept open until the debt is paid. Specifically:

(1) If all parties agree on a solution, whether it involves posting security, discounting or compromising a claim, or even keeping the estate open, the agreement should be honored and the court should be required to ratify the agreement if it reasonably protects the rights of all parties and will not unreasonably prolong administration.

(2) The amount at issue could be deposited in a blocked account in a financial institution, withdrawable on court order when the matter is resolved.

(3) The existing authority to appoint a trustee in the case of a contingent or installment debt should be expanded to cover other debts not yet due and disputed debts as well.

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1. Prob. Code § 11425. It is not clear from this section whether the face amount of the debt may be discounted if the debt is interest-free until the due date.

2. Prob. Code § 11426.

3. Prob. Code § 11427.

(4) The court should be permitted to order the property distributed and the estate closed after assuring adequate protection to the creditor by means such as requiring a bond or other security, imposing a lien on property, or requiring an assumption of liability by distributees.

(5) The court should continue to have the authority it has under existing law to require that the estate be kept open if that appears most appropriate in the circumstances of the particular estate.

The basic concept is that the court should have available a variety of different remedies and the flexibility to provide a reasonable accommodation of interests depending on the circumstances of the particular case.

### PROPOSED LEGISLATION

**Prob. Code § 11425 (repealed). Payment of debt not due**

~~11425. If a creditor whose debt is not due waives interest for the time until the debt is due, the creditor is entitled to payment of the debt.~~

**Comment.** Former Section 11425 is not continued. It is superseded by Section 11462 (agreement of interested persons).

**Prob. Code § 11426 (repealed). Trust for installment or contingent debt**

~~11426. (a) Notwithstanding any other statute, the court may in its discretion appoint a trustee to whom payment of a debt that is contingent or is payable in installments shall be made, with the direction that the trustee invest the payment in investments that would be proper for a personal representative or as authorized by the court. The court in determining the amount of the payment shall compute the present value of the debt, giving consideration to a reasonable interest rate on the amount to be invested.~~

~~(b) The trustee shall pay the debt as ordered by the court. On completion of payment, any excess in possession of the~~

~~trustee shall be paid or distributed in accordance with the order for distribution.~~

**Comment.** Former Section 11426 is continued in Section 11465 (appointment of trustee) and broadened to apply to debts that are disputed or otherwise not due as well as debts that are contingent or payable in installments.

**Prob. Code § 11427 (repealed).** ~~Disputed and contingent debts 11427. Except as otherwise provided in this part, if a debt is not due or is contingent, or if a claim is disputed, the amount of the debt or claim or the part that would be payable if the debt were due or absolute or the claim established, shall be paid into court. The amount paid into court shall remain there, to be paid to the creditor when the debt is due or absolute or the claim is established, or, if the claim is not established, to be paid or distributed as the circumstances of the estate require.~~

**Comment.** Former Section 11427 is continued in Section 11463 (deposit in account withdrawable only on court order), except that the deposit in court is replaced by deposit in a blocked account.

**Prob. Code §§ 11460-11467 (added).** Debts that are contingent, disputed, or not due

#### **CHAPTER 4. DEBTS THAT ARE CONTINGENT, DISPUTED, OR NOT DUE**

##### **§ 11460. Definitions**

11460. As used in this chapter:

(a) A debt is “contingent” if it is established under Part 4 (commencing with Section 9000) in either a fixed or an uncertain amount and will become absolute on occurrence of a stated event other than the passage of time. The term includes a secured obligation for which there may be recourse against property in the estate, other than the property that is the security, if the security is insufficient.

(b) A debt is “disputed” if it is a claim rejected in whole or in part under Part 4 (commencing with Section 9000) and is not barred under Section 9353 as to the part rejected.

(c) A debt is “not due” if it is established under Part 4 (commencing with Section 9000) and will become due on the passage of time. The term includes a debt payable in installments.

**Comment.** The definitions in Section 11460 vary the definition of “debt” in Section 11401. See Section 11400 (definition in 11401 does not govern if provision or context otherwise requires).

Subdivision (a) is new.

Under subdivision (b), a rejected claim is not barred if within three months after the notice of rejection is given or after the claim becomes due the creditor commences an action on the claim or the matter is referred to a referee or to arbitration.

Subdivision (c) incorporates the aspect of former Section 11426 that related to installment debts.

#### **§ 11461. Court order**

11461. When all other debts have been paid and the estate is otherwise in a condition to be closed, on petition by an interested person, the court may make or modify an order or a combination of orders under this chapter that the court in its discretion determines is appropriate to adequately provide for a debt that is contingent, disputed, or not due if the debt becomes absolute, established, or due. Notice of the hearing on the petition shall be given as provided in Section 1220 to the creditor whose debt is contingent, disputed, or not due, as well as to the persons provided in Section 11601.

**Comment.** Section 11461 is correlative with Section 11640 (order for final distribution when all debts have been paid or adequately provided for). The term “interested person” is defined in Section 48.

#### **§ 11462. Agreement of interested persons**

11462. Notwithstanding any other provision of this chapter, if the court determines that all interested persons agree to the manner of providing for a debt that is contingent, disputed, or not due and that the agreement reasonably protects all interested persons and will not extend administration of the estate unreasonably, the court shall approve the agreement.

**Comment.** Section 11462 is new. Regardless of the other techniques provided in this chapter for securing payment, if all interested persons

agree and the agreement reasonably protects them, the court must ratify the agreement (unless the agreement requires administration of the estate to be continued for an unreasonable length of time). The agreement may require, for example, immediate payment of a debt that is disputed, contingent, or not due, if the interested persons are able to work out a satisfactory discount, compromise, or settlement. *Cf.* former Section 11425 (right of creditor to payment of debt not due if interest is waived). The term "interested person" is defined in Section 48.

**§ 11463. Deposit in account withdrawable only on court order**

11463. The court may order an amount deposited in a financial institution, as provided in Chapter 3 (commencing with Section 9700) of Part 5, that would be payable if a debt that is contingent, disputed, or not due were absolute, established, or due. The order shall provide that the amount deposited is subject to withdrawal only upon authorization of the court, to be paid to the creditor when the debt becomes absolute, established, or due, or to be distributed in the manner provided in Section 11642 if the debt does not become absolute or established.

**Comment.** Section 11463 replaces the deposit in court of former Section 11427 with deposit in a blocked account. The reference to Section 11642 incorporates any omnibus order for final distribution or subsequent court order for distribution.

**§ 11464. Distribution subject to assumption of liability**

11464. (a) The court may order property in the estate distributed to a person entitled to it under the final order for distribution, if the person files with the court an assumption of liability for a contingent or disputed debt as provided in subdivision (b). The court may impose any other conditions the court in its discretion determines are just, including that the distributee give a security interest in all or part of the property distributed or that the distributee give a bond in an amount determined by the court.

(b) As a condition for an order under subdivision (a), each distributee shall file with the court a signed and acknowledged agreement assuming personal liability for the contingent or

disputed debt and consenting to jurisdiction within this state for the enforcement of the debt if it becomes absolute or established. The personal liability of each distributee shall not exceed the fair market value on the date of distribution of the property received by the distributee, less the amount of liens and encumbrances. If there is more than one distributee, the personal liability of the distributees is joint and several.

(c) If the debt becomes absolute or established, it may be enforced against each distributee in the same manner as it could have been enforced against the decedent if the decedent had not died. In an action based on the debt, the distributee may assert any defense, cross-complaint, or setoff that would have been available to the decedent if the decedent had not died.

(d) The statute of limitations applicable to a contingent debt is tolled from the time the creditor's claim is filed until 30 days after the order for distribution becomes final. The signing of an agreement under subdivision (b) neither extends nor revives any limitation period.

**Comment.** Section 11464 is new. It provides for assumption of personal liability to the creditor and the right of the creditor to enforce the liability against the distributee.

A bond requirement under subdivision (a) may be satisfied by a cash deposit. Code Civ. Proc. § 995.710 (deposit in lieu of bond).

Tolling of the limitation period for contingent claims under subdivision (d) supplements Section 9352 (tolling during administration). The limitation period applicable to a disputed claim is governed by Sections 9353 and 9370.

#### **§ 11465. Appointment of trustee**

11465. (a) The court may order that a trustee be appointed to receive payment for a debt that is contingent, disputed, or not due. The court in determining the amount paid to the trustee shall compute the present value of the debt, giving consideration to a reasonable return on the amount to be invested. The trustee shall invest the payment in investments

that would be proper for a personal representative or as authorized in the order.

(b) The trustee shall pay the debt as provided in the order. On completion of payment, any excess in possession of the trustee shall be distributed in the manner provided in Section 11642.

**Comment.** Section 11465 continues former Section 11426 without substantive change and broadens it to apply to debts that are disputed or otherwise not due as well as debts that are contingent or payable in installments. The reference to Section 11642 incorporates any omnibus order for final distribution or subsequent court order for distribution.

#### **§ 11466. Distribution subject to bond**

11466. The court may order property in the estate distributed to a person entitled to it under the final order for distribution, if the person gives a bond conditioned on payment by the person of the amount of a contingent or disputed debt that becomes absolute or established. The amount of the bond shall be determined by the court, not to exceed the fair market value on the date of distribution of the property received by the distributee, less the amount of liens and encumbrances. In the case of a disputed debt or in the case of a contingent debt where litigation is required to establish the contingency, the cost of the bond is recoverable from the unsuccessful party as a cost of litigation.

**Comment.** Section 11466 is new.

#### **§ 11467. Continuation of administration**

11467. The court may order that the administration of the estate continue until the contingency, dispute, or passage of time of a debt that is contingent, disputed, or not due is resolved.

**Comment.** Section 11467 gives the court authority to order continuation of administration, if appropriate. This is a specific application of the general authority of the court to order continuation of administration for a reasonable time. Section 11640(c); see also Section 12201 (report of status of administration).



STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

**RECOMMENDATION**

relating to

**Remedies of Creditor Where Personal  
Representative Fails to Give Notice**

July 1990

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 Remedies of Creditor Where Personal Representative Fails to Give Notice*, 20 Cal. L. Revision Comm'n Reports 2719 (1990).**

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

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July 26, 1990

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

This recommendation supplements the remedies available to a creditor who is forced to petition for a late claim in probate because of the personal representative's failure timely to notify the creditor of the probate:

(1) The filing of a late claim petition by the creditor would toll the statute of limitations on the creditor's claim.

(2) Preliminary distributees would be required to restore property to the estate to the extent necessary to satisfy the late claim.

(3) A personal representative whose failure to notify the creditor is wrongful would be personally liable to the extent preliminary distributions are not recoverable and have caused the estate to be insolvent.

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

Respectfully submitted,

Edwin K. Marzec  
*Chairperson*



## RECOMMENDATION

If a personal representative in bad faith fails to notify a known creditor of the estate proceeding, the creditor has no remedy against the personal representative so long as the estate is open, but is relegated to a late claim. It is only where the creditor becomes aware of the administration after the estate is closed that the creditor may have a remedy against the personal representative.<sup>1</sup>

Even though the estate is open, the personal representative may have depleted the estate by preliminary distributions, with the result that the late claim is not a remedy for the omitted creditor. The late claim statute does not provide that preliminary distributions are subject to late claims in probate; property distributed before a late claim is filed is not subject to the claim.<sup>2</sup>

The statute should not immunize preliminary distributions from late claims. A preliminary distribution is intended as a convenience to potential distributees, not as a device to defeat the just claims of creditors. Distributees should take with the understanding that until there is an order for final distribution they may be liable to make restitution of the property or its value if required for estate administration. This is the implication of the preliminary distribution statute itself, which provides that the court may require a bond conditioned on "payment of the distributee's proper share of the debts of the estate, not exceeding the amount distributed".<sup>3</sup> Where a preliminary distributee is unable to make restitution because the distributee is insolvent, the creditor should have an

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1. Prob. Code § 9053.

2. Prob. Code § 9103(d). In addition, the filing of a late claim does not toll the statute of limitations applicable to the claim, with the result that the late claim remedy of an unnotified creditor may be illusory in some cases. Probate Code Section 9352 should be amended to provide that filing a petition for a late claim tolls the statute of limitations applicable to the claim.

3. Prob. Code § 11622(c).

alternative remedy against a personal representative who acted in bad faith.

### PROPOSED LEGISLATION

#### **Prob. Code § 9053 (amended). Immunity of personal representative**

SEC. . Section 9053 of the Probate Code is amended to read:

9053. (a) If the personal representative 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 is not liable to any person for giving the notice, whether or not required by this chapter.

(b) If the personal representative fails to give notice required by this chapter, the personal representative is not liable to any person for the failure, unless a creditor establishes all of the following:

(1) The failure was in bad faith.

(2) Neither the creditor nor the attorney representing the creditor in the matter had actual knowledge of the administration of the estate before ~~the court made an order for final distribution~~ *expiration of the time for filing a claim*, and payment would have been made on the creditor's claim in the course of administration if the claim had been properly filed.

(3) Within 16 months after letters were first issued to a general personal representative, the creditor did both of the following:

(A) Filed a petition requesting that the court in which the estate was administered make an order determining the liability of the personal representative under this subdivision.

(B) At least 30 days before the hearing on the petition, caused notice of the hearing and a copy of the petition to be served on the personal representative in the manner provided in Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure.

(c) Nothing in this section affects the liability of the estate, if any, for the claim of a creditor, and the personal representative is not liable for the claim to the extent it is paid out of the estate *or could be paid out of the estate pursuant to Section 9103*.

(d) Nothing in this chapter imposes a duty on the personal representative to make a search for creditors of the decedent.

**Comment.** Section 9053 is amended to extend liability to a bad faith personal representative in a case where the estate is open but the debt cannot be satisfied out of the estate due to preliminary distributions that cannot be recovered under Section 9103 (late claims).

**Prob. Code § 9103 (amended). Late claims**

**SEC. .** Section 9103 of the Probate Code 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 is satisfied:

(1) Neither the creditor nor the attorney representing the creditor in the matter had actual knowledge of the administration of the estate 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 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) 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. Nothing in this paragraph authorizes allowance or approval of a claim barred by, or extends the time provided in, Section 353 of the Code of Civil Procedure.

(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.

(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. Except to the extent provided in Section 9392 and subject to Section 9053, the personal representative, ~~distributee~~, or payee is not liable on account of the prior ~~distribution or~~ payment. *Nothing in this subdivision limits the liability of a person who receives a preliminary distribution of property to restore to the estate an amount sufficient for payment of the distributee's proper share of the claim, not exceeding the amount distributed.*

**Comment.** Subdivisions (c) and (d) of Section 9103 are amended so that they do not immunize a distribution made under an order for preliminary distribution from subsequent liability for a late claim. Only a distribution made under an order for final distribution is entitled to the immunity provided in subdivision (b). Cf. Section 11622(c) (bond for preliminary distribution).

**Prob. Code § 9352 (amended). Tolling statute of limitations**

9352. (a) The filing of a claim *or a petition under Section 9103 to file a claim* tolls the statute of limitations otherwise applicable to the claim until allowance, approval, or rejection.



**(b) The allowance or approval of a claim in whole or in part further tolls the statute of limitations during the administration of the estate as to the part allowed or approved.**

**Comment.** Subdivision (a) of Section 9352 is amended to provide that filing a petition for a late claim tolls the statute of limitations applicable to the claim.



STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

**RECOMMENDATION**

relating to

**Repeal of Civil Code Section 704  
(Passage of Ownership of U.S. Bonds on Death)**

**November 1990**

**California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
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**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 Repeal of Civil Code Section 704 (Passage of Ownership of U.S. Bonds on Death)*, 20 Cal. L. Revision Comm'n Reports 2729 (1990).

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November 29, 1990

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

This recommendation proposes to repeal Section 704 of the Civil Code. That section, which provides special rules for passage at death of ownership of United States bonds, fails to recognize community property rights of a surviving spouse and concerns matters that are already governed by comprehensive federal regulations.

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

Respectfully submitted,

Roger Arnebergh  
*Chairperson*



## RECOMMENDATION

Civil Code Section 704 provides that:

(1) United States bonds<sup>1</sup> registered in the names of two persons as co-owners in the alternative shall, on death of either co-owner, become the sole property of the surviving co-owner.<sup>2</sup>

(2) United States bonds registered in the name of one person payable on death to a named survivor shall, on death of the owner, become the sole property of the named survivor.

(3) If federal laws or regulations governing issuance of United States bonds provide otherwise, they are controlling.

The matters covered in Section 704 are governed by federal regulations.<sup>3</sup> Moreover, Section 704 says nothing about the rights of the surviving spouse where the deceased spouse used community funds to buy United States bonds to benefit a third person. Under California community property law, one spouse may not make a gift of community funds without written consent of the other spouse.<sup>4</sup> The United States Supreme Court has held that federal law does not prevent

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1. Section 704 applies to "United States savings bonds or other bonds or obligations of the United States, however designated."

2. Section 704 provides for survivorship despite co-ownership in the alternative "or" form. In most U. S. jurisdictions, the alternative "or" form does not create a joint tenancy with right of survivorship. Annot., 171 A.L.R. 522, 528-31 (1947); 10 Am. Jur. 2d *Banks* § 369, at 333 (1963).

3. See 31 C.F.R. §§ 315.0-315.93 (1989). See also *Conrad v. Conrad*, 66 Cal. App. 2d 280, 283, 152 P.2d 221 (1944) (federal regulations control). The federal regulations apply to United States savings bonds of series E and series H and United States savings notes. They also apply to United States savings bonds of series A, B, C, D, F, G, J, and K, all of which have matured and are no longer earning interest. 31 C.F.R. § 315.0 (1989). Except for errors, registration of United States savings bonds "is conclusive of ownership." 31 C.F.R. § 315.5(a) (1989). If one co-owner named on a bond has died, the surviving owner "will be recognized as its sole and absolute owner, and payment or reissue will be made as though the bond were registered in the name of the survivor alone." 31 C.F.R. § 315.70(b) (1989). If the owner of a bond registered in beneficiary form has died and is survived by the beneficiary, "the beneficiary will be recognized as the sole and absolute owner of the bond. Payment or reissue will be made as though the bond were registered in the survivor's name alone." 31 C.F.R. § 315.70(c) (1989).

4. Civil Code § 5125(b).

imposition of a trust on bond proceeds to protect community property rights of a surviving spouse.<sup>5</sup> The California cases protect the rights of the surviving spouse by imposing a trust on the proceeds where the deceased spouse has used community funds to buy United States bonds.<sup>6</sup>

Section 704 is unnecessary because the matter is covered by federal regulations.<sup>7</sup> Section 704 is misleading because it is inconsistent with California community property law. The Law Revision Commission recommends Section 704 be repealed.

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5. *Yiatchos v. Yiatchos*, 376 U.S. 306 (1964). See also Note, *Yiatchos v. Yiatchos: A Sequel to Free v. Bland*, 38 S. Cal. L. Rev. 335 (1965).

6. *Estate of Bray*, 230 Cal. App. 2d 136, 40 Cal. Rptr. 750 (1964); *Chase v. Leiter*, 96 Cal. App. 2d 439, 451-54, 215 P.2d 756 (1950); Note, *Community Property: Survivorship Provisions of United States Savings Bonds: In re Bray's Estate*, 5 Santa Clara Lawyer 196 (1965). But see *Estate of Raphael*, 115 Cal. App. 2d 525, 252 P.2d 979 (1953) (transmutation agreement did not affect U.S. bonds).

7. Section 704 is unnecessary to recognize the validity of a nonprobate transfer of a United States bond: Probate Code Section 160, revised and renumbered as Probate Code Section 5000 by Chapter 79 of the Statutes of 1990, provides that a nonprobate transfer provision in a bond or other written instrument is not invalid because the instrument does not comply with the requirements for execution of a will, and that the Probate Code does not invalidate the instrument.



## PROPOSED LEGISLATION

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

**Civil Code § 704 (repealed). Rights in U.S. savings bonds at death**

~~704. All United States savings bonds or other bonds or obligations of the United States, however designated, now or hereafter issued, which are registered in the names of two persons as co-owners in the alternative, shall, upon the death of either of the registered co-owners, become the sole and absolute property of the surviving co-owner, unless the Federal laws under which such bonds or other obligations were issued or the regulations governing the issuance thereof, made pursuant to such laws, provide otherwise.~~

~~All United States savings bonds or other bonds or obligations of the United States, however designated, now or hereafter issued, which are registered in the name of one person payable on death to a named survivor, shall, upon the death of the registered owner, become the sole and absolute property the surviving beneficiary named therein, unless the Federal laws under which such bonds or other obligations were issued or the regulations governing the issuance thereof, made pursuant to such laws, provide otherwise.~~

~~This section shall not be construed to mean that prior to the enactment hereof the law of this State was otherwise than as herein provided.~~

**Comment.** Former Section 704 is repealed. The matter covered in the former section is governed by federal regulations. See 31 C.F.R. §§ 315.0-315.93 (1989). See also *Conrad v. Conrad*, 66 Cal. App. 2d 280, 152 P.2d 221 (1944) (federal regulations controlling); Prob. Code § 5000 (pay-on-death provision in written instrument not invalid because not executed with formality of a will).



STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

**RECOMMENDATION**

*relating to*

**Disposition of Small Estate  
Without Probate**

**September 1990**

**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 Disposition of Small Estate Without Probate*, 20 Cal. L. Revision Comm'n Reports 2737 (1990).**

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

**CALIFORNIA LAW REVISION COMMISSION**

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ANN E. STODDEN

September 13, 1990

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

The recommended legislation would make the following clarifying or technical revisions in the affidavit procedure for the collection of personal property of a small estate (Probate Code §§ 13000-13116):

(1) The affidavit procedure may be used to substitute the decedent's successor for the decedent in pending litigation concerning property that could have been collected by affidavit.

(2) The affidavit procedure may be used to collect life insurance proceeds and other property passing to the decedent's estate on the decedent's death.

(3) The affidavit procedure may be used, notwithstanding that there are or have been probate proceedings for the decedent's estate, with the consent of the personal representative.

The recommended legislation permits the trustee of a trust created by the decedent's will to act on behalf of the trust in summary proceedings for a small estate.

The recommended legislation also would permit personal property to be collected in a proceeding to obtain a court order determining succession to real property of a small estate (Probate Code §§ 13150-13157).

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

Respectfully submitted,

Roger Arnebergh  
*Chairperson*

## RECOMMENDATION

The Probate Code provides simple and efficient procedures for collection or transfer of property of a small estate without probate.<sup>1</sup> This recommendation proposes revisions in these procedures.

### **Affidavit Procedure for Substitution of Parties**

An affidavit procedure may be used by the successor of the decedent<sup>2</sup> to obtain payment, delivery, or transfer of personal property of the decedent.<sup>3</sup> The successor presents an affidavit (or declaration) to the holder of the property or the person who owes a debt to the decedent. The person to whom the affidavit is presented is discharged from liability if the person transfers the property or pays the debt to the person presenting the affidavit.<sup>4</sup> If the person refuses to transfer the property or pay the debt, the successor may bring an action to enforce transfer or payment.<sup>5</sup>

The affidavit procedure does not cover the situation where the decedent has brought an action to enforce a right to payment or possession of property and dies while the action is pending. If the estate qualifies for use of the affidavit procedure, the recommended legislation permits the decedent's successor to use the affidavit procedure to be

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1. See Prob. Code §§ 13000-13208. Summary procedures may be used in estates having a gross value not exceeding \$60,000. The following are excluded in determining whether the estate value is \$60,000 or less: joint tenancy property; property in which the decedent held a life or other interest terminable on decedent's death; property passing to decedent's surviving spouse; a multiple-party account in a financial institution; a vehicle registered or titled under the Vehicle Code; a vessel numbered under the Vehicle Code; a manufactured home, mobilehome, commercial coach, truck camper, or floating home registered under the Health and Safety Code; amounts due to decedent for service in the armed forces; and not more than \$5,000 in salary for personal services from employment. Prob. Code § 13050.

2. "Successor of the decedent" is defined in Probate Code Section 13006 to mean those who would take under decedent's will if there is a will, or by the law of intestate succession if there is no will.

3. Prob. Code §§ 13100-13116.

4. Prob. Code § 13106.

5. Prob. Code § 13105(b).

substituted as a party in place of the decedent in the pending action or proceeding. To be substituted as a party, the successor must make a motion and file an affidavit or declaration with the court.<sup>6</sup>

### **Collection of Life Insurance Proceeds by Affidavit**

The affidavit procedure may be used to collect "money due the decedent."<sup>7</sup> It is not clear that "money due the decedent" includes property that becomes part of the decedent's estate on the decedent's death, such as life insurance proceeds payable to the estate, or property that reverts to the estate because a named beneficiary failed to survive the decedent or disclaimed the property. The recommended legislation makes clear that the affidavit procedure may be used to collect property that becomes part of the decedent's estate on the decedent's death.<sup>8</sup>

### **Summary Collection of Decedent's Property During or After Probate**

A successor of a decedent may use a summary small estate procedure in several situations:

(1) If the gross value of the decedent's property in this state does not exceed \$60,000,<sup>9</sup> personal property may be collected or transferred by providing the holder of the property with an affidavit or declaration showing the entitlement of the person seeking the property.<sup>10</sup>

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6. The motion for substitution would be made under the applicable procedure in the Code of Civil Procedure. If the Commission's *Recommendation Relating to Litigation Involving Decedents*, 20 Cal. L. Revision Comm'n Reports 2785 (1990), is enacted, the motion would be made under Code of Civil Procedure Section 377.320. If that recommendation is not enacted, the motion would be made under Code of Civil Procedure Section 385.

7. Prob. Code § 13100.

8. The recommended legislation also makes clear that such property is included in determining whether the decedent's estate is within the \$60,000 limit for a small estate.

9. See *supra* note 1.

10. Prob. Code §§ 13100-13116.



(2) If the gross value of the decedent's property in this state does not exceed \$60,000,<sup>11</sup> a court order may be obtained determining succession to the decedent's real property.<sup>12</sup>

(3) If the gross value of the decedent's real property in this state does not exceed \$10,000, a marketable title<sup>13</sup> to real property may be obtained by filing with the court an affidavit that the person is the successor of the decedent to the property, and by recording a certified copy of the affidavit.<sup>14</sup>

None of these procedures may be used if proceedings for administration of the decedent's estate are pending or have been conducted in this state.<sup>15</sup>

An estate may be administered for a limited purpose, without full administration being contemplated. For example, a special administrator may be appointed to do a particular act,<sup>16</sup> such as to take possession of property to protect it, or to exercise an option to purchase property. Or a "dry probate" may be conducted to establish terms of a testamentary trust funded by life insurance, to determine whether decedent exercised a testamentary power of appointment, to facilitate ancillary administration in another state, to enter decedent's safe deposit box, or to handle tax controversies that arose during decedent's lifetime.

The Commission recommends that a person entitled to property of the decedent be permitted to use the summary procedures, despite the pendency of proceedings for administration of the estate, if the personal representative consents in writing. If it later appears that the property is needed in the estate proceeding, the personal representative

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11. See *supra* note 1.

12. Prob. Code §§ 13150-13157.

13. See Prob. Code § 13203 (good faith purchaser or lessee from, or lender to, the affiant is protected).

14. Prob. Code §§ 13200-13208.

15. Prob. Code §§ 13108, 13150, 13200.

16. Prob. Code § 8540.

may request that the property be restored to the estate, and the person who used the summary procedure is required to restore the property to the estate.<sup>17</sup>

### **Including Personal Property in Court Proceeding for Real Property**

If the gross value of decedent's property in California is between \$10,000 and \$60,000,<sup>18</sup> the decedent's personal property may be collected by affidavit,<sup>19</sup> while a petition and court order are required to obtain marketable title to the decedent's real property.<sup>20</sup> If the estate has both real and personal property, the court should have authority in the real property proceeding also to order the payment or transfer of personal property. This would permit the decedent's successor to obtain a court order covering both real and personal property in a single proceeding, rather than requiring a court proceeding to determine succession to real property and a separate affidavit procedure for the transfer or payment of personal property.<sup>21</sup>

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17. This would be consistent with the provision of existing law which permits the personal representative to leave real or tangible personal property in possession of the person presumptively entitled to it, or to surrender the property to that person, unless or until, in the judgment of the personal representative, the property is needed for purposes of administration of the estate. Prob. Code § 9650.

18. See *supra* note 1.

19. Prob. Code § 13101.

20. See Prob. Code §§ 13151, 13154.

21. When the Commission recommended the court procedure for real property, personal property was intentionally excluded from the real property proceeding. The Commission was concerned that the holder of the decedent's personal property, when presented with an affidavit under Sections 13100-13116, might use the availability of a court remedy to insist on a court order before releasing the personal property. The recommended legislation includes a provision that makes clear that the availability of the court proceeding does not excuse the holder of the decedent's personal property from complying with the duty to transfer or pay personal property pursuant to the affidavit procedure.

It seems unnecessary to authorize a summary court proceeding for collection of personal property when there is no real property in the estate. The affidavit procedure is simple and expeditious, and the statute provides sanctions against a holder of the decedent's personal property who unreasonably refuses to turn it over to the affiant. Prob. Code § 13105.

## **Use of Summary Proceeding by Trustee of Testamentary Trust**

Existing law precludes use of the summary proceedings for a small estate by the trustee of a trust created by the decedent's will.<sup>22</sup> The recommended legislation eliminates this restriction; the trustee may use the summary proceedings, whether or not proceedings for the administration of the estate are or will be conducted in this state.<sup>23</sup> No longer will there be a need to probate a small estate merely because a trust rather than an individual is the successor of the decedent.

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22. Prob. Code §§ 13006(a), 13051.

23. If a proceeding for the administration of the decedent's estate is pending in California, the consent in writing of the decedent's personal representative is required before a summary small estate procedure may be used.

## PROPOSED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following amendments and additions:

**Prob. Code § 573 (amended). Survival of actions**

573. (a) Except as provided in this section, no cause of action is lost by reason of the death of any person, but may be maintained by or against the person's personal representative.

(b) In an action brought under this section against a personal representative, all damages may be awarded which might have been recovered against the decedent had the decedent lived except damages awardable under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant.

(c) Where a person having a cause of action dies before judgment, the damages recoverable by his or her personal representative are limited to the loss or damage the decedent sustained or incurred prior to death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived but not including any damages for pain, suffering, or disfigurement.

(d) This section applies where a loss or damage occurs simultaneously with or after the death of a person who would have been liable for the loss or damage if his or her death had not preceded or occurred simultaneously with the loss or damage.

(e) Nothing in this section shall be construed as affecting the assignability of causes of action.

(f) *Nothing in this section limits the right of the successor of the decedent (as defined in Section 13006) to commence or continue an action to have property that is described in an affidavit or declaration executed pursuant to Chapter 3 (commencing with Section 13100) of Part 1 of Division 8 paid, delivered, or transferred to the successor of the decedent.*

**Comment.** Section 573 is amended to add subdivision (f) recognizing exceptions to the general rule in subdivision (a). See Sections 13105 (action for refusal to pay or transfer property to successor pursuant to affidavit), 13107.5 (substitution of parties without probate).

**Note.** This amendment of Section 573 will not be made if the Commission's *Recommendation Relating to Litigation Involving Decedents*, 20 Cal. L. Revision Comm'n Reports 2785 (1990) is enacted, since that recommendation would repeal and supersede Section 573.

**Prob. Code § 13004 (amended). Particular item of property**

13004. (a) "Particular item of property" means; ~~respectively, particular:~~

(1) *Particular* personal property of the decedent which is sought to be collected, received, or transferred by the successor of the decedent under Chapter 3 (commencing with Section 13100); ~~or particular.~~

(2) *Particular* real property of the decedent, *or particular real and personal property of the decedent*, for which the successor of the decedent seeks a court order determining succession under Chapter 4 (commencing with Section 13150) ~~or.~~

(3) *Particular real property of the decedent* with respect to which the successor of the decedent files an affidavit of succession under Chapter 5 (commencing with Section 13200).

(b) Subject to ~~this section subdivision (a)~~, "particular item of property" includes all interests specified in Section 62.

**Comment.** Section 13004 is amended to conform to the revision of Chapter 4 (commencing with Section 13150) which makes that chapter applicable to personal property of the decedent under some circumstances.

**Prob. Code § 13005 (added). Property of the decedent**

13005. "Property of the decedent," "decedent's property," "money due the decedent," and similar phrases, include property that becomes part of the decedent's estate on the decedent's death, whether by designation of the estate as beneficiary under an insurance policy on the decedent's life or under the decedent's retirement plan, or otherwise.

**Comment.** Section 13005 makes clear that the affidavit procedure under Chapter 3 (commencing with Section 13100) may be used by the successor of the decedent to collect insurance on the decedent's life payable to the estate of the decedent, and other property that becomes part of the decedent's estate on the decedent's death. Property that becomes part of the decedent's estate on the decedent's death also is included in determining whether the decedent's real and personal property in this state exceeds \$60,000 for the purpose of Section 13100.

Property may become part of the decedent's estate from causes other than a designation of the estate as beneficiary, including failure of the primary and secondary beneficiaries of the decedent's life insurance or retirement plan to survive the decedent, and disclaimer of insurance or retirement benefits by the beneficiary.

**Prob. Code § 13006 (amended). Successor of the decedent**

13006. "Successor of the decedent" means:

(a) If the decedent died leaving a will, the sole beneficiary or all of the beneficiaries who succeeded to a particular item of property of the decedent under the decedent's will. For the purposes of this part, the ~~trustee of a trust created during the decedent's lifetime~~ is a beneficiary under the decedent's will if the trust succeeds to the particular item of property under the decedent's will.

(b) If the decedent died without a will, the sole person or all of the persons who succeeded to the particular item of property of the decedent under Sections 6401 and 6402 or, if the law of a sister state or foreign nation governs succession to the particular item of property, under the law of the sister state or foreign nation.

**Comment.** Section 13006 is amended to delete the language which precluded the trustee of a testamentary trust from using the procedures under this part. This deletion allows the trustee of a testamentary trust created in the decedent's will to act on behalf of the trust. This permits the trustee to use a small estate summary procedure where no proceeding is being or has been conducted in California for administration of the decedent's estate or where the decedent's personal representative has consented to use of the procedure. See Sections 13101(a)(4), 13108(a)(2), 13150(b), 13200(a)(7).

**Prob. Code § 13051 (amended). Guardians, conservators, trustees, custodians, sister state personal representatives**  
13051. For the purposes of this part:

(a) ~~A~~ *The* guardian or conservator of the estate of a person entitled to any of the decedent's property may act on behalf of the person without authorization or approval of the court in which the guardianship or conservatorship proceeding is pending.

(b) ~~A~~ *The* trustee of a trust ~~created during the decedent's lifetime~~ may act on behalf of the trust. In the case of a trust that is subject to continuing jurisdiction of the court pursuant to Chapter 4 (commencing with Section 17300) of Part 5 of Division 9, the trustee may act on behalf of the trust without the need to obtain approval of the court.

(c) If the decedent's will ~~nominates~~ *authorizes* a custodian ~~to receive a devise to a beneficiary~~ under the Uniform Gifts to Minors Act or the Uniform Transfer to Minors Act of any state ~~and the nomination has not been revoked~~ *to receive a devise to a beneficiary*, the custodian may act on behalf of the beneficiary until such time as the custodianship terminates.

(d) A sister state personal representative may act on behalf of the beneficiaries as provided in Chapter 3 (commencing with Section 12570) of Part 13 of Division 7.

(e) The attorney in fact authorized under a durable power of attorney may act on behalf of the beneficiary giving the power of attorney.

**Comment.** Subdivision (b) of Section 13051 is amended to eliminate the restriction that the trust must be created during the decedent's lifetime. This deletion allows the trustee of a testamentary trust by whomever created to act on behalf of the trust. This permits the trustee to use a small estate summary procedure where no proceeding is being or has been conducted in California for administration of the decedent's estate or where the decedent's personal representative has consented to use of the procedure. See Sections 13101(a)(4), 13108(a)(2), 13150(b), 13200(a)(7). See also Section 13006 ("successor of the decedent" defined).

**Prob. Code § 13101 (amended). Furnishing affidavit or declaration**

13101. (a) To collect money, receive tangible personal property, or have evidences of a debt, obligation, interest, right, security, or chose in action transferred under this chapter, an affidavit or a declaration under penalty of perjury under the laws of this state shall be furnished to the holder of the decedent's property stating all of the following:

(1) The decedent's name.

(2) The date and place of the decedent's death.

(3) "At least 40 days have elapsed since the death of the decedent, as shown in a certified copy of the decedent's death certificate attached to this affidavit or declaration."

(4) *Either of the following, as appropriate:*

(A) "No proceeding is now being or has been conducted in California for administration of the decedent's estate."

(B) "*The decedent's personal representative has consented in writing to the payment, transfer, or delivery to the affiant or declarant of the property described in the affidavit or declaration.*"

(5) "The *current gross fair market value* of the decedent's real and personal property in California, excluding the property described in Section 13050 of the California Probate Code, does not exceed sixty thousand dollars (\$60,000)."

(6) A description of the property of the decedent that is to be paid, transferred, or delivered to the affiant or declarant.

(7) The name of the successor of the decedent (as defined in Section 13006 of the California Probate Code) to the described property.

(8) *Either of the following, as appropriate:*

(A) "The affiant or declarant is the successor of the decedent (as defined in Section 13006 of the California Probate Code) to the decedent's interest in the described property."



(B) "The affiant or declarant is authorized under Section 13051 of the California Probate Code to act on behalf of the successor of the decedent (as defined in Section 13006 of the California Probate Code) with respect to the decedent's interest in the described property."

(9) "No other person has a right to the interest of the decedent in the described property."

(10) "The affiant or declarant requests that the described property be paid, delivered, or transferred to the affiant or declarant."

(11) "The affiant or declarant affirms or declares under penalty of perjury under the laws of the State of California that the foregoing is true and correct."

(b) Where more than one person executes the affidavit or declaration under this section, the statements required by subdivision (a) shall be modified as appropriate to reflect that fact.

(c) If the particular item of property to be transferred under this chapter is a debt or other obligation secured by a lien on real property and the instrument creating the lien has been recorded in the office of the county recorder of the county where the real property is located, the affidavit or declaration shall satisfy the requirements both of this section and Section 13106.5.

(d) A certified copy of the decedent's death certificate shall be attached to the affidavit or declaration.

*(e) If the decedent's personal representative has consented to the payment, transfer, or delivery of the described property to the affiant or declarant, a copy of the consent and of the personal representative's letters shall be attached to the affidavit or declaration.*

**Comment.** Subdivision (a)(4) of Section 13101 is revised and subdivision (e) is added to reflect the new authorization for the decedent's personal representative to consent to use of the affidavit procedure, notwithstanding that an estate proceeding is pending or has been conducted in this state. See Section 13108(a)(2).

**Prob. Code § 13107.5 (added). Substitution of parties without probate**

13107.5. Where the money or property claimed in an affidavit or declaration executed under this chapter is the subject of a pending action or proceeding in which the decedent was a party, the successor of the decedent shall, without procuring letters of administration or awaiting probate of the will, be substituted as a party in place of the decedent by making a motion Section 385 of the Code of Civil Procedure. The successor of the decedent shall file the affidavit or declaration with the court when the motion is made. For the purpose of Section 385, a successor of the decedent who complies with this chapter shall be considered as a successor in interest of the decedent.

**Comment.** Section 13107.5 is a new provision permitting the successor of the decedent (as defined in Section 13006) to be substituted for the decedent in an action or proceeding involving the money or property claimed by the successor that was pending when the decedent died. The right to be substituted for the decedent under this section exists only where the value of the estate, as determined pursuant to Section 13050, does not exceed \$60,000. This right is consistent with the right of the successor under Section 13105(b) to bring an action to recover money or property that the holder refuses to pay or deliver to the successor.

The decedent's surviving spouse may use the procedure provided by this section if the surviving spouse is the successor in interest and the value of the estate, as determined pursuant to Section 13050, does not exceed \$60,000. As provided in Section 13050(a)(1), the value of property passing to the surviving spouse pursuant to Section 13500 is excluded in determining the value of the estate.

**Note.** Section 13107.5 will be replaced by the version of Section 13107.5 set out in the *Recommendation Relating to Litigation Involving Decedents*, 20 Cal. L. Revision Comm'n Reports 2785 (1990), if that recommendation is enacted.

**Prob. Code § 13108 (amended). Limitation on use of affidavit procedure**

13108. (a) The procedure provided by this chapter may be used only if ~~no~~ *one of the following requirements is satisfied:*

(1) *No proceeding for the administration of the decedent's estate is pending or has been conducted in this state.*

(2) *The decedent's personal representative consents in writing to the payment, transfer, or delivery of the property described in the affidavit or declaration pursuant to this chapter.*

(b) Payment, delivery, or transfer of a decedent's property pursuant to this chapter does not preclude later proceedings for administration of the decedent's estate.

**Comment.** Subdivision (a)(2) is added to Section 13108 to permit use of the procedure provided by this chapter, notwithstanding that an estate proceeding is pending or has been conducted in this state.

**Prob. Code § 13110 (amended). Liability to person having superior right**

13110. (a) Except as provided in subdivision (b), each person to whom payment, delivery, or transfer of the decedent's property is made under this chapter is personally liable to the extent provided in Section 13112 to any person having a superior right by testate or intestate succession from the decedent.

(b) In addition to any other liability the person has under this section and Sections 13109, 13111, and 13112, any person who fraudulently secures the payment, delivery, or transfer of the decedent's property under this chapter is liable to the person having such a superior right for three times the fair market value of the property. For the purposes of this subdivision, the "fair market value of the property" is the fair market value of the property paid, delivered, or transferred to the person liable under this subdivision, valued as of the time the person liable under this subdivision presents the affidavit or declaration under this chapter to the holder of the decedent's property, *excluding less* any liens and encumbrances on that property at that time.

(c) An action to impose liability under this section is forever barred three years after the affidavit or declaration is

presented under this chapter to the holder of the decedent's property, or three years after the discovery of the fraud, whichever is later. The three-year period specified in this subdivision is not tolled for any reason.

**Comment.** Subdivision (b) of Section 13110 is amended to change "excluding" to "less" liens and encumbrances, to make clear that fair market value means net value.

**Prob. Code § 13111 (amended). Restitution if estate proceeding commenced or on request of personal representative**

13111. (a) Subject to the provisions of this section, if proceedings for the administration of the decedent's estate are commenced in this state, *or if the decedent's personal representative has consented to the payment, transfer, or delivery of the decedent's property under this chapter and the personal representative later requests that the property be restored to the estate*, each person to whom payment, delivery, or transfer of the decedent's property is made under this chapter is liable for:

(1) The restitution of the property to the estate if the person still has the property, together with (A) the net income the person received from the property and (B) if the person encumbered the property after it was delivered or transferred to the person, the amount necessary to satisfy the balance of the encumbrance as of the date the property is restored to the estate.

(2) The restitution to the estate of the fair market value of the property if the person no longer has the property, together with (A) the net income the person received from ~~that the~~ property and (B) interest on the fair market value of the property from the date of disposition at the rate payable on a money judgment. For the purposes of this subdivision, the "fair market value of the property" is ~~the fair market value,~~ *valued determined* as of the time of the disposition of the property, of the property paid, delivered, or transferred to the

person under this chapter, ~~excluding~~ *less* any liens and encumbrances on the property at that time.

(b) Subject to subdivision (c) and subject to any additional liability the person has under Sections 13109 to 13112, inclusive, if the person fraudulently secured the payment, delivery, or transfer of the decedent's property under this chapter, the person is liable under this section for restitution to the decedent's estate of three times the fair market value of the property. For the purposes of this subdivision, the "fair market value of the property" is ~~the fair market value, valued~~ *determined* as of the time the person liable under this subdivision presents the affidavit or declaration under this chapter, of the property paid, delivered, or transferred to the person under this chapter, ~~excluding~~ *less* the amount of any liens and encumbrances on the property at that time.

(c) The property and amount required to be restored to the estate under this section shall be reduced by any property or amount paid by the person to satisfy a liability under Section 13109 or 13110.

(d) An action to enforce the liability under this section may be brought only by the personal representative of the estate of the decedent. In an action to enforce the liability under this section, the court's judgment may enforce the liability only to the extent necessary to protect the interests of the heirs, devisees, and creditors of the decedent.

(e) An action to enforce the liability under this section is forever barred three years after presentation of the affidavit or declaration under this chapter to the holder of the decedent's property, or three years after the discovery of the fraud, whichever is later. The three-year period specified in this subdivision is not tolled for any reason.

(f) In the case of a nondomiciliary decedent, restitution under this section shall be made to the estate in an ancillary administration proceeding.

**Comment.** Section 13111 is amended to reflect the authorization for the decedent's personal representative to consent to summary payment, transfer, or delivery of the decedent's property, notwithstanding that an estate proceeding is pending or has been conducted in this state. See Section 13108.

**Heading to Chapter 4 (commencing with Section 13150) of Part 1 of Division 8 (amended)**

**CHAPTER 4. COURT ORDER DETERMINING  
SUCCESSION TO ~~REAL~~ PROPERTY**

**Prob. Code § 13150 (amended).** When procedure provided by this chapter may be used

13150. The procedure provided by this chapter may be used only if ~~no~~ *one of the following requirements is satisfied:*

(a) *No proceeding is being or has been conducted in this state for administration of the decedent's estate.*

(b) *The decedent's personal representative consents in writing to use of the procedure provided by this chapter to determine that real property of the decedent is property passing to the petitioners.*

**Comment.** Subdivision (b) is added to Section 13150 to permit the procedure provided by this chapter to be used if the decedent's personal representative consents, notwithstanding that an estate proceeding is pending or has been conducted in this state.

**Prob. Code § 13151 (amended).** **Petition for order determining succession to real property**

13151. Exclusive of the property described in Section 13050, if a decedent dies leaving real property in this state and the gross value of the decedent's real and personal property in this state does not exceed sixty thousand dollars (\$60,000) and 40 days have elapsed since the death of the decedent, the successor of the decedent to an interest in a particular item of property that is real property, without procuring letters of administration or awaiting the probate of the will, may file a petition in the superior court of the county in which the estate of the decedent may be administered requesting a court order determining that the petitioner has succeeded to that real

~~property and that administration of the decedent's estate is unnecessary.~~ *A petition under this chapter may include an additional request that the court make an order determining that the petitioner has succeeded to personal property described in the petition.*

**Comment.** Section 13151 is amended to delete the requirement that the petition request an order determining that administration of the decedent's estate is unnecessary. This requirement is no longer appropriate in view of the new authorization for the decedent's personal representative to consent to a court order determining succession to decedent's property pursuant to this chapter, notwithstanding that an estate proceeding is pending or has been conducted in this state. See Section 13150.

The last sentence is added to Section 13151 to permit a petition under this chapter to include a request that the court make an order determining that the petitioner has succeeded to personal property of the decedent. Such an order may be made only if the petition requests an order determining that the petitioner has succeeded to real property described in the petition. A petition requesting an order concerning personal property only is not permitted under this chapter. Where only personal property is involved, the affidavit procedure under Chapter 3 (commencing with Section 13100) is the appropriate summary procedure to use.

**Prob. Code § 13152 (amended). Contents of petition; inventory and appraisal**

13152. (a) The petition shall be verified by each petitioner, shall contain a request that the court make an order under this chapter determining that the ~~particular item of property described in the petition is property passing to the petitioner and that no administration of the decedent's estate is necessary,~~ and shall state all of the following:

(1) The facts necessary to determine that the petition is filed in the proper county.

(2) The gross value of the decedent's real and personal property in California, excluding the property described in Section 13050, as shown by the inventory and appraisal attached to the petition, does not exceed sixty thousand dollars (\$60,000).

(3) A description of the particular item of *real* property in this state which the petitioner alleges is property of the decedent passing to the petitioner, *and a description of the personal property which the petitioner alleges is property of the decedent passing to the petitioner if the requested order also is to include a determination that the described personal property is property passing to the petitioner.*

(4) The facts upon which the petitioner bases the allegation that the described *real* property is property passing to the petitioner.

(5) *Either of the following, as appropriate:*

(A) A statement that no proceeding is being or has been conducted in this state for administration of the decedent's estate.

(B) *A statement that the decedent's personal representative has consented in writing to use of the procedure provided by this chapter.*

(6) Whether estate proceedings for the decedent have been commenced in any other jurisdiction and, if so, where those proceedings are pending or were conducted.

(7) The name, age, address, and relation to the decedent of each heir and devisee of the decedent, the names and addresses of all persons named as executors of the will of the decedent, and, if the petitioner is the trustee of a trust that is a devisee under the will of the decedent, the names and addresses of all persons interested in the trust, as determined in cases of future interests pursuant to paragraph (1), (2), or (3) of subdivision (a) of Section 15804, so far as known to any petitioner.

(8) The name and address of each person serving as guardian or conservator of the estate of the decedent at the time of the decedent's death, so far as known to any petitioner.

(b) There shall be attached to the petition an inventory and appraisal in the form set forth in Section 8802 of the decedent's real and personal property in this state, excluding



the property described in Section 13050. The appraisal shall be made by a probate referee selected by the petitioner from those probate referees appointed by the Controller under Section 400 to appraise property in the county where the real property is located. The appraisal shall be made as set forth in Part 3 (commencing with Section 8800) of Division 7. The petitioner may appraise the assets which a personal representative could appraise under Section 8901.

(c) If the petitioner bases his or her claim to the described ~~particular item~~ of property upon the will of the decedent, a copy of the will shall be attached to the petition.

*(d) If the decedent's personal representative has consented to use of the procedure provided by this chapter, a copy of the consent shall be attached to the petition.*

**Comment.** The introductory clause of Section 13152 is amended to delete the requirement that the petition request an order determining that administration of the decedent's estate is unnecessary. This requirement is no longer appropriate in view of the new authorization for the decedent's personal representative to consent to a court order determining succession to decedent's property pursuant to this chapter, notwithstanding that an estate proceeding is pending or has been conducted in this state. See Section 13150. Subdivision (d) is added to implement the new authorization. See also the Comment to Section 13151.

Section 13152 is also revised to reflect the fact that a petition under this chapter may include a request that the court make an order determining that the petitioner has succeeded to personal property of the decedent. See the Comment to Section 13151.

**Prob. Code § 13154 (amended). Court order**

13154. (a) If the court makes the determinations required under subdivision (b), the court shall issue an order determining (1) that real property, to be described in the order, of the decedent is property passing to the petitioners and the specific property interest of each petitioner in the described property and (2) ~~that no administration of the decedent's estate is necessary~~ *if the petition so requests, that personal property, to be described in the order, of the decedent is property*

*passing to the petitioners and the specific property interest of each petitioner in the described property.*

(b) The court may make an order under this section only if the court makes all of the following determinations:

(1) The gross value of the decedent's real and personal property in this state, excluding the property described in Section 13050, does not exceed sixty thousand dollars (\$60,000).

(2) Not less than 40 days have elapsed since the death of the decedent.

(3) *Whichever of the following is appropriate:*

(A) No proceeding is being or has been conducted in this state for administration of the decedent's estate.

(B) *The decedent's personal representative has consented in writing to use of the procedure provided by this chapter.*

(4) The real property described in the order is property of the decedent passing to the petitioner.

(c) If the petition has attached an inventory and appraisal that satisfies the requirements of subdivision (b) of Section 13152, the determination required by paragraph (1) of subdivision (b) of this section shall be made on the basis of the verified petition and the attached inventory and appraisal, unless evidence is offered by a person opposing the petition that the gross value of the decedent's real and personal property in this state, excluding the property described in Section 13050, exceeds sixty thousand dollars (\$60,000).

**Comment.** Section 13154 is amended to delete from subdivision (a) the requirement that the order include a determination that no administration of the decedent's estate is necessary and to revise subdivision (b)(3) to recognize the new authorization for the decedent's personal representative to consent to a court order determining succession to decedent's property pursuant to this chapter, notwithstanding that an estate proceeding is pending or has been conducted in this state. See Section 13150. See also the Comment to Section 13151.

Section 13154 also is amended to recognize that the court in a proceeding under this chapter may, if requested, include in its order a

determination that the decedent's personal property is property passing to petitioners. See the Comment to Section 13151.

**Prob. Code § 13155 (amended). Conclusiveness of order**

13155. Upon becoming final, an order under this chapter determining that real property is property passing to the petitioner is conclusive on all persons, whether or not they are in being.

**Comment.** Section 13155 is amended to reflect the expansion of the court's authority to include personal property in its order. See Section 13154.

**Prob. Code § 13158 (added). No effect on affidavit procedure for personal property**

13158. Nothing in this chapter excuses compliance with Chapter 3 (commencing with Section 13100) by the holder of the decedent's personal property if an affidavit or declaration is furnished as provided in that chapter.

**Comment.** Section 13158 is added to ensure that the holder of decedent's personal property will not insist that the person seeking to collect the property by affidavit or declaration instead use the court procedure in this chapter. See Sections 13105, 13154. For the penalty for refusing to transfer the decedent's personal property to the person executing the affidavit or declaration, see Section 13105.

**Prob. Code § 13200 (amended). Filing affidavit in superior court; inventory and appraisal**

13200. (a) No sooner than six months from the death of a decedent, a person or persons claiming as successor of the decedent to a particular item of property that is real property may file in the superior court in the county in which the decedent was domiciled at the time of death, or if the decedent was not domiciled in this state at the time of death, then in any county in which real property of the decedent is located, an affidavit in the form prescribed by the Judicial Council pursuant to Section 13209 1001 stating all of the following:

- (1) The name of the decedent.
- (2) The date and place of the decedent's death.
- (3) A legal description of the real property and the interest of the decedent therein.

(4) The name and address of each person serving as guardian or conservator of the estate of the decedent at the time of the decedent's death, so far as known to the affiant.

(5) "The gross value of all real property in the decedent's estate located in California, as shown by the inventory and appraisal attached to this affidavit, excluding the real property described in Section 13050 of the California Probate Code, does not exceed ten thousand dollars (\$10,000)."

(6) "At least six months have elapsed since the death of the decedent as shown in a certified copy of decedent's death certificate attached to this affidavit."

(7) *Either of the following, as appropriate:*

(A) "No proceeding is now being or has been conducted in California for administration of the decedent's estate."

(B) "*The decedent's personal representative has consented in writing to use of the procedure provided by this chapter.*"

(8) "Funeral expenses, expenses of last illness, and all unsecured debts of the decedent have been paid."

(9) "The affiant is the successor of the decedent (as defined in Section 13006 of the Probate Code) and to the decedent's interest in the described property, and no other person has a superior right to the interest of the decedent in the described property."

(10) "The affiant declares under penalty of perjury under the law of the State of California that the foregoing is true and correct."

(b) For each person executing the affidavit, the affidavit shall contain a notary public's certificate of acknowledgment identifying the person.

(c) There shall be attached to the affidavit an inventory and appraisal of the decedent's real property in this state, excluding the real property described in Section 13050. The inventory and appraisal of the real property shall be made as provided in Part 3 (commencing with Section 8800) of Division 7. The appraisal shall be made by a probate referee

selected by the affiant from those probate referees appointed by the Controller under Section 400 to appraise property in the county where the real property is located.

(d) ~~If the person or persons executing the affidavit claim~~ *affiant claims* under the decedent's will *and no estate proceeding is pending or has been conducted in California*, a copy of the will shall be attached to the affidavit.

(e) A certified copy of the decedent's death certificate shall be attached to the affidavit. *If the decedent's personal representative has consented to the use of the procedure provided by this chapter, a copy of the consent and of the personal representative's letters shall be attached to the affidavit.*

(f) The affiant shall mail a copy of the affidavit and attachments to any person identified in paragraph (4) of subdivision (a).

**Comment.** Section 13200 is amended to recognize that the decedent's personal representative may consent to use of the procedure provided by this chapter, notwithstanding that an estate proceeding is pending or has been conducted in this state. See Section 13210.

**Prob. Code § 13205 (amended). Liability to person having superior right**

13205. (a) Except as provided in subdivision (b), each person who is designated as a successor of the decedent in a certified copy of any affidavit issued under Section 13202 is personally liable to the extent provided in Section 13207 to any person having a superior right by testate or intestate succession from the decedent.

(b) In addition to any other liability the person has under this section and Sections 13204, 13206, and 13207, if the person fraudulently executed or filed the affidavit under this chapter, the person is liable to the person having a superior right for three times the fair market value of the property. For the purposes of this subdivision, the "fair market value of the property" is the fair market value, valued as of the time the certified copy of the affidavit was issued under Section 13202,

of the property the person liable took under the certified copy of the affidavit to which the other person has a superior right, ~~excluding~~ *less* any liens and encumbrances on the property at that time.

(c) An action to impose liability under this section is forever barred three years after the certified copy of the affidavit is issued under Section 13202, or three years after the discovery of the fraud, whichever is later. The three-year period specified in this subdivision is not tolled for any reason.

**Comment.** Subdivision (b) of Section 13205 is amended to change “excluding” to “less” liens and encumbrances, to make clear that fair market value means net value.

**Prob. Code § 13206 (amended). Restitution if estate proceeding commenced or on request of personal representative**

13206. (a) Subject to subdivisions (b), (c), (d), and (e), if proceedings for the administration of the decedent’s estate are commenced, *or if the decedent’s personal representative has consented to use of the procedure provided by this chapter and the personal representative later requests that the property be restored to the estate*, each person who is designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 is liable for:

(1) The restitution to the decedent’s estate of the property the person took under the certified copy of the affidavit if the person still has the property, together with (A) the net income the person received from the property and (B) if the person encumbered the property after the certified copy of the affidavit was issued, the amount necessary to satisfy the balance of the encumbrance as of the date the property is restored to the estate.

(2) The restitution to the decedent’s estate of the fair market value of the property if the person no longer has the property, together with (A) the net income the person received from the property prior to disposing of it and (B) interest from the date of disposition at the rate payable on a money judgment on the

fair market value of the property. For purposes of this paragraph, the "fair market value of the property" is ~~the fair market value, valued~~ *determined* as of the time of the disposition of the property, of the property the person took under the certified copy of the affidavit, ~~excluding~~ *less* the amount of any liens and encumbrances on the property at the time the certified copy of the affidavit was issued.

(b) Subject to subdivision (d), if the person fraudulently executed or filed the affidavit under this chapter, the person is liable under this section for restitution to the decedent's estate of three times the fair market value of the property. For the purposes of this subdivision, the "fair market value of the property" is ~~the fair market value, valued~~ *determined* as of the time the certified copy of the affidavit was issued, of the property the person took under the certified copy of the affidavit, ~~excluding~~ *less* the amount of any liens and encumbrances on the property at that time.

(c) Subject to subdivision (d), if proceedings for the administration of the decedent's estate are commenced and a person designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 made a significant improvement to the property taken by the person under the certified copy of the affidavit in the good faith belief that the person was the successor of the decedent to that property, the person is liable for whichever of the following the decedent's estate elects:

(1) The restitution of the property, as improved, to the estate of the decedent upon the condition that the estate reimburse the person making restitution for (A) the amount by which the improvement increases the fair market value of the property restored, ~~valued~~ *determined* as of the time of restitution, and (B) the amount paid by the person for principal and interest on any liens or encumbrances that were on the property at the time the certified copy of the affidavit was issued.

(2) The restoration to the decedent's estate of the fair market value of the property, *valued determined* as of the time of the issuance of the certified copy of the affidavit under Section 13202, *excluding less* the amount of any liens and encumbrances on the property at that time, together with interest on the net amount at the rate payable on a money judgment running from the date of the issuance of the certified copy of the affidavit.

(d) The property and amount required to be restored to the estate under this section shall be reduced by any property or amount paid by the person to satisfy a liability under Section 13204 or 13205.

(e) An action to enforce the liability under this section may be brought only by the personal representative of the estate of the decedent. In an action to enforce the liability under this section, the court's judgment may enforce the liability only to the extent necessary to protect the interests of the heirs, devisees, and creditors of the decedent.

(f) An action to enforce the liability under this section is forever barred three years after the certified copy of the affidavit is issued under Section 13202, or three years after the discovery of the fraud, whichever is later. The three-year period specified in this subdivision is not tolled for any reason.

**Comment.** Section 13206 is amended to reflect the authorization for the decedent's personal representative to consent to use of the procedure provided by this chapter, notwithstanding that an estate proceeding is pending or has been conducted in this state. See Section 13210.

**Prob. Code § 13207 (amended). Limitation on liability under Sections 13204 and 13205**

13207. (a) A person designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 is not liable under Section 13204 or 13205 if proceedings for the administration of the decedent's estate are commenced, *or if the decedent's personal representative has consented to use of the procedure provided by this chapter*



*and the personal representative later requests that the property be restored to the estate, and the person satisfies the requirements of Section 13206.*

(b) Except as provided in subdivision (b) of Section 13205, the aggregate of the personal liability of a person under Sections 13204 and 13205 shall not exceed the fair market value at the time of the issuance of the certified copy of the affidavit under Section 13202 of the decedent's property received by that person under this chapter, less the amount of any liens and encumbrances on the property at that time, together with the net income the person received from the property and, if the property has been disposed of, interest on the fair market value of the property from the date of disposition at the rate payable on a money judgment. For the purposes of this subdivision, "fair market value of the property" has the same meaning as defined in paragraph (2) of subdivision (a) of Section 13206.

**Comment.** Section 13207 is amended to reflect the new authorization for the decedent's personal representative to consent to use of the procedure provided by this chapter, notwithstanding that an estate proceeding is pending or has been conducted in this state. See Section 13210.

**Prob. Code § 13210 (added). Limitation on use of procedure provided by this chapter**

13210. The procedure provided by this chapter may be used only if one of the following requirements is satisfied:

(a) No proceeding for the administration of the decedent's estate is pending or has been conducted in this state.

(b) The decedent's personal representative consents in writing to use of the procedure provided by this chapter.

**Comment.** Section 13210 is a new provision. It expands the authorization to use the procedure provided by this chapter to cover the case where the decedent's personal representative consents to use of the procedure, notwithstanding that an estate proceeding is pending or has been conducted in this state. See also Section 13108 (summary collection of personal property).



STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

RECOMMENDATION

relating to

**Right of Surviving Spouse to Dispose of  
Community Property**

April 1990

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 Right of Surviving Spouse to Dispose of Community Property*, 20 Cal. L. Revision Comm'n Reports 2769 (1990).**

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

**CALIFORNIA LAW REVISION COMMISSION**

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ANN E. STODDEN

April 26, 1990

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

This recommendation would fill gaps in the law authorizing a surviving spouse to deal with and dispose of community property after the decedent's death free of probate. The recommendation makes a number of technical changes to facilitate the ability of the surviving spouse to deal with and dispose of community real property; but if the decedent has willed the decedent's share to a different beneficiary, the recommendation makes clear that the decedent's beneficiary, like the decedent's creditors, may look to the surviving spouse for recompense. The recommendation also enables the surviving spouse to deal with and dispose of community property securities registered in the name of the surviving spouse, subject to the same protections for beneficiaries and creditors of the decedent.

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

Respectfully submitted,

Edwin K. Marzec  
*Chairperson*



## RECOMMENDATION

When a married person dies leaving the person's one-half interest in community property and quasi-community property to the surviving spouse, the surviving spouse takes the decedent's share free of the necessity of probate administration.<sup>1</sup> The Law Revision Commission recommends changes in the statute governing this matter to fill two gaps in it that have come to the attention of the Commission.

### **Right of Surviving Spouse to Dispose of Real Property**

The statute gives the surviving spouse the right to deal with and dispose of community real property if there is no notice of an adverse interest recorded within 40 days after the decedent's death.<sup>2</sup> Thus, if the decedent leaves the decedent's share of the community property to a beneficiary other than the surviving spouse, the beneficiary has 40 days within which to record the notice, failure of which enables the surviving spouse freely to dispose of the property.<sup>3</sup>

Presumably, if the beneficiary fails to record the notice and the surviving spouse disposes of the property, the beneficiary would have a right to recover the value of the beneficiary's interest in the property from the surviving spouse.<sup>4</sup> The

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1. Prob. Code §§ 13500-13660.

2. Prob. Code § 13540.

3. Although the 40-day recording statute (Probate Code Section 13541) is not the main subject of the present recommendation, the Commission also recommends the addition of clarifying language to remedy a few technical defects in that statute:

(1) A notice recorded by a beneficiary *after* expiration of the 40-day period should still be effective if the surviving spouse has not yet disposed of the property.

(2) Recordation of the notice should not be privileged if done for the purpose of slandering the surviving spouse's title.

(3) Absent a recording, the surviving spouse should be expressly authorized to convey, as well as otherwise deal with and dispose of, the property, free of rights of the estate of the deceased spouse, as well as the rights of devisees and creditors. Recordation of an affidavit of facts authorizing the disposition should be expressly authorized if needed to complete the chain of title.

4. Cf. *Knego v. Grover*, 208 Cal. App. 2d 134, 147-48, 25 Cal. Rptr. 158 (1962).

Comment to Probate Code Section 13540 states that the beneficiary may obtain a judgment to enforce the beneficiary's rights against the surviving spouse,<sup>5</sup> but this is nowhere expressly stated in the statute.

The omission of clear statutory provisions governing the matter is inadvertent. The Commission recommends that express provisions be added to the statute to govern the liability of the surviving spouse to a beneficiary.<sup>6</sup>

### **Right of Surviving Spouse to Dispose of Securities**

Whereas the surviving spouse may freely dispose of community real property if 40 days has elapsed after the decedent's death and no notice has been recorded, the rule does not extend to personal property. Thus a potential transferee of personal property may be unwilling to enter into a transaction for fear that the surviving spouse may not have full power to dispose of the property due to a possible devise of the decedent's share to a beneficiary other than the surviving spouse. A person who wants to be secure in accepting a transfer of personal property may refuse to consummate the transaction until the surviving spouse obtains

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5. See Comment to Prob. Code § 13540 in *Recommendation Proposing New Probate Code*, 20 Cal. L. Revision Comm'n Reports 1001, 1846 (1990):

Subdivision (b) makes clear that this section does not affect or limit the liability of a surviving spouse under Sections 13550-13553. Although Section 13540 may preclude a devisee or creditor from enforcing his or her rights against a grantee, purchaser, encumbrancer, or lessee or against the property interest transferred to the grantee, purchaser, encumbrancer, or lessee, the section does not relieve the surviving spouse of any liability under Sections 13550-13553. If the surviving spouse is liable under those sections and the devisee or creditor obtains a judgment against the surviving spouse, the judgment may be enforced against any property of the surviving spouse (including the proceeds of the disposition described in Section 13540) that is subject to the enforcement of a judgment.

Sections 13550-13553, referred to in the Comment, relate only to the decedent's debts and not to rights of the decedent's devisees.

6. The recommended provisions are drawn from comparable provisions in Probate Code Sections 13205-13208 governing liability to a beneficiary of a person who takes a small estate by affidavit.



a court order confirming the surviving spouse's ownership of the property.<sup>7</sup>

As a practical matter, this is only a problem for transfer of personal property of a type whose title is evidenced by documentation, such as securities. Most tangible personal property is untitle and of relatively low value, and its transferability by the possessor is not ordinarily questioned.

The ability of the surviving spouse to transfer securities is critical, since securities may fluctuate rapidly in value. Moreover, the market system for securities depends on the assurance to a purchaser that a transaction made by the registered owner passes good title to the purchaser notwithstanding an undisclosed cloud on the title of the registered owner.

Statutes governing the usual securities transfer enable the person in whose name securities are registered to dispose of the securities in the ordinary course of business without impediment.<sup>8</sup> These provisions should not be compromised by the possibility that the securities are community property or quasi-community property and that the spouse of the registered owner has died and has made an undisclosed devise of the spouse's community property interest to a person other than the surviving spouse. A purchaser should be able to take a transfer of securities from the registered owner free of the need to make inquiry concerning the community character of the securities, the death of the owner's spouse, and the contents of the decedent's will, if any. Any other rule could

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7. See Prob. Code §§ 13650-13660 (determination or confirmation of property passing or belonging to surviving spouse).

8. A certificated security is a negotiable instrument under Commercial Code Section 8105. Corporations Code Section 420 immunizes a corporation and its transfer agent and registrar for executing a securities transfer properly endorsed by the person to whom the securities are registered, even if the registration shows the securities are held as community property. Commercial Code Section 8302 provides that the transferee takes a security free of any adverse claim if the transferee is a bona fide purchaser for value in good faith and without notice of any adverse claim.

compromise every securities transfer by a natural person, since a prudent transferee would require assurance of the marital status of the transferor, the health of the transferor's spouse, and the like.

For these reasons the Law Revision Commission recommends that the statute make clear that the death of the spouse of a registered owner of securities does not affect the ability of the registered owner to pass good title. The laws governing the security of such transactions should apply with equal force before or after the death of the registered owner's spouse.

### PROPOSED LEGISLATION

The Commission's recommendations would be implemented by enactment of the following measure.

An act to amend Sections 13207, 13540, and 13541 of, and to amend the heading of Chapter 2 (commencing with Section 13540) of Part 2 of Division 8 of, to add Section 13545 to, and to add Chapter 3.5 (commencing with Section 13560) to Part 2 of Division 8 of, the Probate Code, relating to disposition of property after death.

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

**Prob. Code § 13207 (amended). Limitation on liability under Sections 13204 and 13205**

**SECTION 1.** Section 13207 of the Probate Code is amended to read:

13207. (a) A person designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 is not liable under Section 13204 or 13205 if proceedings for the administration of the decedent's estate are commenced and the person satisfies the requirements of Section 13206.

(b) Except as provided in subdivision (b) of Section 13205, the aggregate of the personal liability of a person under

Sections 13204 and 13205 shall not exceed the *sum of the following*:

(1) *The fair market value at the time of the issuance of the certified copy of the affidavit under Section 13202 of the decedent's property received by that person under this chapter, less the amount of any liens and encumbrances on the property at that time, together with the.*

(2) *The net income the person received from the property and, if.*

(3) *If the property has been disposed of, interest on the fair market value of the property from the date of disposition at the rate payable on a money judgment. For the purposes of this subdivision paragraph, "fair market value of the property" has the same meaning as defined in paragraph (2) of subdivision (a) of Section 13206.*

**Comment.** Section 13207 is amended to make a technical, nonsubstantive clarification.

**Prob. Code §§ 13540-13542 (chapter heading). Right of surviving spouse to dispose of property**

**SEC. 2.** The heading of Chapter 2 (commencing with Section 13540) of Part 2 of Division 8 of the Probate Code is amended to read:

**CHAPTER 2. RIGHT OF SURVIVING SPOUSE TO  
DISPOSE OF ~~REAL~~ PROPERTY**

**Comment.** The heading of Chapter 2 (commencing with Section 13540) is amended to reflect the expansion of the chapter to include Section 13545 (right of surviving spouse to dispose of securities).

**Prob. Code § 13540 (amended). Right of surviving spouse to dispose of real property**

**SEC. 3.** Section 13540 of the Probate Code is amended to read:

13540. (a) Except as provided in Section 13541, after 40 days from the death of a spouse, the surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse has full power to sell,

*convey, lease, mortgage, or otherwise deal with and dispose of the community or quasi-community real property, and the right, title, and interest of any grantee, purchaser, encumbrancer, or lessee shall be free of rights of the estate of the deceased spouse or of devisees or creditors of the deceased spouse to the same extent as if the property had been owned as the separate property of the surviving spouse.*

*(b) The surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse may record, together with the instrument that makes a disposition of property under this section, an affidavit of the facts that establish the right of the surviving spouse to make the disposition.*

*(c) Nothing in this section affects or limits the liability of the surviving spouse under Sections 13550 to 13553, inclusive, and Chapter 3.5 (commencing with Section 13560).*

**Comment.** Subdivision (a) of Section 13540 is amended for completeness. Subdivision (b) is added to enable the surviving spouse to fill a gap in the chain of title. Subdivision (c) is amended to include a cross-reference to Sections 13560 to 13564 (liability for property of deceased spouse).

**Prob. Code § 13541 (amended). Recording notice of interest in property**

**SEC. 4.** Section 13541 of the Probate Code is amended to read:

13541. (a) Section 13540 does not apply ~~if, within 40 days from the death of the spouse,~~ *to a sale, conveyance, lease, mortgage, or other disposition that takes place after a notice that satisfies the requirements of this section is recorded in the office of the county recorder of the county in which real property is located.*

(b) The notice shall contain all of the following:

(1) A description of the property in which an interest is claimed.

(2) A statement that an interest in the property is claimed by a named person under the will of the deceased spouse.

(3) The name or names of the owner or owners of the record title to the property.

(c) There shall be endorsed on the notice instructions that it shall be indexed by the recorder in the name or names of the owner or owners of record title to the property, as grantor or grantors, and in the name of the person claiming an interest in the property, as grantee.

*(d) A person shall not record a notice under this section for the purpose of slandering title to the property. If the court in an action or proceeding relating to the rights of the parties determines that a person recorded a notice under this section for the purpose of slandering title, the court shall award against the person the cost of the action or proceeding, including a reasonable attorney's fee, and the damages caused by the recording.*

**Comment.** Subdivision (a) of Section 13541 is amended to make clear that the right provided in Section 13540 does not apply to a disposition made after a notice under this section is recorded, whether the notice is recorded before or after expiration of the 40-day waiting period provided in Section 13540.

Subdivision (d) is comparable to Civil Code Section 880.360 (marketable record title), and makes clear that recordation of notice under this section is not privileged. Subdivision (d) does not affect the elements of the cause of action for slander of title and codifies the measure of recovery for slander of title, with the addition of reasonable attorney's fees. See 5 B. Witkin, *Summary of California Law, Torts* § 572 (9th ed. 1988).

**Prob. Code § 13545 (added). Right of surviving spouse to dispose of securities**

**SEC. 5.** Section 13545 is added to the Probate Code, to read:

13545. (a) After the death of a spouse, the surviving spouse, or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse, has full power to sell, assign, pledge, or otherwise deal with and dispose of community or quasi-community property securities registered in the name of the surviving spouse alone, and the

right, title, and interest of any purchaser, assignee, encumbrancer, or other transferee shall be free of the rights of the estate of the deceased spouse or of devisees or creditors of the deceased spouse to the same extent as if the deceased spouse had not died.

(b) Nothing in this section affects or limits the liability of a surviving spouse under Sections 13550 to 13553, inclusive, and Chapter 3.5 (commencing with Section 13560).

**Comment.** Section 13545 is drawn from Section 13540 (right of surviving spouse to dispose of real property).

Subdivision (a) makes clear that the right of a surviving spouse to deal with community and quasi-community property securities is not affected by the death of the other spouse. Thus, the fact that there may be a person having a superior right by testate succession to the decedent's share of securities does not impair the ability of the surviving spouse in whose name the securities are registered to make binding transactions affecting the securities just as if the deceased spouse had not died. See, e.g., Corp. Code § 420 (immunity of corporation and agents for executing properly endorsed securities transfer, including community property securities); Com. Code § 8302 (bona fide purchaser for value in good faith and without notice of adverse claim takes security free of adverse claim).

Subdivision (b) makes clear that this section does not affect or limit the liability of the surviving spouse under Sections 13550-13553 (liability for debts of deceased spouse) and 13560-13564 (liability for property of deceased spouse). Although Section 13545 may preclude a devisee or creditor from enforcing his or her rights against a purchaser, assignee, encumbrancer, or other transferee or against the property interest transferred to the purchaser, assignee, encumbrancer, or other transferee, the section does not relieve the surviving spouse of any liability under Sections 13550-13553 and 13560-13564. If the surviving spouse is liable under those sections and the devisee or creditor obtains a judgment against the surviving spouse, the judgment may be enforced against any property of the surviving spouse (including the proceeds of the disposition described in Section 13545) that is subject to the enforcement of a judgment.

**Prob. Code §§ 13560-13564 (added). Liability for decedent's property**

**SEC. 6.** Chapter 3.5 (commencing with Section 13560) is added to Part 2 of Division 8 of the Probate Code, to read:

## CHAPTER 3.5. LIABILITY FOR DECEDENT'S PROPERTY

### § 13560. "Decedent's property" defined

13560. For the purposes of this chapter, "decedent's property" means the one-half of the community property that belongs to the decedent under Section 100 and the one-half of the quasi-community property that belongs to the decedent under Section 101.

**Comment.** Section 13560 is included for drafting convenience.

### § 13561. Liability to person having superior right

13561. (a) If the decedent's property is in the possession or control of the surviving spouse at the time of the decedent's death, the surviving spouse is personally liable to the extent provided in Section 13563 to any person having a superior right by testate succession from the decedent.

(b) An action to impose liability under this section is forever barred three years after the death of the decedent. The three-year period specified in this subdivision is not tolled for any reason.

**Comment.** Section 13561 is drawn from subdivisions (a) and (c) of Section 13205 (affidavit procedure for real property of small value).

### § 13562. Restitution if estate proceeding commenced

13562. (a) Subject to subdivisions (b), (c), and (d), if proceedings for the administration of the decedent's estate are commenced, the surviving spouse is liable for:

(1) The restitution to the decedent's estate of the decedent's property if the surviving spouse still has the decedent's property, together with (A) the net income the surviving spouse received from the decedent's property and (B) if the surviving spouse encumbered the decedent's property after the date of death, the amount necessary to satisfy the balance of the encumbrance as of the date the decedent's property is restored to the estate.

(2) The restitution to the decedent's estate of the fair market value of the decedent's property if the surviving spouse no

longer has the decedent's property, together with (A) the net income the surviving spouse received from the decedent's property prior to disposing of it and (B) interest from the date of disposition at the rate payable on a money judgment on the fair market value of the decedent's property. For the purposes of this paragraph, the "fair market value of the decedent's property" is the fair market value of the decedent's property, valued as of the time of the disposition of the decedent's property, excluding the amount of any liens and encumbrances on the decedent's property at the time of the decedent's death.

(b) Subject to subdivision (c), if proceedings for the administration of the decedent's estate are commenced and the surviving spouse made a significant improvement to the decedent's property in the good faith belief that the surviving spouse was the successor of the decedent to the decedent's property, the surviving spouse is liable for whichever of the following the decedent's estate elects:

(1) The restitution of the decedent's property, as improved, to the estate of the decedent upon the condition that the estate reimburse the surviving spouse for (A) the amount by which the improvement increases the fair market value of the decedent's property restored, valued as of the time of restitution, and (B) the amount paid by the surviving spouse for principal and interest on any liens or encumbrances that were on the decedent's property at the time of the decedent's death.

(2) The restoration to the decedent's estate of the fair market value of the decedent's property, valued as of the time of the decedent's death, excluding the amount of any liens and encumbrances on the decedent's property at that time, together with interest on the net amount at the rate payable on a money judgment running from the date of the decedent's death.

(c) The property and amount required to be restored to the estate under this section shall be reduced by any property or



amount paid by the surviving spouse to satisfy a liability under Chapter 3 (commencing with Section 13550).

(d) An action to enforce the liability under this section may be brought only by the personal representative of the estate of the decedent. In an action to enforce the liability under this section, the court's judgment may enforce the liability only to the extent necessary to protect the interests of the heirs, devisees, and creditors of the decedent.

(e) An action to enforce the liability under this section is forever barred three years after the death of the decedent. The three-year period specified in this subdivision is not tolled for any reason.

**Comment.** Section 13562 is drawn from Section 13206 (affidavit procedure for real property of small value).

Under subdivision (a)(1), if the surviving spouse encumbered the property after the decedent's death, the surviving spouse is liable for the amount necessary to satisfy the balance of the encumbrance on the decedent's one-half interest as of the date the property is restored to the estate. This amount is in addition to the property and the net income the surviving spouse received from the property.

Restitution of property to the estate where the spouse still has the property may necessitate partition if the parties are unable to agree on possession or other matters. See Section 9823 (partition actions).

### **§ 13563. Limitation on liability under Section 13561**

13563. (a) The surviving spouse is not liable under Section 13561 if proceedings for the administration of the decedent's estate are commenced and the surviving spouse satisfies the requirements of Section 13562.

(b) The aggregate of the personal liability of the surviving spouse under Section 13561 shall not exceed the sum of the following:

(1) The fair market value at the time of the decedent's death, less the amount of any liens and encumbrances on the decedent's property at that time, of the portion of the decedent's property that passes to any person having a superior right by testate succession from the decedent.

(2) The net income the surviving spouse received from the portion of the decedent's property that passes to any person having a superior right by testate succession from the decedent.

(3) If the decedent's property has been disposed of, interest on the fair market value of the portion of the decedent's property that passes to any person having a superior right by testate succession from the decedent from the date of disposition at the rate payable on a money judgment. For the purposes of this paragraph, "fair market value" is fair market value, valued as of the time of the disposition of the decedent's property, excluding the amount of any liens and encumbrances on the decedent's property at the time of the decedent's death.

**Comment.** Section 13563 is drawn from Section 13207 (affidavit procedure for real property of small value).

#### **§ 13564. Other remedies not affected**

13564. The remedies available under Sections 13561 to 13563, inclusive, are in addition to any remedies available by reason of any fraud or intentional wrongdoing.

**Comment.** Section 13564 is drawn from Section 13208 (affidavit procedure for real property of small value). This section makes clear that the remedies provided in this chapter for the decedent's estate and persons having a superior right to the property by testate succession do not limit any other remedies that are available by reason of fraud or intentional wrongdoing.

STATE OF CALIFORNIA

**CALIFORNIA LAW  
REVISION COMMISSION**

RECOMMENDATION

relating to

**Litigation Involving Decedents**

September 1990

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 Litigation Involving Decedents*, 20 Cal. L. Revision Comm'n Reports 2785 (1990).

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

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July 26, 1990

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

This recommendation would modernize and reorganize the statutes in the Code of Civil Procedure concerning survival and continuation of actions after the death of parties. The recommendation would also permit an action to be continued by a decedent's successors in interest without the necessity of opening a probate proceeding and appointing a personal representative, subject to certain limitations.

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

Respectfully submitted,

**Edwin K. Marzec**  
*Chairperson*



## RECOMMENDATION

In the course of revising the Probate Code, the Law Revision Commission recommended several changes in the law relating to litigation involving decedents.<sup>1</sup> The 1987 recommendation on this subject noted that the Commission “anticipates a future recommendation that treats the entire body of law in a comprehensive manner.”<sup>2</sup> The statutes concerning litigation involving decedents that appeared in the Probate Code were revised on recommendation of the Commission, but related provisions in the Code of Civil Procedure concerning survival and continuation of actions, statutes of limitations, and proper parties have not been subject to comprehensive review. This recommendation would complete the revision of this area of the law.

Some of the provisions in the Code of Civil Procedure overlap or disagree with the Probate Code.<sup>3</sup> The rules in the Code of Civil Procedure were developed before the increasing importance of nonprobate transfers was recognized. Consequently, unless a specific procedure in the Probate Code applies to the situation, the law may be unclear. The proposed law consolidates and reorganizes the existing statutes in a comprehensive fashion. In addition to making technical and clarifying changes, the proposed law makes a number of significant substantive changes described below.

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1. See Prob. Code §§ 550-555 (liability of decedent covered by insurance), 9350-9399 (claims in litigation). This revision resulted in the repeal of former Probate Code Sections 707, 709, 709.1, 716, 720, and 721, and the amendment of Code of Civil Procedure Sections 353 and 385. See 1988 Cal. Stat. ch. 1199.

2. See *Recommendation Relating to Litigation Involving Decedents*, 19 Cal. L. Revision Comm'n Reports 899, 903 (1988).

3. See, e.g., Code Civ. Proc. §§ 353, 353.5, 369, 377, 385.

### Commencement of Decedent's Cause of Action

Existing law provides that a decedent's cause of action may be brought by the decedent's personal representative.<sup>4</sup> However, in many cases there is no administration of the decedent's estate either because of its size or because all the substantial assets pass to successors by means of nonprobate transfers. In such a situation it may not make sense to open a probate proceeding for the sole purpose of appointing a personal representative to assert the decedent's cause of action. The cause of action belongs to the decedent's heirs or devisees on the decedent's death<sup>5</sup> or rightfully passes to a successor in interest who takes property that is the subject of the litigation, e.g., by virtue of a contract provision or account agreement or by operation of law. The proposed law authorizes the successors in interest to bring an action if there is no probate.<sup>6</sup>

Because disputes may arise as to who is a successor in interest entitled to bring the action, as to the management of litigation, or as a result of the later appointment of a personal representative, the proposed law empowers the court in which the action is brought to make any order concerning parties that is appropriate to ensure proper administration of justice in the case. This would include appointing the successor in interest as a guardian ad litem<sup>7</sup> or special administrator<sup>8</sup> to protect interests of other potential beneficiaries or successors.

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4. Code Civ. Proc. § 353; Prob. Code § 573. Code of Civil Procedure Section 353 actually refers to the decedent's "representatives" rather than personal representative. However, it appears that the personal representative is intended, since the provision also speaks of issuance of letters.

5. See Prob. Code § 7000.

6. This is consistent with the authority of successors in interest to continue litigation commenced by the decedent before death. See "Continuation of Decedent's Pending Action or Proceeding" *infra*.

7. See Code Civ. Proc. §§ 372-373.5.

8. See Prob. Code §§ 8540-8547.



### **Continuation of Decedent's Pending Action or Proceeding**

If the plaintiff in an action or proceeding dies during its pendency, the litigation may be continued by the decedent's personal representative or successor in interest, with court approval.<sup>9</sup> The proposed law limits the substitution of a successor in interest as a party to cases where there is no personal representative. This limitation will simplify problems of administration and will be consistent with the treatment given persons entitled to assert the decedent's cause of action.<sup>10</sup>

### **Commencement of Action on Decedent's Liability**

If a person dies against whom a cause of action for personal liability exists, the cause of action may be asserted against the decedent's personal representative.<sup>11</sup> Where the decedent has assets that pass by nonprobate transfer, however, it makes little sense to open probate proceedings and appoint a personal representative to serve as a party defendant, since the assets are not subject to the control of the personal representative. The proposed law makes clear that a cause of action may be asserted directly against the decedent's successors in interest where another statute provides direct liability of the successors.<sup>12</sup>

In all other cases involving the decedent's personal liability, the personal representative is the proper party. This rule ensures that all the decedent's beneficiaries are assessed their proper shares of the debt without the complications of

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9. Code Civ. Proc. § 385. Although the existing statute refers to the decedent's "representative," it appears that the personal representative is intended, since the decedent's "successor in interest" is mentioned separately. While the statute states that the court "may" allow the litigation to proceed, in fact this is mandatory and the proposed law recognizes this. See, e.g., *Pepper v. Superior Court*, 76 Cal. App. 3d 252, 260-61, 142 Cal. Rptr. 759 (1977).

10. See "Commencement of Decedent's Cause of Action" *supra*.

11. Prob. Code § 573.

12. See Prob. Code §§ 13109 (liability of transferee of property by affidavit), 13550 (liability of surviving spouse who takes property without administration); see also Prob. Code § 18201 (liability of property in living trust).

interpleader and contribution. The rule also enables the creditor to marshal assets simply, without the need to join various recipients of the decedent's property and without complicating issues of the extent to which the property and its proceeds may be traced. And the rule provides a mechanism for ranking claims where there is more than one creditor.

### **Continuation of Pending Action or Proceeding Against Decedent**

If a person against whom an action or proceeding is pending dies during the pendency of the litigation, the court may allow the litigation to be continued against the decedent's personal representative or successor in interest.<sup>13</sup> The proposed law makes clear that a successor in interest may be substituted as a party only where there is an express statutory provision making successors in interest personally liable; in all other cases, the personal representative should be substituted. This will ensure consistent treatment of a cause of action against a decedent whether the cause is asserted before or after the decedent's death.<sup>14</sup>

If a pending action or proceeding that survives involves matters other than personal liability of the decedent, such as title to property that passes to a successor without going through probate administration, the proposed law makes clear that the successor in interest may be substituted as the party defendant.

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13. Code Civ. Proc. § 385.

14. See "Commencement of Action on Decedent's Liability" *supra*.

## OUTLINE

### *NEW SECTIONS IN CODE OF CIVIL PROCEDURE*

#### PART 2. CIVIL ACTIONS

#### TITLE 2. TIME OF COMMENCING CIVIL ACTIONS

#### CHAPTER 6. TIME OF COMMENCEMENT OF ACTION AFTER PERSON'S DEATH

- § 366.1. Limitations period after death of person entitled to bring action
- § 366.2. Limitations period after death of person against whom action may be brought

#### TITLE 3. PARTIES TO CIVIL ACTIONS

#### CHAPTER 4. EFFECT OF DEATH

##### Article 1. Definitions

- § 377.110. Beneficiary of decedent's estate
- § 377.120. Decedent's successor in interest

##### Article 2. Survival and Continuation

- § 377.210. Survival of cause of action
- § 377.220. Continuation of pending action
- § 377.230. Assignability of causes of action

##### Article 3. Decedent's Cause of Action

- § 377.310. Commencement of action decedent could have commenced
- § 377.320. Continuation of pending action commenced by decedent
- § 377.330. Affidavit or declaration by decedent's successor in interest
- § 377.340. Order concerning parties
- § 377.350. Damages recoverable in action by decedent's personal representative or successor in interest

##### Article 4. Cause of Action Against Decedent

- § 377.410. Assertion of cause of action against decedent
- § 377.420. Continuation of pending action against decedent
- § 377.430. Damages recoverable

##### Article 5. Insured Claims

- § 377.510. Action on insured claim

##### Article 6. Wrongful Death

- § 377.610. Parties in wrongful death action
- § 377.620. Damages in wrongful death action
- § 377.630. Joinder and consolidation of actions

**CONFORMING CHANGES****CIVIL CODE**

- § 1363 (amended). Association to manage common interest development
- § 2225 (amended). Proceeds from sale of felon's story
- § 3294 (amended). Exemplary damages

**CODE OF CIVIL PROCEDURE**

- § 353 (repealed). Death of party before expiration of limitation period
- § 355 (amended). Limitation on new action following reversal on appeal

**TITLE 3. PARTIES TO CIVIL ACTIONS**

*[shown in context with related unchanged provisions]*

**CHAPTER 1 (heading added). GENERAL PROVISIONS**

- § 367 (amended). Real party in interest
- § 368 (unchanged). *Assignment of thing in action*
- § 368.5 (added). Transfer of interest in pending action
- § 369 (amended). Fiduciaries
- § 369.5 (added). Partnership or association

**CHAPTER 2 (heading added). MARRIED PERSON**

- § 370 (unchanged). *Action by or against married person*
- § 371 (unchanged). *Action against both spouses*

**CHAPTER 3 (heading added). DISABILITY OF PARTY**

- § 372 (unchanged). *Guardian ad litem for minor or incompetent*
- § 373 (unchanged). *Procedure for appointment of guardian ad litem*
- § 373.5 (unchanged). *Guardian ad litem for unascertained or unborn person*
- § 374 (repealed). Association to manage common interest development
- § 375 (added). Effect of disability on pending action
- § 376 (amended). Injury to minor
- § 377 (repealed). Wrongful death

**CHAPTER 4 (added). EFFECT OF DEATH**

- §§ 377.110-377.530 (added). Effect of death [see above]

**CHAPTER 5 (heading added). PERMISSIVE JOINDER**

- § 378 (unchanged). *Permissive joinder of plaintiffs*
- § 379 (unchanged). *Permissive joinder of defendants*
- § 379.5 (unchanged). *Protective orders*
- § 382 (unchanged). *Class actions*
- § 385 (repealed). Disability or death

**CHAPTER 6 (heading added). INTERPLEADER**

- § 386 (unchanged). *Interpleader*
- § 386.1 (unchanged). *Interpleader funds*
- § 386.5 (unchanged). *Dismissal of stakeholder*
- § 386.6 (unchanged). *Costs and attorney's fees*

**CHAPTER 7 (HEADING ADDED). INTERVENTION**

- § 387 (unchanged). *Intervention*
- § 388 (repealed). *Partnership or association*
- § 388 (added). *Copy of environmental litigation to Attorney General*

**CHAPTER 8 (heading added). COMPULSORY JOINDER**

- § 389 (unchanged). *Compulsory joinder*
- § 389.5 (unchanged). *Joinder in action for recovery of property*
- § 389.6 (repealed). *Copy of environmental litigation to Attorney General*
- § 390 (repealed). *Action against board of fire commissioners*

**PROBATE CODE**

- § 551 (technical amendment). *Statute of limitations*
- § 573 (repealed). *Survival of actions; continuation against personal representative*
- § 6611 (technical amendment). *Liability for unsecured debts of decedent*
- § 7664 (technical amendment). *Liability for decedent's unsecured debts*
- § 9103 (technical amendment). *Late claims*
- § 9391 (technical amendment). *Enforcement of security interest*
- § 9392 (technical amendment). *Liability of distributee*
- § 13107.5 (added). *Substitution of parties without probate*
- § 13109 (technical amendment). *Liability for decedent's unsecured debts*
- § 13156 (technical amendment). *Liability for decedent's unsecured debts*
- § 13204 (technical amendment). *Liability for decedent's unsecured debts*
- § 13554 (technical amendment). *Enforcement of liability*



## PROPOSED LEGISLATION

The Commission's recommendation would be implemented by enactment of the following legislation:

An act to amend Sections 1363, 2225, and 3294 of the Civil Code, to amend Sections 355, 367, 369, and 376 of, to add Sections 368.5, 369.5, 375, and 388 to, to add Chapter 6 (commencing with Section 366.1) to Title 2 of, and Chapter 4 (commencing with Section 377.110) to Title 3 of, Part 2 of, to add chapter headings preceding Sections 367, 370, 372, 378, 386, 387, and 389 of, to repeal Sections 353, 374, 377, 385, 388, 389.6, and 390 of, the Code of Civil Procedure, and to amend Sections 551, 6611, 7664, 9103, 9391, 9392, 13109, 13156, 13204, and 13554 of, to add Section 13107.5 to, and to repeal Chapter 2 (commencing with Section 573) of Part 13 of Division 2 of, the Probate Code, relating to litigation after death of persons.

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

**Code Civ. Proc. §§ 366.1-366.2 (added). Time of commencement of action after person's death**

**SEC. . Chapter 6 (commencing with Section 366.1) is added to Title 2 of Part 2 of the Code of Civil Procedure, to read:**

### **CHAPTER 6. TIME OF COMMENCEMENT OF ACTION AFTER PERSON'S DEATH**

**§ 366.1. Limitations period after death of person entitled to bring action**

366.1. If a person entitled to bring an action dies before the expiration of the applicable limitations period, and the cause of action survives, an action may be commenced before the expiration of the later of the following times:

(a) Six months after the person's death.

(b) The limitations period that would have been applicable if the person had not died.

**Comment.** Section 366.1 restates part of former Section 353(a) without substantive change. This section makes clear that the decedent's

death does not shorten the limitations period applicable to the decedent's cause of action, but may extend it for up to six months. As to survival of causes of action, see Section 377.210. For persons entitled to bring the action, see Section 377.310 (commencement of action decedent could have brought). See also Section 355 (one-year limitations period after reversal).

**§ 366.2. Limitations period after death of person against whom action may be brought**

366.2. (a) Subject to Part 4 (commencing with Section 9000) of Division 7 of the Probate Code governing creditor claims, if a person against whom an action may be brought on a liability of the person, whether arising in contract, tort, or otherwise, dies before the expiration of the applicable limitations period, and the cause of action survives, an action may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply.

(b) Subject to Chapter 8 (commencing with Section 9350) of Part 4 of Division 7 of the Probate Code, the limitations period provided in this section for commencement of an action is not tolled or extended for any reason.

(c) This section applies a person against whom an action may be brought who died on or after January 1, 1992.

**Comment.** Section 366.2 restates former Section 353(b) without substantive change. This section applies a one-year 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. This one-year limitations period applies 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 of limitations. See 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. See Prob. Code §§ 8000 (petition), 8461 (priority for appointment); see also Prob. Code § 48 ("interested person" defined).



The reference to the decedent's "representatives" was deleted from former Section 353(b). This section is concerned only with the time within which an action on a liability of the decedent may be brought, not with the proper parties in such a case. See Section 377.410 (assertion of cause of action against decedent). The one-year limitation of Section 366.2 applies in any action on a liability of the decedent, whether against a personal representative under Probate Code Sections 9350-9354 or against another person, such as a distributee under Probate Code Section 9392, a person who takes the decedent's property and is liable for the decedent's debts under Probate Code 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), or 13554 (passage of property to surviving spouse without administration), or a trustee. For cases where an action may be brought against the estate of the decedent, rather than the personal representative, see Section 377.510 and Probate Code Sections 550-555 (insured claims). See also Prob. Code § 58 ("personal representative" defined). As to survival of causes of action, see Section 377.210.

Subdivision (c) makes clear that this section does not apply to persons who died before January 1, 1992. The rules applicable to cases involving decedents who died before January 1, 1992, are set forth in former Section 353. The repeal of former Section 353 does not have any effect on the application of subdivisions (c) and (d) of former Section 353 in the cases to which they applied.

**Code Civ. Proc. §§ 377.110-377.630 (added). Effect of death**

**SEC. . Chapter 4 (commencing with Section 377.110) is added to Title 3 of Part 2 of the Code of Civil Procedure, to read:**

## **CHAPTER 4. EFFECT OF DEATH**

### **Article 1. Definitions**

#### **§ 377.110. Beneficiary of decedent's estate**

377.110. For the purposes of this chapter, "beneficiary of the decedent's estate" means:

(a) If the decedent died leaving a will, the sole beneficiary or all of the beneficiaries who succeed to a cause of action, or to a particular item of property that is the subject of a cause of action, under the decedent's will.

(b) If the decedent died without leaving a will, the sole person or all of the persons who succeed to a cause of action, or to a particular item of property that is the subject of a cause of action, under Sections 6401 and 6402 of the Probate Code or, if the law of a sister state or foreign nation governs succession to the cause of action or particular item of property, under the law of the sister state or foreign nation.

**Comment.** Section 377.110 is a new provision drawn from Probate Code Section 13006. See also Section 377.120 (“decedent’s successor in interest” defined).

### **§ 377.120. Decedent’s successor in interest**

377.120. For the purposes of this chapter, “decedent’s successor in interest” means the beneficiary of the decedent’s estate or other successor in interest who succeeds to a cause of action or to a particular item of the property that is the subject of a cause of action.

**Comment.** Section 377.120 is new. The term “successor in interest” is derived from the second sentence of former Section 385. “Beneficiary of the decedent’s estate” is defined Section 377.110, and refers to takers of assets that are or would be subject to probate. Other successors in interest include persons who take property at the decedent’s death by operation of law or a contract or account agreement.

The decedent’s successor in interest does not include a person to whom the cause of action or property was assigned during the decedent’s lifetime.

## **Article 2. Survival and Continuation**

### **§ 377.210. Survival of cause of action**

377.210. (a) Except as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person’s death, but survives subject to the applicable limitations period.

(b) This section applies even though a loss or damage occurs simultaneously with or after the death of a person who would have been liable if the person’s death had not preceded or occurred simultaneously with the loss or damage.

**Comment.** Subdivision (a) of Section 377.210 restates the first part of former Probate Code Section 573(a) without substantive change. Subdivision (b) restates former Probate Code Section 573(d) without substantive change. The applicable limitations period may be affected by the death of a person. See Sections 366.1-366.2 (time of commencement of action after death of person).

**§ 377.220. Continuation of pending action**

**377.220.** A pending action or proceeding does not abate by the death of a party if the cause of action survives.

**Comment.** Section 377.220 restates part of the first sentence of former Section 385 without substantive change.

**§ 377.230. Assignability of causes of action**

**377.230.** Nothing in this chapter shall be construed as affecting the assignability of causes of action.

**Comment.** Section 377.230 restates former Probate Code Section 573(e) without substantive change.

**Article 3. Decedent's Cause of Action**

**§ 377.310. Commencement of action decedent could have commenced**

**377.310.** A cause of action that survives the death of the person entitled to commence an action or proceeding passes to the decedent's successor in interest, subject to Chapter 1 (commencing with Section 7000) of Part 1 of Division 7 of the Probate Code, and an action may be commenced by the decedent's personal representative or, if none, by the decedent's successor in interest.

**Comment.** Section 377.310 restates the first part of former Code of Civil Procedure Section 353(a) and part of former Probate Code Section 573(a) without substantive change, but adds the reference to the successor in interest drawn from former Code of Civil Procedure Section 385. Under this section, an action or proceeding may be commenced by the decedent's successor in interest only if there is no personal representative. The distributee of the cause of action in probate is the successor in interest or, if there is no distribution, the heir, devisee, trustee, or other successor has the right to proceed under this article. See Section 377.120 ("decedent's successor in interest" defined). See also Prob. Code § 58 ("personal representative" defined). The addition of the

reference to the successor in interest makes the rules applicable to commencement of an action consistent with the rules applicable to continuation of a pending action. Thus, the distinction between commencing and continuing the decedent's action drawn in *Everett v. Commissioner, T.C.M. (P-H) ¶ 89,124 (Mar. 27, 1989)*, is not applicable under Sections 377.310 and 377.320.

**§ 377.320. Continuation of pending action commenced by decedent**

**377.320.** On motion after the death of a person who commenced an action or proceeding, the court shall allow a pending action or proceeding that does not abate to be continued by the decedent's personal representative or, if none, by the decedent's successor in interest.

**Comment.** Section 377.320 restates part of former Section 385, but recognizes that the personal representative or successor in interest has an absolute right to be substituted for the decedent; substitution in this situation is not discretionary with the court. See, e.g., *Pepper v. Superior Court*, 76 Cal. App. 3d 252, 260-61, 142 Cal. Rptr. 759 (1977). See also Section 377.120 ("decedent's successor in interest" defined); Prob. Code § 58 ("personal representative" defined).

This section is consistent with the application of former Section 385 in a federal Tax Court. See *Everett v. Commissioner, T.C.M. (P-H) ¶ 89, 124 (Mar. 27, 1989)* (daughter of decedent petitioner substituted as party under federal rules adopting local law as to proper parties).

**§ 377.330. Affidavit or declaration by decedent's successor in interest**

**377.330.** (a) The person who seeks to commence an action or proceeding or to continue a pending action or proceeding as the decedent's successor in interest under this article, shall execute and file an affidavit or a declaration under penalty of perjury under the laws of this state stating all of the following:

(1) The decedent's name.

(2) The date and place of the decedent's death.

(3) "No proceeding is now pending in California for administration of the decedent's estate."

(4) If the decedent's estate was administered, a copy of the final order showing the distribution of the decedent's cause of action to the successor in interest.

(5) Either of the following, as appropriate, with facts in support thereof:

(A) "The affiant or declarant is the decedent's successor in interest (as defined in Section 377.120 of the California Code of Civil Procedure) and succeeds to the decedent's interest in the action or proceeding."

(B) "The affiant or declarant is authorized to act on behalf of the decedent's successor in interest (as defined in Section 377.120 of the California Code of Civil Procedure) with respect to the decedent's interest in the action or proceeding."

(6) "No other person has a superior right to commence the action or proceeding or to be substituted for the decedent in the pending action or proceeding."

(7) "The affiant or declarant affirms or declares under penalty of perjury under the laws of the State of California that the foregoing is true and correct."

(b) Where more than one person executes the affidavit or declaration under this section, the statements required by subdivision (a) shall be modified as appropriate to reflect that fact.

(c) A certified copy of the decedent's death certificate shall be attached to the affidavit or declaration.

**Comment.** Section 337.330 is new. The affidavit provided in this section is drawn from the affidavit provided in Probate Code Section 13101.

### **§ 377.340. Order concerning parties**

The court in which an action is commenced or continued under this article may make any order concerning parties that is appropriate to ensure proper administration of justice in the case, including appointment of the decedent's successor in interest as a special administrator or guardian ad litem.

**Comment.** Section 377.340 is new. The court in which the action or proceeding is pending has authority to resolve questions concerning the proper parties to the litigation and to make conclusive and binding orders, including determinations of the right of a successor in interest to commence or continue an action or proceeding. The references to

appointment of the successor in interest as a special administrator or guardian ad litem are intended to recognize that there may be a need to impose fiduciary duties on the successor to protect the interests of other potential beneficiaries. See Code Civ. Proc. §§ 372-373.5 (guardian ad litem); Prob. Code §§ 8540-8547 (special administrator).

**§ 377.350. Damages recoverable by decedent's personal representative or successor in interest**

**377.350.** In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement.

**Comment.** Section 377.350 restates former Probate Code Section 573(c) without substantive change, and adds the reference to the successor in interest. See Section 377.120 ("decedent's successor in interest" defined); Prob. Code § 58 ("personal representative" defined). The limitations in this section apply to the decedent's cause of action and not to a cause of action that others may have for the wrongful death of the decedent. See Sections 377.610-377.630 (wrongful death).

**Article 4. Cause of Action Against Decedent**

**§ 377.410. Assertion of cause of action against decedent**

**377.410.** Subject to Part 4 (commencing with Section 9000) of Division 7 of the Probate Code governing creditor claims, a cause of action against a decedent that survives may be asserted against the decedent's personal representative or, to the extent provided by statute, against the decedent's successor in interest.

**Comment.** Section 377.410 restates a portion of the first sentence of former Code of Civil Procedure Section 353(b) and part of former Probate Code Section 573(a) without substantive change. For special rules providing direct liability of successors in interest, see, e.g., Prob. Code §§ 13109 (transferee of property by affidavit), 13550 (surviving spouse who takes property without administration).

The introductory portion of Section 377.410, referring to Part 4 (creditor claims) of Division 7 of the Probate Code, is intended for cross-

referencing purposes. See Prob. Code §§ 9350-9399 (claims in litigation). For special rules governing liability covered by insurance, see Code Civ. Proc. § 377.510; Prob. Code §§ 550-555.

See also Code Civ. Proc. § 377.120 (“decedent’s successor in interest” defined); Prob. Code § 58 (“personal representative” defined).

#### **§ 377.420. Continuation of pending action against decedent**

**377.420.** On motion, the court shall allow a pending action or proceeding against the decedent that does not abate to be continued against the decedent’s personal representative or, to the extent provided by statute, against the decedent’s successor in interest, except that the court may not permit an action or proceeding to be continued against the personal representative unless proof of compliance with Part 4 (commencing with Section 9000) of Division 7 of the Probate Code governing creditor claims is first made.

**Comment.** Section 377.420 supersedes part of former Section 385. An action or proceeding may be continued against the decedent’s successor in interest only if a statute provides for liability in such cases. For special rules providing direct liability of successors in interest, see, e.g., Prob. Code §§ 13109 (transferee of property by affidavit), 13550 (surviving spouse who takes property without administration), 18201 (trust assets). See also Section 377.120 (“decedent’s successor in interest” defined); Prob. Code § 58 (“personal representative” defined); Veh. Code § 17452 (continuation of action against personal representative of nonresident defendant involved in motor vehicle accident).

#### **§ 377.430. Damages recoverable**

**377.430.** In an action or proceeding against a decedent’s personal representative or, to the extent provided by statute, against the decedent’s successor in interest, on a cause of action against the decedent, all damages are recoverable that might have been recovered against the decedent had the decedent lived except damages recoverable under Section 3294 of the Civil Code or other punitive or exemplary damages.

**Comment.** Section 377.430 restates former Probate Code Section 573(b) without substantive change, and applies the rule to successors in

interest, to the extent they are liable. See Comments to Sections 377.410 & 377.420. See also Code Civ. Proc. § 377.120 (“decedent’s successor in interest” defined); Prob. Code § 58 (“personal representative” defined).

### **Article 5. Insured Claims**

#### **§ 377.510. Action on insured claim**

**377.510.** An action to establish the decedent’s liability for which the decedent was protected by insurance may be commenced or continued against the decedent’s estate as provided in Chapter 1 (commencing with Section 550) of Part 13 of Division 2 of the Probate Code.

**Comment.** Section 377.510 is a new provision that provides a cross-reference to the special provisions in the Probate Code concerning insured claims against the decedent.

### **Article 6. Wrongful Death**

#### **§ 377.610. Parties in wrongful death action**

**377.610.** A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent’s personal representative on their behalf:

(a) The persons, including the surviving spouse, who would be entitled under the statutes of intestate succession to the property of the decedent.

(b) Whether or not qualified under subdivision (a), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, or parents. As used in this subdivision, “putative spouse” means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.

(c) A minor, whether or not qualified under subdivision (a) or (b), if, at the time of the decedent’s death, the minor resided for the previous 180 days in the decedent’s household and was dependent on the decedent for one-half or more of the minor’s support.



**Comment.** Section 377.610 restates subdivision (b) and the first part of the first sentence of subdivision (a) of former Section 377 without substantive change. If the wrongdoer dies before or after the decedent, the cause of action provided in this section may be asserted against the personal representative of the wrongdoer. See Sections 377.210 (survival of cause of action), 377.410 (assertion of cause of action against decedent). See also Prob. Code § 6400 *et seq.* (intestate succession).

Unlike other provisions of this chapter that relate to causes of action belonging to the decedent, this article relates to a cause of action for the decedent's wrongful death, which belongs not to the decedent, but to the persons specified in this section. Thus, the cause of action is not property in the estate of the decedent, and the authority of the personal representative to assert the cause of action is for administrative convenience only and is not for the benefit of creditors or other persons interested in the decedent's estate.

#### **§ 377.620. Damages in wrongful death action**

377.620. In an action under this article, damages may be awarded that, under all the circumstances of the case, may be just, but may not include damages recoverable under Section 377.350. The court shall determine the respective rights in an award of the persons entitled to assert the cause of action.

**Comment.** Section 377.620 restates the third and fourth sentences of former Section 377(a) without substantive change.

#### **§ 377.630. Joinder and consolidation of actions**

377.630. (a) An action under Section 377.310 may be joined with an action under Section 377.610 arising out of the same wrongful act or neglect.

(b) An action under Section 377.610 and an action under Section 377.320 arising out of the same wrongful act or neglect may be consolidated for trial as provided in Section 1048.

**Comment.** Subdivision (a) of Section 377.630 restates and generalizes the fifth sentence of former Section 377(a).

Subdivision (b) replaces the last sentence of former Section 377(a). This subdivision incorporates the general provision governing consolidation of actions which recognizes the court's discretion to order consolidation. Former Section 377(a) provided that the court "shall" order consolidation on motion of an interested party.

## CONFORMING REVISIONS

### *Civil Code*

#### **Civil Code § 1363 (amended). Association to manage common interest development**

SEC. . Section 1363 of the Civil Code is amended to read:

1363. (a) A common interest development shall be managed by an association which may be incorporated or unincorporated. *The association may be referred to as a community association.*

(b) *An association, whether incorporated or unincorporated, shall prepare a budget pursuant to Section 1365 and disclose information, if requested, in accordance with Section 1368.*

(c) Unless the governing documents provide otherwise, and regardless of whether the association is incorporated or unincorporated, the association ~~may exercise the~~ *has all of the following powers:*

(1) *The powers granted to a nonprofit mutual benefit corporation, as enumerated in Section 7140 of the Corporations Code, except that an unincorporated association may not adopt or use a corporate seal or issue membership certificates in accordance with Section 7313 of the Corporations Code. ~~An association, whether incorporated or unincorporated, may exercise the powers granted to an association by Section 374 of the Code of Civil Procedure and the~~*

(2) *Standing to institute, defend, settle, or intervene in litigation, arbitration, mediation, or administrative proceedings in its own name as the real party in interest and without joining with it the individual owners of the common interest development, in matters pertaining to the following:*

(A) *Enforcement of the governing documents.*

(B) *Damage to the common areas.*

(C) *Damage to the separate interests that the association is obligated to maintain or repair.*

*(D) Damage to the separate interests which arises out of, or is integrally related to, damage to the common areas or separate interests that the association is obligated to maintain or repair.*

*(3) The other powers granted to the association in this title. ~~The association may be referred to as a community association:~~*

~~An association, whether incorporated or unincorporated, shall prepare a budget pursuant to Section 1365 and disclose information, if requested, in accordance with Section 1368.~~

**Comment.** Section 1363 is amended to incorporate the substance of former Code of Civil Procedure Section 374 in newly designated subdivision (c). The section is also reorganized for clarity. The order of some provisions is altered to preserve the material in subdivision (b), as it was designated by 1988 Cal. Stat. ch. 123, § 1, since this provision is referred to in Section 1373. The subdivision designations added in 1988 were omitted when Section 1363 was amended by 1989 Cal. Stat. ch. 571, § 1.

**Civil Code § 2225 (technical amendment). Proceeds from sale of felon's story**

**SEC. .** Section 2225 of the Civil Code is amended to read:

**2225. (a)** As used in this section:

(1) "Convicted felon" means any person convicted of a felony, or found not guilty by reason of insanity of a felony committed in California, either by a court or jury trial or by entry of a plea in court.

(2) "Felony" means a felony defined by any California or United States statute.

(3) "Representative of the felon" means any person or entity receiving proceeds by designation of that felon, or on behalf of that felon or in the stead of that felon, whether by the felon's designation or by operation of law.

(4)(A) "Beneficiary" means a person who, under applicable law, other than the provisions of this section, has or had a right to recover damages from the convicted felon for physical, mental, or emotional injury, or pecuniary loss proximately

caused by the convicted felon as a result of the crime for which the felon was convicted.

(B) If a beneficiary described in subparagraph (A) has died, "beneficiary" also includes a person or estate entitled to recover damages pursuant to ~~Section 573 of the Probate Code~~ *Chapter 4 (commencing with Section 377.110) of Title 3 of Part 2 of the Code of Civil Procedure.*

(C) If a person has died and the death was proximately caused by the convicted felon as a result of the crime for which the felon was convicted, "beneficiary" also includes a person described in ~~Section 377~~ 377.610 of the Code of Civil Procedure and any beneficiary of a will of the decedent who had a right under that will to receive more than 25 percent of the value of the estate of the decedent.

(5) "Beneficiary's interest in the proceeds" means that portion of the proceeds necessary to pay the following:

(A) In the case of a beneficiary described in subparagraph (A) or (B) of paragraph (4), those damages which, under applicable law, other than the provisions of this section, the beneficiary has or had a right to recover from the convicted felon for injuries proximately caused by the convicted felon as a result of the crime for which the felon was convicted.

(B) In the case of a beneficiary described in subparagraph (C) of paragraph (4), those damages which under all the circumstances of the case may be just.

(C) A beneficiary's interest in the proceeds shall be reduced by the following amount:

(i) Money paid to the beneficiary from the Restitution Fund because of the crime for which the felon was convicted.

(ii) Money paid to the beneficiary by the convicted felon because of a requirement of restitution imposed by a court in connection with the crime for which the felon was convicted.

(iii) Money paid to the beneficiary because of a judgment against the convicted felon based upon the crime for which the felon was convicted.

**(D)** In the case of an unsatisfied existing judgment or order of restitution against the convicted felon and in favor of a beneficiary, any money paid to the beneficiary pursuant to this section shall be applied to reduce the amount of the unsatisfied judgment or order.

**(6)** “Materials” means books, magazine or newspaper articles, movies, films, video tapes, sound recordings, interviews or appearances on television and radio stations, and live presentations of any kind.

**(7)** “Story” means a depiction, portrayal, or reenactment of a felony and shall not be taken to mean a passing mention of the felony, as in a footnote or bibliography.

**(8)** “Sale” includes lease, license, or any other transfer or alienation taking place in California or elsewhere.

**(9)** “Proceeds” means all fees, royalties, real property, or other consideration of any and every kind or nature received by or owing to a felon or his or her representatives for the preparation for the purpose of sale of materials, for the sale of the rights to materials, or the sale or distribution by the convicted felon of materials whether earned, accrued, or paid before or after the conviction. It includes any interest, earnings, or accretions upon proceeds, and any property received in exchange for proceeds.

**(b)** All proceeds from the preparation for the purpose of sale, the sale of the rights to, or the sale of materials that include or are based on the story of a felony for which a convicted felon was convicted, shall be subject to an involuntary trust for the benefit of the beneficiaries set forth in this section. That trust shall continue until five years after the time of payment of the proceeds to the felon or five years after the date of conviction, whichever is later. If an action is filed by a beneficiary to recover his or her interest in a trust within those time limitations, the trust character of the property shall continue until the conclusion of the action.

(c)(1) Any beneficiary may bring an action against a convicted felon or representative of the felon to recover his or her interest in the trust established by this section.

(2) That action may be brought in the superior court of the county in which the beneficiary resides, or of the county in which the convicted felon resides, or of the county in which proceeds are located.

(3) If the court determines that a beneficiary is entitled to proceeds pursuant to this section, the court shall order the payment from proceeds which have been received, and, if that is insufficient, from proceeds which may be received in the future.

(d) If there are two or more beneficiaries and if the available proceeds are insufficient to pay all beneficiaries, the proceeds shall be equitably apportioned among the beneficiaries taking into account the impact of the crime upon them.

Prior to any distribution of any proceeds to a beneficiary, the court shall determine whether the convicted felon has failed to pay any portion of a restitution fine or penalty fine imposed by a court, or any restitution imposed as a condition of probation. The court shall also determine whether the felon is obligated to reimburse a governmental entity for the costs of his or her defense and whether a portion of the proceeds is needed to cover his or her reasonable attorney's fees incurred in the criminal proceeding related to the felony, or any appeal or other related proceeding, or in the defense of the action brought under this section. The court shall order payment of these obligations prior to any payment to a beneficiary, except that 10 percent of the proceeds shall be reserved for payment to the beneficiaries.

(e)(1) The Attorney General may bring an action to require proceeds received by a convicted felon to be held in an express trust in a bank authorized to act as a trustee.

(2) An action may be brought under this subdivision within six months after the receipt of proceeds by a convicted felon or six months after the date of conviction, whichever is later.

That action may be brought in the superior court of any county in which the Attorney General has an office.

(3) If the Attorney General proves that the proceeds are proceeds from the sale of a story which are subject to an involuntary trust pursuant to this section, and that it is more probable than not that there are beneficiaries within the meaning of this section, the court shall order that all proceeds be deposited in a bank and held by the bank as trustee of the trust until an order of disposition is made by a court pursuant to subdivision (d), or until the expiration of the period specified in subdivision (b).

(4) If the Attorney General prevails in an action under this subdivision, the court shall order the payment from the proceeds to the Attorney General of reasonable costs and attorney's fees.

(f) In any action brought pursuant to subdivision (d) or (e), upon motion of a party the court shall grant a preliminary injunction to prevent any waste of proceeds if it appears that the proceeds are subject to the provisions of this section, and that they may be subject to waste.

(g) Any violation of an order of a court made pursuant to this section shall be punishable as contempt.

(h) The remedies provided by this section are in addition to other remedies provided by law.

No period of limitations, except those provided by this section, shall limit the right of recovery under this section.

**Comment.** Section 2225 is amended to revise section references. These revisions are technical, nonsubstantive changes.

**Civil Code § 3294 (technical amendment).** Exemplary damages

SEC. . Section 3294 of the Civil Code is amended, to read:

3294. (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and

convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

(d) Damages may be recovered pursuant to this section in an action pursuant to ~~Section 377 of the Code of Civil Procedure or Section 573 of the Probate Code~~ *Chapter 4 (commencing with Section 377.110) of Title 3 of Part 2 of the Code of Civil Procedure* based upon a death which resulted from a homicide



for which the defendant has been convicted of a felony, whether or not the decedent died instantly or survived the fatal injury for some period of time. The procedures for joinder and consolidation contained in Section ~~377~~ 377.630 of the Code of Civil Procedure shall apply to prevent multiple recoveries of punitive or exemplary damages based upon the same wrongful act.

(e) The amendments to this section made by Chapter 1498 of the Statutes of 1987 apply to all actions in which the initial trial has not commenced prior to January 1, 1988.

**Comment.** Section 3294 is amended to revise section references. These revisions are technical, nonsubstantive changes.

### *Code of Civil Procedure*

**Code Civ. Proc. § 353 (repealed).** Death of party before expiration of limitation period

**SEC. .** Section 353 of the Code of Civil Procedure is repealed.

~~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 subdivisions (c) and (d), if a person against whom an action may be brought on a liability of the person, whether arising in contract, tort, or otherwise, dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced within one year after the date of death, and the time otherwise limited for the commencement of the action does not apply. Subject to Chapter 8 (commencing with Section 9350) of Part 4 of Division 7 of the Probate Code, the time provided in this subdivision for commencement of an action is not tolled or extended for any reason.~~

~~(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 January 1, 1991, 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 before the expiration of the later of the following times:~~

~~(1) January 1, 1992.~~

~~(2) One year after the issuing of letters testamentary or of administration, or the time otherwise limited for the commencement of the action, whichever is the later time.~~

**Comment.** Subdivision (a) of former Section 353 is restated without substantive change in Sections 366.1 (limitations period after death of person entitled to bring action) and 377.310 (commencement of decedent's cause of action). See also Section 377.210 (survival of cause of action).

Subdivision (b) is restated without substantive change in Sections 366.2(a)-(b) and 377.410. See Comments to Sections 366.2 & 377.410.

Subdivisions (c) and (d) are not continued in the new statute because they served their purposes before the repeal of Section 353 and the enactment of the superseding statute became effective. The repeal of former Section 353 does not have any effect on the application of subdivisions (c) and (d) in the cases to which they applied. See Section 366.2(c) & Comment.

**Code Civ. Proc. § 355 (amended).** Limitation on new action following reversal on appeal

**SEC. .** Section 355 of the Code of Civil Procedure is amended to read:

355. If an action is commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal *other than on the merits*, ~~the plaintiff, or if he die and the cause of action survive, his representatives,~~ may commence a new action *may be commenced* within one year after the reversal.

**Comment.** Section 355 is amended for conformity with the revised rules concerning litigation after death of a party. See Sections 377.110-377.630. This section is also revised to make clear that it does not apply where the judgment was reversed on the merits. See, e.g., *Watterson v. Owens River Canal Co.*, 190 Cal. 88, 93, 210 P. 625 (1922); *Schneider v. Schimmels*, 256 Cal. App. 2d 366, 370, 64 Cal. Rptr. 273 (1967).

**Code Civ. Proc. § 367 (chapter heading)**

SEC. . A chapter heading is added immediately preceding Section 367 of the Code of Civil Procedure, to read:

**CHAPTER 1. GENERAL PROVISIONS**

**Code Civ. Proc. § 367 (amended). Real party in interest**

SEC. . Section 367 of the Code of Civil Procedure is amended to read:

367. Every action must be prosecuted in the name of the real party in interest, except as *otherwise* provided ~~in Sections 369 and 374 of this code~~ *by statute*.

**Comment.** Section 367 is amended to eliminate the obsolete listing of statutes that permit prosecution of an action in the name of a person other than the real party in interest. Statutes that permit prosecution in the name of a person other than the real party in interest include Civil Code Section 1363 (association to manage common interest development), Code of Civil Procedure Section 369 (fiduciaries), and Probate Code Sections 550-555 (insured claims).

**Code Civ. Proc. § 368.5 (added). Transfer of interest in pending action**

SEC. . Section 368.5 is added to the Code of Civil Procedure, to read:

368.5. An action or proceeding does not abate by the transfer of an interest in the action or proceeding or by any other transfer of an interest. The action or proceeding may be

continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding.

**Comment.** Section 368.5 restates part of former Section 385 without substantive change.

**Code Civ. Proc. § 369 (amended). Fiduciaries**

**SEC. .** Section 369 of the Code of Civil Procedure is amended to read:

369. (a) ~~An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, The following persons~~ may sue without joining ~~with him or her as parties~~ the persons for whose benefit the action is prosecuted:

(1) *A personal representative.*

(2) *A trustee of an express trust.*

(3) Except for a person upon whom a power of sale has been conferred pursuant to a deed of trust or mortgage, a person with whom, or in whose name, a contract is made for the benefit of another, ~~is a trustee of an express trust, within the meaning of this section.~~

(4) *Any other person expressly authorized by statute.*

(b) Notwithstanding subdivision (a), a trustee upon whom a power of sale has been conferred pursuant to a deed of trust or mortgage may sue to exercise the trustee's powers and duties pursuant to Chapter 2 (commencing with Section 2920) of Title 14 of Part 4 of Division 3 of the Civil Code.

**Comment.** Subdivision (a) of Section 369 is reorganized and the terminology clarified. These changes are technical and not substantive. See also Prob. Code §§ 58 ("personal representative" defined), 82 ("trust" defined), 84 ("trustee" defined).

**Code Civ. Proc. § 369.5 (added). Partnership or association**

**SEC. .** Section 369.5 is added to the Code of Civil Procedure, to read:

369.5. (a) A partnership or other unincorporated association, whether organized for profit or not, may sue and be sued in the name it has assumed or by which it is known.

(b) A member of the partnership or other unincorporated association may be joined as a party in an action against the unincorporated association. If service of process is made on the member as an individual, whether or not the member is also served as a person upon whom service is made on behalf of the unincorporated association, a judgment against the member based on the member's personal liability may be obtained in the action, whether the liability is joint, joint and several, or several.

**Comment.** Section 369.5 restates former Section 388 without substantive change.

**Code Civ. Proc. § 370 (chapter heading)**

**SEC. .** A chapter heading is added immediately preceding Section 370 of the Code of Civil Procedure, to read:

**CHAPTER 2. MARRIED PERSON**

**Code Civ. Proc. § 372 (chapter heading)**

**SEC. .** A chapter heading is added immediately preceding Section 372 of the Code of Civil Procedure, to read:

**CHAPTER 3. DISABILITY OF PARTY**

**Code Civ. Proc. § 374 (repealed). Association to manage common interest development**

**SEC. .** Section 374 of the Code of Civil Procedure is repealed.

~~374. An association established to manage a common interest development shall have standing to institute, defend, settle, or intervene in litigation, arbitration, mediation, or administrative proceedings in its own name as the real party in interest and without joining with it the individual owners of the common interest development, in matters pertaining to the following:~~

- ~~(a) Enforcement of the governing documents.~~
- ~~(b) Damage to the common areas.~~
- ~~(c) Damage to the separate interests which the association is obligated to maintain or repair.~~

~~(d) Damage to the separate interests which arises out of, or is integrally related to, damage to the common areas or separate interests that the association is obligated to maintain or repair.~~

**Comment.** Former Section 374 is restated in Civil Code Section 1363 (association to manage common interest development) without substantive change.

**Code Civ. Proc. § 375 (added). Effect of disability on pending action**

**SEC. .** Section 375 is added to the Code of Civil Procedure, to read:

375. An action or proceeding does not abate by the disability of a party. The court, on motion, shall allow the action or proceeding to be continued by or against the party's representative.

**Comment.** Section 375 restates part of former Section 385, but makes clear that substitution of the representative of a disabled person is mandatory rather than permissive.

**Code Civ. Proc. § 376 (technical amendment). Injury to minor**

**SEC. .** Section 376 of the Code of Civil Procedure is amended to read:

376. (a) The parents of a legitimate unmarried minor child, acting jointly, may maintain an action for injury to ~~such~~ *the* child caused by the wrongful act or neglect of another. If either parent ~~shall fail~~ *fails* on demand to join as plaintiff in ~~such~~ *the* action or is dead or cannot be found, then the other parent may maintain ~~such~~ *the* action ~~and the~~. *The* parent, if living, who does not join as plaintiff ~~must~~ *shall* be joined as a defendant and, before trial or hearing of any question of fact, ~~must~~ *shall* be served with summons either in the manner provided by law for the service of a summons in a civil action or by sending a copy of the summons and complaint by registered mail with proper postage prepaid addressed to ~~such~~ *that* parent's last known address with request for a return receipt. If service is made by registered mail, the production of a return receipt purporting to be signed by the addressee

creates a rebuttable presumption that ~~such~~ *the* summons and complaint have been duly served. The presumption established by this section is a presumption affecting the burden of producing evidence. The respective rights of the parents to any award shall be determined by the court.

(b) A parent may maintain an action for such an injury to his or her illegitimate unmarried minor child if a guardian has not been appointed. Where ~~such~~ *a* parent who does not have care, custody, or control of the child brings the action, the parent who has care, custody, or control of the child shall be served with the summons either in the manner provided by law for the serving of a summons in a civil action or by sending a copy of the summons and complaint by registered mail, with proper postage prepaid, addressed to the last known address of ~~such~~ *that* parent, with request for a return receipt. If service is made by registered mail, the production of a return receipt purporting to be signed by the addressee creates a rebuttable presumption that the summons and complaint have been duly served. The presumption established by this section is a presumption affecting the burden of producing evidence. The respective rights of the parents to any award shall be determined by the court.

(c) The father of an illegitimate child who maintains an action under this section shall have acknowledged in writing prior to the child's injury, in the presence of a competent witness, that he is the father of the child, or, prior to the child's injury, have been judicially determined to be the father of the child.

(d) A parent of an illegitimate child who does not maintain an action under this section may be joined as a party thereto.

(e) A guardian may maintain an action for such an injury to his or her ward.

(f) ~~Any such~~ *An action under this section may be maintained against the person causing the injury. If any other person is responsible for any such the wrongful act or neglect,*

the action may also be maintained against ~~such~~ *the* other person. The death of the child or ward ~~shall~~ *does* not abate the parents' or guardian's cause of action for ~~his or her~~ *the child's* injury as to damages accruing before ~~his or her~~ *the child's* death.

(g) In ~~every~~ *an* action under this section, such damages may be ~~given as~~ *awarded that*, under all of the circumstances of the case, may be just; except that ~~in any~~:

(1) ~~In an~~ action maintained after the death of the child or ward ~~or against the executor or administrator of~~, *the damages recoverable are as provided in Section 377.350.*

(2) ~~Where~~ the person causing the injury ~~is deceased~~, the damages recoverable ~~shall be in an action against the decedent's personal representative~~ *are as provided in Section 573 of the Probate Code 377.430.*

(h) If an action arising out of the same wrongful act or neglect may be maintained pursuant to Section ~~377~~ *377.610* for wrongful death of ~~any such~~ *a child described in this section*, the action authorized by this section ~~shall~~ *may* be consolidated therewith for trial ~~on motion of any interested party~~ *as provided in Section 1048.*

**Comment.** Section 376 is revised to correct cross-references, to add subdivision letters to the existing paragraphs, and to improve the wording. The word "ward" in subdivision (g)(1) has been omitted as surplus; this is a technical, nonsubstantive change.

Subdivision (h) is revised for consistency with Section 377.630.

### **Code Civ. Proc. § 377 (repealed). Wrongful death**

**SEC.** . Section 377 of the Code of Civil Procedure is repealed.

~~377. (a) When the death of a person is caused by the wrongful act or neglect of another, his or her heirs or personal representatives on their behalf may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is~~



~~responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his or her death, his or her personal representatives. In every action under this section, such damages may be given as under all the circumstances of the case, may be just, but shall not include damages recoverable under Section 573 of the Probate Code. The respective rights of the heirs in any award shall be determined by the court. Any action brought by personal representatives of the decedent pursuant to the provisions of Section 573 of the Probate Code may be joined with an action arising out of the same wrongful act or neglect brought pursuant to the provisions of this section. If an action be brought pursuant to the provisions of this section and a separate action arising out of the same wrongful act or neglect be brought pursuant to the provisions of Section 573 of the Probate Code, such actions shall be consolidated for trial on the motion of any interested party.~~

~~(b) For the purposes of subdivision (a), "heirs" means only the following:~~

~~(1) Those persons who would be entitled to succeed to the property of the decedent according to the provisions of Part 2 (commencing with Section 6400) of Division 6 of the Probate Code;~~

~~(2) Whether or not qualified under paragraph (1), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, and parents. As used in this paragraph, "putative spouse" means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid; and~~

~~(3) Minors, whether or not qualified under paragraphs (1) or (2), if, at the time of the decedent's death, they resided for the previous 180 days in the decedent's household and were dependent upon the decedent for one half or more of their support.~~

~~Nothing in this subdivision shall be construed to change or modify the definition of "heirs" under any other provisions of law.~~

**Comment.** The first part of the first sentence of subdivision (a) and subdivision (b) of former Section 377 are restated in Section 377.610 (parties in wrongful death action) without substantive change. The last part of the first sentence of subdivision (a) is superseded by Sections 377.210 (survival of cause of action) and 377.410 (assertion of cause of action against decedent). The second sentence of subdivision (a) is superseded by Sections 377.610 (parties in wrongful death action), 377.210 (survival of cause of action), and 377.410 (assertion of cause of action against decedent). The third and fourth sentences of subdivision (a) are restated in Section 377.620 (damages in wrongful death action) without substantive change. The fifth sentence of subdivision (a) is restated and generalized in Section 377.630(a) (joinder of causes of action). The last sentence of subdivision (a) is superseded by Section 377.630(b) (consolidation of actions). See Comment to Section 377.630(b).

#### **Code Civ. Proc. § 378 (chapter heading)**

**SEC. .** A chapter heading is added immediately preceding Section 378 of the Code of Civil Procedure, to read:

#### **CHAPTER 5. PERMISSIVE JOINDER**

#### **Code Civ. Proc. § 385 (repealed). Disability or death**

**SEC. .** Section 385 of the Code of Civil Procedure is repealed.

~~385. An action or proceeding does not abate by the death, or any disability of a party, or by the transfer of any interest therein, if the cause of action survives or continues. In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his or her representative or successor in interest. In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding.~~

**Comment.** Section 385 is restated in Sections 368.5 (transfer of interest in pending action), 375 (effect of disability on pending action),

377.220 (continuation of pending action), 377.320 (continuation of pending action commenced by decedent), and 377.420 (continuation of pending action against decedent) without substantive change, except that Section 375 provides that substitution of parties is mandatory rather than permissive.

**Code Civ. Proc. § 386 (chapter heading)**

SEC. . A chapter heading is added immediately preceding Section 386 of the Code of Civil Procedure, to read:

**CHAPTER 6. INTERPLEADER**

**Code Civ. Proc. § 387 (chapter heading)**

SEC. . A chapter heading is added immediately preceding Section 387 of the Code of Civil Procedure, to read:

**CHAPTER 7. INTERVENTION**

**Code Civ. Proc. § 388 (repealed). Partnership or association**

SEC. . Section 388 of the Code of Civil Procedure is repealed.

~~388. (a) Any partnership or other unincorporated association, whether organized for profit or not, may sue and be sued in the name which it has assumed or by which it is known.~~

~~(b) Any member of the partnership or other unincorporated association may be joined as a party in an action against the unincorporated association. If service of process is made on such member as an individual, whether or not he is also served as a person upon whom service is made on behalf of the unincorporated association, a judgment against him based on his personal liability may be obtained in the action, whether such liability be joint, joint and several, or several.~~

**Comment.** Former Section 388 is restated in Section 369.5 without substantive change.

**Code Civ. Proc. § 388 (added). Copy of environmental litigation to Attorney General**

SEC. . Section 388 is added to the Code of Civil Procedure, to read:

388. In an action brought by a party for relief of any nature other than solely for money damages where a pleading alleges facts or issues concerning alleged pollution or adverse environmental effects which could affect the public generally, the party filing the pleading shall furnish a copy to the Attorney General of the State of California. The copy shall be furnished by the party filing the pleading within 10 days after filing.

**Comment.** Section 388 restates former Section 389.6 without substantive change.

**Code Civ. Proc. § 389 (chapter heading)**

SEC. . A chapter heading is added immediately preceding Section 389 of the Code of Civil Procedure, to read:

**CHAPTER 8. COMPULSORY JOINDER**

**Code Civ. Proc. § 389.6 (repealed). Copy of litigation to Attorney General**

SEC. . Section 389.6 of the Code of Civil Procedure is repealed.

~~389.6. In any action brought by any party for relief of any nature other than solely for money damages where a pleading alleges facts or issues concerning alleged pollution or adverse environmental effects which could affect the public generally, the party filing the pleading shall furnish a copy to the Attorney General of the State of California. Such copy shall be furnished by the party filing the pleading within 10 days after filing.~~

**Comment.** Former Section 389.6 is restated in Section 388 without substantive change.

**Code Civ. Proc. § 390 (repealed). Action against board of fire commissioners**

SEC. . Section 390 of the Code of Civil Procedure is repealed.

~~390. Causes of action upon contract, or for damages arising out of, or pertaining or incident to the official administration of the fire departments created by acts of the legislature of this~~

~~state, shall be brought directly by and against the municipality by its corporate name wherein the damage was sustained. And the said boards of fire commissioners shall not be sued as such, except to compel or restrain the performance of acts proper to be compelled or restrained under and not within the discretion intended to be conferred by this act.~~

**Comment.** Former Section 390 is omitted. This section, enacted in 1885, had become obsolete and was superseded by general provisions governing lawsuits by and against local public entities. See, e.g., Gov't Code §§ 810-996.6 (claims and actions against public entities and public employees).

### *Probate Code*

#### **Prob. Code § 551 (technical amendment). Statute of limitations**

**SEC.** . Section 551 of the Probate Code is amended to read:

551. Notwithstanding Section ~~353~~ 366.2 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 revise a section reference. This revision is a technical, nonsubstantive change.

#### **Prob. Code § 573 (repealed). Survival of actions**

**SEC.** . Chapter 2 (commencing with Section 573) of Part 13 of Division 2 of the Probate Code is repealed.

**Comment.** Subdivision (a) of former Section 573 is restated without substantive change in Code of Civil Procedure Sections 377.210(a) (survival of cause of action), 377.310 (commencement of action decedent could have brought), and 377.410 (assertion of cause of action against decedent).

Subdivision (b) is restated and generalized in Code of Civil Procedure Section 377.430 (damages recoverable in action against decedent's personal representative).

Subdivision (c) is restated and generalized in Code of Civil Procedure Section 337.350 (damages recoverable in action by decedent's personal representative or successor in interest).

Subdivision (d) is restated in Code of Civil Procedure 377.210(b) survival of cause of action) without substantive change.

Subdivision (e) is restated in Code of Civil Procedure Section 377.230 (assignability of causes of action) without substantive change.

**Prob. Code § 6611 (technical amendment). Liability for unsecured debts of decedent**

**SEC. .** Section 6611 of the Probate Code is amended to read:

6611. (a) Subject to the limitations and conditions specified in this section, the person or persons in whom title vested pursuant to Section 6609 are personally liable for the unsecured debts of the decedent.

(b) The personal liability of a person under this section does not exceed the fair market value at the date of the decedent's death of the property title to which vested in that person pursuant to Section 6609, less the total of all of the following:

(1) The amount of any liens and encumbrances on that property.

(2) The value of any probate homestead interest set apart under Section 6520 out of that property.

(3) The value of any other property set aside under Section 6510 out of that property.

(c) In any action or proceeding based upon an unsecured debt of the decedent, the surviving spouse of the decedent, the child or children of the decedent, or the guardian of the minor child or children of the decedent, may assert any defense, cross-complaint, or setoff which would have been available to the decedent if the decedent had not died.

(d) If proceedings are commenced in this state for the administration of the estate of the decedent and the time for filing claims has commenced, any action upon the personal liability of a person under this section is barred to the same extent as provided for claims under Part 4 (commencing with Section 9000) of Division 7, except as to the following:

(1) Creditors who commence judicial proceedings for the enforcement of the debt and serve the person liable under this

section with the complaint therein prior to the expiration of the time for filing claims.

(2) Creditors who have or who secure an acknowledgment in writing of the person liable under this section that that person is liable for the debts.

(3) Creditors who file a timely claim in the proceedings for the administration of the estate of the decedent.

(e) Section ~~353~~ 366.2 of the Code of Civil Procedure applies in an action under this section.

**Comment.** Section 6611 is amended to revise a section reference. This revision is a technical, nonsubstantive change.

**Prob. Code § 7664 (technical amendment). Liability for decedent's unsecured debts**

**SEC.** . Section 7664 of the Probate Code is amended to read:

7664. A person to whom property is distributed under this article is personally liable for the unsecured debts of the decedent. Such a debt may be enforced against the person in the same manner as it could have been enforced against the decedent if the decedent had not died. In an action based on the debt, the person may assert any defenses available to the decedent if the decedent had not died. The aggregate personal liability of a person under this section shall not exceed the fair market value of the property distributed to the person, valued as of the date of the distribution, less the amount of any liens and encumbrances on the property on that date. Section ~~353~~ 366.2 of the Code of Civil Procedure applies in an action under this section.

**Comment.** Section 7664 is amended to revise a section reference. This revision is a technical, nonsubstantive change.

**Prob. Code § 9103 (technical amendment). Late claims**

**SEC.** . Section 9103 of the Probate Code 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 is satisfied:

(1) Neither the creditor nor the attorney representing the creditor in the matter had actual knowledge of the administration of the estate 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 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) 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. Nothing in this paragraph authorizes allowance or approval of a claim barred by, or extends the time provided in, Section 353 366.2 of the Code of Civil Procedure.

(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.



(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. Except to the extent provided in Section 9392 and subject to Section 9053, the personal representative, distributee, or payee is not liable on account of the prior distribution or payment.

**Comment.** Section 9103 is amended to revise a section reference. This revision is a technical, nonsubstantive change.

**Prob. Code § 9391 (technical amendment). Enforcement of security interest**

**SEC. .** Section 9391 of the Probate Code is amended to read:

9391. The holder of a mortgage or other lien on property in the decedent's estate, including, but not limited to, a judgment lien, may commence an action to enforce the lien against the property that is subject to the lien, without first filing a claim as provided in this part, if in the complaint the holder of the lien expressly waives all recourse against other property in the estate. Section 353 366.2 of the Code of Civil Procedure does not apply to an action under this section.

**Comment.** Section 9391 is amended to revise a section reference. This revision is a technical, nonsubstantive change.

**Prob. Code § 9392 (technical amendment). Liability of distributee**

**SEC. .** Section 9392 of the Probate Code is amended 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 has 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~~ 366.2 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 a pro rata portion of the claim of the creditor, based on the proportion that the value of the property distributed to the person out of the estate bears to the total value of all property distributed to all persons out of the estate. Personal liability under this section for all claims of all creditors shall not exceed the value of the property distributed to the person out of the estate. As used in this section, the value of property is 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.

(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 amended to revise a section reference. This revision is a technical, nonsubstantive change.

**Prob. Code § 13107.5 (added). Substitution of parties without probate**

13107.5. Where the money or property claimed in an affidavit or declaration executed under this chapter is the subject of a pending action or proceeding in which the decedent was a party, the successor of the decedent shall, without procuring letters of administration or awaiting probate

of the will, be substituted as a party in place of the decedent by making a motion under Section 377.320 of the Code of Civil Procedure and filing the affidavit or declaration required by Section 377.330 of the Code of Civil Procedure.

**Comment.** Section 13107.5 makes clear that the general procedure for substituting the decedent's successor in interest provided in the Code of Civil Procedure applies to disposition of small estates without probate under this part. For this purpose, a "successor of the decedent" as defined in Section 13006 is a "decedent's successor in interest" as defined in Code of Civil Procedure Section 377.120.

**Note.** Section 13107.5 replaces the version of Section 13107.5 set out in the Commission's *Recommendation Relating to Disposition of Small Estate Without Probate*, 20 Cal. L. Revision Comm'n Reports 2737(1990).

**Prob. Code § 13109 (technical amendment). Liability for decedent's unsecured debts**

**SEC. .** Section 13109 of the Probate Code is amended to read:

13109. A person to whom payment, delivery, or transfer of the decedent's property is made under this chapter is personally liable, to the extent provided in Section 13112, for the unsecured debts of the decedent. Any such debt may be enforced against the person in the same manner as it could have been enforced against the decedent if the decedent had not died. In any action based upon the debt, the person may assert any defenses, cross-complaints, or setoffs that would have been available to the decedent if the decedent had not died. Nothing in this section permits enforcement of a claim that is barred under Part 4 (commencing with Section 9000) of Division 7. Section ~~353~~ 366.2 of the Code of Civil Procedure applies in an action under this section.

**Comment.** Section 13109 is amended to revise a section reference. This revision is a technical, nonsubstantive change.

**Prob. Code § 13156 (technical amendment). Liability for decedent's unsecured debts**

**SEC. .** Section 13156 of the Probate Code is amended to read:

13156. (a) Subject to subdivisions (b), (c), and (d), the petitioner who receives the decedent's property pursuant to an order under this chapter is personally liable for the unsecured debts of the decedent.

(b) The personal liability of any petitioner shall not exceed the fair market value at the date of the decedent's death of the property received by that petitioner pursuant to an order under this chapter, less the amount of any liens and encumbrances on the property.

(c) In any action or proceeding based upon an unsecured debt of the decedent, the petitioner may assert any defense, cross-complaint, or setoff which would have been available to the decedent if the decedent had not died.

(d) Nothing in this section permits enforcement of a claim that is barred under Part 4 (commencing with Section 9000) of Division 7.

(e) Section ~~353~~ 366.2 of the Code of Civil Procedure applies in an action under this section.

**Comment.** Section 13156 is amended to revise a section reference. This revision is a technical, nonsubstantive change.

**Prob. Code § 13204 (technical amendment). Liability for decedent's unsecured debts**

**SEC. .** Section 13204 of the Probate Code is amended to read:

13204. Each person who is designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 is personally liable to the extent provided in Section 13207 for the unsecured debts of the decedent. Any such debt may be enforced against the person in the same manner as it could have been enforced against the decedent if the decedent had not died. In any action based upon the debt, the person may assert any defense, cross-complaint, or setoff that would have been available to the decedent if the decedent had not died. Nothing in this section permits enforcement of a claim that is barred under Part 4 (commencing with Section

9000) of Division 7. Section 353 366.2 of the Code of Civil Procedure applies in an action under this section.

**Comment.** Section 13204 is amended to revise a section reference. This revision is a technical, nonsubstantive change.

**Prob. Code § 13554 (technical amendment). Enforcement of liability**

**SEC. .** Section 13554 of the Probate Code is amended to read:

13554. (a) Except as otherwise provided in this chapter, any debt described in Section 13550 may be enforced against the surviving spouse in the same manner as it could have been enforced against the deceased spouse if the deceased spouse had not died.

(b) In any action or proceeding based upon the debt, the surviving spouse may assert any defense, cross-complaint, or setoff which would have been available to the deceased spouse if the deceased spouse had not died.

(c) Section 353 366.2 of the Code of Civil Procedure applies in an action under this section.

**Comment.** Section 13554 is amended to revise a section reference. This revision is a technical, nonsubstantive change.



STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

RECOMMENDATION

relating to

**Compensation in Guardianship and  
Conservatorship Proceedings**

September 1990

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 Compensation in Guardianship and Conservatorship Proceedings*, 20 Cal. L. Revision Comm'n Reports 2837 (1990).



STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

**CALIFORNIA LAW REVISION COMMISSION**

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September 13, 1990

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

This recommendation makes clear that the court has discretion under the guardianship-conservatorship law in fixing compensation of counsel, and of a guardian or conservator of the person, estate, or both, to include compensation for all services rendered in the proceeding, not merely those services rendered after the effective date of the order appointing counsel or appointing the guardian or conservator.

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

Respectfully submitted,

**Roger Arnebergh**  
*Chairperson*



## RECOMMENDATION

### Compensation of Counsel

Under existing law, the court in a guardianship or conservatorship proceeding may appoint counsel for a ward or conservatee.<sup>1</sup> On conclusion of the matter, the court fixes a reasonable sum for compensation and expenses of counsel, payable out of the estate of the ward or conservatee.<sup>2</sup> There is some question whether the attorney may be compensated for legal services provided before the order of appointment.<sup>3</sup>

The Commission recommends that it be made clear that the court in a guardianship or conservatorship proceeding may award compensation for legal services provided before, as well as after, the appointment order. Preliminary legal work may be necessary before the court's order of appointment is made. For example, the attorney may need to interview the ward or conservatee and investigate the facts before applying for appointment.<sup>4</sup> The ward or conservatee would be protected by the court's discretion not to make the appointment, or not to award compensation for services rendered before the appointment.

### Compensation of Guardian or Conservator

Similarly, there is some question whether a guardian or conservator may be compensated for services provided before the order of appointment. For a conservator of the estate,

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1. Prob. Code § 1470. See also Prob. Code §§ 1471, 1472.

2. Prob. Code § 1470. If the person for whom counsel is appointed is a minor, the court may order compensation to be paid by the parent or parents of the minor, or out of the minor's estate, or by any combination thereof. *Id.*

3. A recent case held the court in a conservatorship proceeding could not award attorneys' fees for services rendered before the appointment order. *Young, Wooldridge, Paulden, Self, Farr & Griffin v. Thomas*, 210 Cal. App. 3d 812, 258 Cal. Rptr. 574 (1989). The California Supreme Court has ordered that this opinion not be published in the official reports.

4. 11 Est. Plan. & Cal. Prob. Rep. 21 (Cal. Cont. Ed. Bar, Aug. 1989).

some courts allow a larger fee for services rendered during the first accounting period.<sup>5</sup>

The Commission recommends that it be made clear the court in a guardianship or conservatorship proceeding may award compensation for services provided by a guardian or conservator of the person, estate, or both, before the order of appointment.

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5. See W. Johnstone, G. Zillgitt, & S. House, *California Conservatorships* § 12.10, at 704 (Cal. Cont. Ed. Bar, 2d ed. 1983). For a conservator of the person, there is no minimum fee as there is in some counties for a conservator of the estate; compensation depends on the time the conservator is required to spend with the conservatee and on the nature of the services performed. *Id.* § 12.14, at 707.

## PROPOSED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following amendments.

**Prob. Code § 1470 (amended). Discretionary appointment of legal counsel**

1470. (a) The court may appoint private legal counsel for a ward, a proposed ward, a conservatee, or a proposed conservatee in any proceeding under this division if the court determines such person is not otherwise represented by legal counsel and that the appointment would be helpful to the resolution of the matter or is necessary to protect the person's interests.

(b) If a person is furnished legal counsel under this section, the court shall, upon conclusion of the matter, fix a reasonable sum for compensation and expenses of counsel. *Such sum may, in the discretion of the court, include compensation for services rendered, and expenses incurred, before the order of appointment.*

(c) The court shall order the sum fixed under subdivision (b) to be paid:

(1) If the person for whom legal counsel is appointed is an adult, from the estate of such person.

(2) If the person for whom legal counsel is appointed is a minor, by a parent or the parents of the minor or from the minor's estate, or any combination thereof, in such proportions as the court deems just.

(d) The court may make an order under subdivision (c) requiring payment by a parent or parents of the minor only after the parent or parents, as the case may be, have been given notice and the opportunity to be heard on whether the order would be just under the circumstances of the particular case.

(e) *If a guardian or conservator is not appointed for the person furnished legal counsel, the order for payment may be enforced in the same manner as a money judgment.*

**Comment.** Section 1470 is amended to add the second sentence to subdivision (b), and to add a new subdivision (e). The second sentence of subdivision (b) gives the court discretion to award compensation for legal services rendered before the date of appointment, and to award expenses incurred before the date of appointment. An attorney who provides legal services without an appointment order does so at the risk that the court will not later make the appointment or will not authorize compensation for services rendered before the date of appointment.

Subdivision (e) is drawn from paragraph (4) of subdivision (a) of Section 1472.

**Prob. Code § 1472 (amended). Compensation of mandatory court-appointed counsel**

1472. (a) If a person is furnished legal counsel under Section 1471:

(1) The court shall, upon conclusion of the matter, fix a reasonable sum for compensation and expenses of counsel and shall make a determination of the person's ability to pay all or a portion of such sum. *Such sum may, in the discretion of the court, include compensation for services rendered, and expenses incurred, before the order of appointment.*

(2) If the court determines that the person has the ability to pay all or a portion of such sum, the court shall order the conservator of the estate or, if none, the person to pay in such installments and in such manner as the court determines to be reasonable and compatible with the person's financial ability.

(3) In a proceeding under Chapter 3 (commencing with Section 3100) of Part 6 for court authorization of a proposed transaction involving community property, the court may order payment out of the proceeds of the transaction.

(4) If a conservator is not appointed for the person furnished legal counsel, the order for payment may be enforced in the same manner as a money judgment.

(b) If the court determines that a person furnished private counsel under Section 1471 lacks the ability to pay all or a portion of the sum determined under paragraph (1) of subdivision (a), the county shall pay such sum to the private

counsel to the extent the court determines the person is unable to pay.

(c) The payment ordered by the court under subdivision (a) shall be made to the county if the public defender has been appointed or if private counsel has been appointed to perform the duties of the public defender and the county has compensated such counsel. In the case of other court-appointed counsel, the payment shall be made to such counsel.

**Comment.** Paragraph (1) of subdivision (a) of Section 1472 is amended to add the second sentence. The second sentence gives the court discretion to award compensation for legal services rendered before the date of appointment, and to award expenses incurred before the date of appointment.

An attorney who provides legal services without an appointment order does so at the risk that the court will not later make the appointment or will not authorize compensation for services rendered before the date of appointment.

Although Section 1472 requires the court to fix compensation of counsel "upon conclusion of the matter," this does not prevent the court from making an award of compensation during the pendency of the guardianship or conservatorship proceeding. See W. Johnstone, G. Zillgitt, & S. House, *California Conservatorships* § 4.57, at 197-98 (Cal. Cont. Ed. Bar, 2d ed. 1983). The "matter" to which Section 1472 refers is the particular matter for which counsel was appointed. See Section 1471.

**Prob. Code § 2640 (amended). Petition by guardian or conservator of estate**

2640. (a) At any time after the filing of the inventory and appraisal, but not before the expiration of 90 days from the issuance of letters, the guardian or conservator of the estate may petition the court for an order fixing and allowing compensation to any one or more of the following:

(1) The guardian or conservator of the estate for services rendered in that capacity to that time.

(2) The guardian or conservator of the person for services rendered in that capacity to that time.

(3) The attorney for services rendered to that time by the attorney to the guardian or conservator of the person or estate or both.

(b) Notice of the hearing shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

(c) Upon the hearing, the court shall make an order allowing (1) such compensation requested in the petition as the court determines is just and reasonable to the guardian or conservator of the estate for services rendered in that capacity or to the guardian or conservator of the person for services rendered in that capacity, or to both, and (2) such compensation requested in the petition as the court determines is reasonable to the attorney for services rendered to the guardian or conservator of the person or estate or both. The compensation so allowed shall thereupon be charged to the estate. *The compensation allowed to the guardian or conservator of the person and the guardian or conservator of the estate may, in the discretion of the court, include compensation for services rendered before the order of appointment.* Legal services for which the attorney may ~~apply to the court for compensation~~ *be compensated* include those services rendered by any paralegal performing the legal services under the direction and supervision of an attorney. The petition or application for compensation shall set forth the hours spent and services performed by the paralegal.

**Comment.** Subdivision (c) of Section 2640 is amended to make clear the court has discretion to award compensation for services rendered before the date of appointment. Under Section 2623, the guardian or conservator may be allowed all reasonable disbursements made before appointment as guardian or conservator. See also Sections 1470 (compensation of counsel), 1472 (compensation of counsel), 2641 (compensation of guardian or conservator).

Subdivision (c) is also amended to delete the former reference to compensation for which the attorney may "apply to the court." Under Section 2640, the application to the court for the attorney's compensation is made by the guardian or conservator of the estate, not by the attorney.



**Prob. Code § 2641 (amended). Petition by guardian or conservator of person**

2641. (a) At any time permitted by Section 2640 and upon the notice therein prescribed, the guardian or conservator of the person may petition the court for an order fixing and allowing compensation for services rendered to that time in such capacity.

(b) Upon the hearing, the court shall make an order allowing such compensation as the court determines just and reasonable to the guardian or conservator of the person for services rendered. The compensation allowed shall thereupon be charged against the estate. *The compensation allowed to the guardian or conservator of the person may, in the discretion of the court, include compensation for services rendered before the order of appointment.*

**Comment.** Section 2641 is amended to make clear the court has discretion to award compensation for services rendered before the date of appointment. Under Section 2623, the guardian or conservator may be allowed all reasonable disbursements made before appointment as guardian or conservator. See also Sections 1470 (compensation of counsel), 1472 (compensation of counsel), 2640 (compensation of guardian or conservator).



STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

RECOMMENDATION

relating to

**Recognition of Trustees' Powers**

November 1990

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 Recognition of Trustees' Powers*, 20 Cal. L. Revision Comm'n Reports 2849 (1990).

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

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November 29, 1990

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

This recommendation provides for a trustee's affidavit directed to third persons stating that the trustee is qualified to act and is properly exercising powers under the trust. The recommended legislation is intended to improve the recognition of trustees' powers by protecting third persons who rely on the affidavit in good faith. The Commission is informed that some third persons are unwilling to rely on the automatic statutory powers or powers expressed in the trust, despite the Trust Law provisions relieving the third person from liability and any duty of inquiry. Accordingly, a third person who unreasonably refuses to rely on the affidavit would be liable for attorney's fees incurred in proceedings necessary to obtain court confirmation of the trustee's powers.

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

Respectfully submitted,

Roger Arnebergh  
*Chairperson*

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## RECOMMENDATION

Under the Trust Law, a trustee has three classes of powers without the need to obtain court authorization: powers conferred by the trust instrument and, except as limited in the trust instrument, powers provided by statute and powers needed to perform duties under the statutory standard of care.<sup>1</sup> The broad set of statutory powers that are automatically granted a trustee, except to the extent that the powers are limited in the trust instrument,<sup>2</sup> avoid the need to repeat the statutory powers in the trust instrument and are intended to give general guidance to third persons dealing with trustees without the need to examine lengthy trust instruments.

The Trust Law protects third persons who deal with the trustee in good faith, for value, and without actual knowledge that the trustee is exceeding the trustee's powers or exercising them improperly.<sup>3</sup> The Trust Law focuses on the trustee's duty to exercise powers consistently with fiduciary principles, rather than on the question of whether a power has been granted by the trust, as under former law.<sup>4</sup> The statute makes

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1. Prob. Code § 16200.

2. Prob. Code §§ 16200(b), 16220-16249.

3. Probate Code Section 18100 provides:

18100. With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, if the third person acts in good faith and for a valuable consideration and without actual knowledge that the trustee is exceeding the trustee's powers or improperly exercising them:

(a) The third person is not bound to inquire whether the trustee has power to act or is properly exercising a power and may assume without inquiry the existence of a trust power and its proper exercise.

(b) The third person is fully protected in dealing with or assisting the trustee just as if the trustee has and is properly exercising the power the trustee purports to exercise.

4. See former Civil Code § 2267; former Prob. Code § 1120.2. Under former law, the trustee had only the powers conferred by the trust instrument and a few statutory powers, unless additional powers were granted by the court. See *Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Reports 501, 543 (1986).

clear that the third person does not have a duty to inquire into the existence or manner of exercise of the power.<sup>5</sup>

These elements of the Trust Law seek to improve the efficiency of transactions between trustees and third persons and to avoid the expense and delay that result from the need to petition for court confirmation of the existence of a power. However, the Commission is informed that this purpose is being thwarted in some cases by overly cautious third persons who are unwilling to rely on the statutory protections. This problem may occur with regard to both the automatic statutory powers and the powers expressly provided in the trust instrument. In the case of a lengthy or complicated instrument, the third person may not want to take the time and incur the expense to be sure that the power claimed actually exists. Some third persons are probably unfamiliar with the automatic statutory powers, but others may simply be unwilling to rely on the existence of the automatic statutory power because it may be subject to a limitation in the trust instrument which they decline to review. No doubt there are situations where the existence of the power may not be sufficiently certain to the third person even after a careful and time-consuming review of the trust instrument. In this case, the third person may still be unwilling to act because of doubts about whether, having made an inquiry into the matter, the third person will be found by a court to have acted in good faith should the transaction be questioned by disgruntled beneficiaries.

In order to make the automatic powers scheme more effective and to avoid unnecessary judicial proceedings, as well as to protect the legitimate reliance interest of third persons, the Commission recommends that the Trust Law be

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5. Protecting persons acting in good faith in transactions with a trustee brings trust law into conformity with modern developments in the law applicable to negotiable instruments, securities, and bank accounts. See *Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Reports 501, 593 & n.374 (1986).



revised to provide for a trustee's affidavit that the trustee has the power sought to be exercised and is properly exercising it.<sup>6</sup> The affidavit could be given voluntarily by the trustee or on demand of the third person as a precondition to dealing with the trustee. The third person relying on the affidavit would be protected from liability and would not have any duty of inquiry so long as the third person did not have actual knowledge that the trustee did not have the power or was improperly exercising it.<sup>7</sup> A third person who refuses to rely on the trustee's affidavit would be liable for attorney's fees incurred in proceedings necessary to obtain court confirmation of the power, unless the court finds that the third person believed in good faith that the trustee did not have the power claimed or was attempting to exercise it improperly. The affidavit procedure would be supplementary to the existing protection provided by Probate Code Section 18100 and no implication of a lack of good faith would arise from the failure of a third person to demand an affidavit from a trustee.

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6. This type of affidavit is familiar under the durable power of attorney. Civil Code § 2404. More extensive and detailed enforcement of powers and protection of reliance is given under some recent power of attorney statutes in other states. See, e.g., Ill. Ann. Stat. ch. 110 § 802-8 (Smith-Hurd Supp. 1990); Minn. Stat. Ann. §§ 523.16-523.20 (West Supp. 1990); Mo. Ann. Stat. § 404.719 (Vernon 1990).

7. This actual knowledge standard differs from the general standard under Probate Code Section 18100 which also requires the third person to act in good faith and for a valuable consideration.

## PROPOSED LEGISLATION

### **Prob. Code § 18100.5 (added). Reliance on trustee's affidavit; liability for attorney's fees**

18100.5. (a) The trustee may execute an affidavit stating that the trustee is qualified and has power to act and is properly exercising the powers under the trust. The affidavit shall state the name or other designation of the trust sufficient to identify it and shall state that the trust is in effect. An affidavit under this subdivision may be executed by the trustee voluntarily or on the demand of a third person.

(b) With respect to a third person dealing with the trustee or assisting the trustee in the conduct of a transaction, if the third person relies on the trustee's affidavit without actual knowledge that the trustee is exceeding the trustee's powers or improperly exercising them:

(1) The third person is not bound to inquire whether the trustee has power to act or is properly exercising a power and may assume without inquiry the existence of a trust power and its proper exercise.

(2) The third person is fully protected in dealing with or assisting the trustee just as if the trustee has and is properly exercising the power the trustee purports to exercise.

(c) If the trustee furnishes an affidavit pursuant to subdivision (a), whether voluntarily or on demand, a third person dealing with the trustee who refuses to accept the exercise of a trustee's power covered by the affidavit is liable for attorney's fees incurred in an action or proceeding necessary to confirm the trustee's qualifications or powers, unless the court determines that the third person believed in good faith that the trustee was not qualified or was attempting to exceed or improperly exercise the trustee's powers.

(d) A third person's failure to demand an affidavit under subdivision (a) does not affect the protection provided the third person by Section 18100, and no inference as to whether

a third person has acted in good faith may be drawn from the failure to demand an affidavit from the trustee.

**Comment.** Section 18100.5 is new. This section supplements the protection of third persons provided by Section 18100. See subdivision (d).

Subdivision (a) provides for execution of an affidavit concerning the existence of the trustee's powers, either voluntarily or on the demand of a third person with whom the trustee seeks to do business. This provision is drawn in part from the affidavit provision applicable to powers of attorney. See Civil Code § 2404. The powers covered by the affidavit may be powers granted in the trust instrument, statutory powers, or necessary powers. See Sections 16200(a) (powers expressed in trust), 16200(b) (statutory powers except as limited), 16220-16249 (statutory powers), 16200(c) (powers needed to perform duty under standard of care). A declaration under penalty of perjury may be used instead of an affidavit. See Code Civ. Proc. § 2015.5; see also Code Civ. Proc. § 2015.6 (affirmation instead of oath). The affidavit under this section may only be given by a trustee. Hence, a third person must be satisfied that the person presenting the affidavit is the trustee and may require sufficient proof of that fact.

Subdivision (b) protects a third person who relies on the trustee's affidavit, so long as the third person does not have actual knowledge that the trustee is not qualified, does not have the powers claimed, or is improperly exercising the powers. The protection provided by subdivision (b) is the same as the general protection of third persons provided in Section 18100(b) where there is no affidavit. However, there is a crucial difference between these two immunity provisions. To be protected under Section 18100(b), the third person must act in good faith, for valuable consideration, and without actual knowledge of a defect in the trustee's authority. Under Section 18100.5(b), the third person relying on a trustee's affidavit is protected from liability as long as the third person does not have actual knowledge of a defect in the trustee's authority. Both sections provide explicitly that the third person has no duty of inquiry.

Unless the court determines that the third person refused in good faith to rely on the trustee's affidavit, subdivision (c) imposes liability on the third person for attorney's fees in a proceeding needed to confirm exercise of a power. This provision is intended to make trustees' powers more effective and avoid the need to seek judicial confirmation of the existence of a power. The liability under subdivision (c) applies only where the trustee gives an affidavit, whether voluntarily or on demand. If

the trustee has not executed an affidavit, a third person may refuse to recognize the trustee's power even though the third person would be fully protected under Section 18100.

Subdivision (d) makes clear that the failure to require the trustee to execute an affidavit does not affect the protection provided by Section 18100, and no inference as to whether a third person has acted in good faith should be drawn from the failure to request an affidavit from the trustee. Consequently, a third person who satisfies the requirements of Section 18100 is fully protected. The availability of the affidavit procedure in this section is not intended in any way to detract from the general protection provided in Section 18100.

STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

**RECOMMENDATION**

relating to

**Access to Decedent's Safe Deposit Box**

**November 1990**

**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 Access to Decedent's Safe Deposit Box*, 20 Cal. L. Revision Comm'n Reports 2859 (1990).

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

**CALIFORNIA LAW REVISION COMMISSION**

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ANN E. STODDEN

November 29, 1990

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

This recommendation proposes to make clear that, when a decedent dies having a safe deposit box in a financial institution, a survivor with a key to the box may gain access to remove the decedent's will, trust instrument, and instructions for the disposition of the decedent's remains, and to inventory the contents of the box. Most, but not all, financial institutions now permit this without explicit legislative authorization.

This recommendation renews a recommendation made to the 1990 session of the Legislature. The recommendation was part of a comprehensive probate bill, but was removed from the bill to deal with concerns expressed by the California Bankers Association. This recommendation imposes the duty to file the will with the court clerk on the person removing the will, rather than on the financial institution.

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

Respectfully submitted,

Roger Arnebergh  
*Chairperson*





## RECOMMENDATION

When a person dies, the person's will, trust, and instructions for disposition of the person's remains may be in a safe deposit box in a financial institution. Instructions for disposition of remains are needed immediately so the disposition may be done in accordance with the decedent's wishes. The will is needed before letters are issued so it may be determined who is entitled to appointment as executor. The trust instrument is needed because the trust may make a probate proceeding unnecessary, and it should not be necessary to have a probate proceeding for the sole purpose of appointing a personal representative to take custody of the trust instrument.

Most financial institutions permit the attorney and a member of the surviving family to get access to the decedent's safe deposit box to remove a will or instructions for disposition of remains, if the person seeking access has a key and produces a death certificate.<sup>1</sup> However, this practice is not invariably followed: Sometimes a financial institution will not permit access to a safe deposit box until after letters are issued.<sup>2</sup>

The Commission recommends legislation to permit a person who has a key to a decedent's safe deposit box to have immediate access to remove the decedent's will, trust instrument, and instructions for disposition of the decedent's remains, and to inventory the contents of the box.<sup>3</sup> The person seeking access should be required (1) to establish the fact of the decedent's death

1. See Gould, *First Steps in Handling a Decedent's Estate*, in 1 California Decedent Estate Practice § 2.25 (Cal. Cont. Ed. Bar, Feb. 1989). See also Kellogg, *Managing an Estate Planning Practice, Client Communication and Automatic Drafting* § 6.4, at 213 (Cal. Cont. Ed. Bar, 3d ed. 1982) (executor, surviving spouse, or close relative may ask bank to open safe deposit box to remove will); former Rev. & Tax. Code § 14344 (1945 Cal. Stat. ch. 1019, repealed by 1980 Cal. Stat. ch. 634) (removal from safe deposit box of anything other than a will or burial instructions prohibited without Controller's consent).

2. Letter from Kenneth M. Klug to John H. DeMouilly, Executive Secretary of California Law Revision Commission (March 15, 1989) (on file in office of California Law Revision Commission).

3. This is consistent with Probate Code Section 330, which authorizes a public administrator, government official, law enforcement agency, hospital or institution in

by providing the financial institution a certified copy of the decedent's death certificate, or a written statement of death from the coroner, treating physician, or hospital or institution where decedent died, and (2) to give the financial institution reasonable proof of the identity of the person seeking access. The financial institution should have no duty to inquire into the truth of any statement, declaration, certificate, affidavit, or document offered as proof of the decedent's death or of the identity of the person seeking access.

When the person seeking access has given the financial institution the necessary proof, the financial institution should be required to keep a record of the identity of the person, and to permit the person to open the safe deposit box under the supervision of an officer or employee of the financial institution. The financial institution should be required to make a photocopy of all wills and trust instruments removed from the box, and to keep the photocopy on file for a period of five years. The financial institution should be authorized to charge the person given access a reasonable fee for photocopying.

The person given access who removes a will must comply with existing law which requires the custodian of a will who learns of the testator's death to deliver the will to the clerk of the superior court of the county in which the estate of the decedent may be administered, and to mail a copy of the will to the person named in the will as executor if the person's whereabouts is known, and if not, to a person named in the will as a beneficiary.<sup>4</sup>

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which a decedent died, or a decedent's employer, to deliver the decedent's personal property to the decedent's surviving spouse, relative, conservator, or guardian, without the need for issuance of letters to a personal representative.

4. Prob. Code § 8200.

## PROPOSED LEGISLATION

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

**Heading to Part 10 (commencing with Section 330) (amended).**

### **PART 10. ~~DELIVERY OF IMMEDIATE STEPS~~ CONCERNING DECEDENT'S TANGIBLE PERSONAL PROPERTY AND SAFE DEPOSIT BOX**

**Prob. Code § 331 (added). Access to decedent's safe deposit box**

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

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

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

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

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

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

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

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

(3) Make a photocopy of all wills and trust instruments removed from the safe deposit box, and keep the photocopy on file for a period of five years. The financial institution may charge the person given access with a reasonable fee for photocopying.

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

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

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

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

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

Subdivision (e) requires the person given access to deliver the wills to the clerk of the superior court and mail or deliver a copy to the person named in the will as executor or beneficiary "as provided in Section 8200." Section 8200 requires the custodian to deliver the will to the clerk of the superior court in the county in which the estate of the decedent may be administered, and to mail a copy of the will to the person named in the will as executor, if the person's whereabouts is known to the custodian, or if not, to a person named in the will as a beneficiary, if the person's whereabouts is known to

the custodian. For the county in which the estate of the decedent may be administered, see Sections 7051 (for California domiciliary, county of domicile), 7052 (nondomiciliary). See also Sections 40 ("financial institution" defined), 52 ("letters" defined), 88 ("will" includes a codicil).



STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

**RECOMMENDATION**

relating to

**Gifts in View of Impending Death**

**November 1990**

**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 Gifts in View of Impending Death*, 20 Cal. L. Revision Comm'n Reports 2869 (1990).**



STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

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**CALIFORNIA LAW REVISION COMMISSION**

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ANN E. STODDEN

November 29, 1990

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

This recommendation proposes that the existing Civil Code provisions relating to gifts in view of death be recodified in the Probate Code with technical and clarifying revisions.

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

Respectfully submitted,

**Roger Arnebergh**  
*Chairperson*



## RECOMMENDATION

A gift in view of death is a gift of personal property made in contemplation, fear, or peril of death, and with intent that it shall take effect only if the giver dies.<sup>1</sup> The gift is revoked by the giver's recovery from the illness or escape from the peril that prompted the gift.<sup>2</sup>

### Moving Provisions into Probate Code

The provisions for gifts in view of death are in the Civil Code.<sup>3</sup> But a gift in view of death is a kind of nonprobate transfer, essentially testamentary in character.<sup>4</sup> It would be more logical to locate these provisions in the Probate Code, in the division relating to nonprobate transfers.<sup>5</sup> The Commission recommends that the provisions for gifts in view of death be moved from the Civil Code into the Probate Code.

### Death Must Be "Impending"

The present statute refers merely to a gift "in view of death." But by case law, the gift must be made under circumstances that impress the giver with an expectation of "impending" death.<sup>6</sup> The Commission recommends condensing the rule that the giver's expectation must be of "impending" death.<sup>7</sup> This will negate a possible construction

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1. Civil Code §§ 1146, 1149.

2. Civil Code § 1151. A gift in view of death may be revoked by the giver during his or her lifetime for any reason, and by a later will of the giver which expresses an intention to revoke the gift. *Id.* §§ 1151, 1152. A gift in view of death is revoked by the occurrence of any event which would operate as a revocation of a will made at the same time. *Id.* § 1151.

3. Civil Code §§ 1149-1153.

4. J. Cribbett & C. Johnson, *Principles of the Law of Property* 156 (3d ed. 1989).

5. Prob. Code §§ 5100-5407.

6. E.g., *Rosenberg v. Broy*, 190 Cal. App. 2d 591, 598, 12 Cal. Rptr. 103 (1961). See also 4 B. Witkin, *Summary of California Law Personal Property* § 108, at 100 (9th ed. 1987).

7. The Commission also recommends changing the terminology, so that a gift in view of death will be called a gift in view of impending death.

that a gift in view of death is any gift made in contemplation of death, whether imminent or remote, such as a gift to reduce estate taxes or to avoid probate.<sup>8</sup>

### **Revocation by Death of the Donee Before the Giver**

In the four U.S. jurisdictions that have considered the question, death of the donee before the death of the giver revokes the gift.<sup>9</sup> This question has not been addressed in California.<sup>10</sup> Death of the donee before the giver should revoke the gift, because as long as the giver is living the gift retains its conditional character. Also, if the donee dies before the giver, it is likely that the giver would prefer to benefit his or her heirs or devisees rather than relatives of the donee. The Commission recommends codifying the rule that death of the donee before the giver revokes the gift.

### **Revocation by Event Which Would Revoke Will**

Under existing law, a gift in view of death is revoked "by the occurrence of any event which would operate as a revocation of a will made at the same time."<sup>11</sup> Although this language dates from 1872, it has not been construed by the courts. Its meaning is not clear.<sup>12</sup>

The Commission recommends not continuing the provision that a gift in view of death is revoked by any event which

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8. Cf. *In re Estate of Pauson*, 186 Cal. 358, 199 P. 331 (1921) (construing inheritance tax law).

9. 38 Am. Jur. 2d *Gifts* § 90, at 889 (1968) (citing cases from New Hampshire, New York, North Carolina, and Virginia).

10. See 4 B. Witkin, *Summary of California Law Personal Property* §§ 108-109, at 100-01 (9th ed. 1987).

11. Civil Code § 1151.

12. It may refer, among other things, to the giver's marriage: Sections 1299 and 1300 of the 1872 Civil Code provided that, if the testator married after making a will, the will "is revoked." It seems far-fetched to imagine that a person may make a gift in view of death and then marry before the gift is revoked by the giver's escape from the peril. Moreover, existing law no longer uses language of revocation. The testator's marriage after the will is made gives the new spouse a statutory share of the estate. Prob. Code §§ 6560-6561. (The testator's divorce "revokes" a devise to the former spouse. *Id.* § 6122.)

would revoke the giver's will. The question of whether the giver intends to revoke the gift should be treated as a question of fact.<sup>13</sup>

### **Gift on Condition Precedent or Condition Subsequent**

Existing law defines a gift in view of death as one given "with intent that it shall take effect only in case of the death of the giver."<sup>14</sup> There is a problem with this language because it is stated in terms of a condition precedent: If the giver intends the gift to become absolute only upon the giver's death, with title passing at the instant of death, the gift is clearly testamentary.<sup>15</sup> In such a case, the courts hold the attempted gift to be ineffective, and the property must be restored to the decedent's estate.<sup>16</sup> If the condition is subsequent, with the donee's title vesting immediately on delivery, subject to revocation if the giver recovers from the illness or survives the peril, the gift is not testamentary and can be sustained.<sup>17</sup>

The Commission recommends defining a gift in view of death as one which the giver intends to take immediate effect, subject to revocation if the giver recovers from the illness or survives the peril.

### **Rights of Creditors of Giver**

Existing law provides that a "gift in view of death must be treated as a legacy, so far as relates only to the creditors of the giver."<sup>18</sup> This means that the property may be subjected to claims of creditors of a deceased giver if other assets of the estate are insufficient.<sup>19</sup> This rule is stated in more modern

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13. See, e.g., *Adams v. Atherton*, 132 Cal. 164, 64 P. 283 (1901).

14. Civil Code § 1149.

15. J. Cribbett & C. Johnson, *Principles of the Law of Property* 156 (3d ed. 1989).

16. See *Hart v. Ketchum*, 121 Cal. 426, 429, 53 P. 931 (1898); *Yates v. Dundas*, 80 Cal. App. 2d 468, 182 P.2d 305 (1947).

17. J. Cribbett & C. Johnson, *Principles of the Law of Property* 156 (3d ed. 1989); see *Yates v. Dundas*, 80 Cal. App. 2d 468, 473, 182 P.2d 305 (1947).

18. Civil Code § 1153.

19. *Adams v. Prather*, 176 Cal. 33, 41, 167 P. 534 (1917).

language in Section 9653 of the Probate Code. The Commission recommends replacing the archaic language of existing law with a cross-reference to the new Probate Code provision.

If the giver survives and the gift is revoked, existing law provides that the rights of a bona fide purchaser from the giver before the revocation are not affected by the revocation.<sup>20</sup> The Commission recommends extending this protection to a good faith encumbrancer as well.<sup>21</sup>

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20. Civil Code § 1151.

21. The Commission also recommends revising the reference to a “bona fide” purchaser or encumbrancer to refer instead to a purchaser or encumbrancer “acting in good faith and for a valuable consideration and without knowledge of the conditional nature of the gift.” This is consistent with usage in the Probate Code generally. See, e.g., Prob. Code §§ 1875, 3074, 13202, 18104; but see Prob. Code § 10591.

## PROPOSED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following amendments, additions, and repeals.

### **Civil Code § 1148 (technical amendment). Revocability**

1148. A gift, other than a gift in view of *impending* death, cannot be revoked by the giver.

**Comment.** Section 1148 is amended to refer to a gift in view of "impending" death, consistent with Probate Code Sections 5701-5705.

### **Civil Code § 1149 (repealed). Gift in view of death defined**

~~1149. A gift in view of death is one which is made in contemplation, fear, or peril of death, and with intent that it shall take effect only in case of the death of the giver.~~

**Comment.** Former Section 1149 is superseded by Section 5702 of the Probate Code.

### **Civil Code § 1150 (repealed). Presumption of gift in view of death**

~~1150. A gift made during the last illness of the giver, or under circumstances which would naturally impress him with an expectation of speedy death, is presumed to be a gift in view of death.~~

**Comment.** Former Section 1150 is continued in substance in Section 5703 of the Probate Code.

### **Civil Code § 1151 (repealed). Revocation of gift in view of death**

~~1151. A gift in view of death may be revoked by the giver at any time, and is revoked by his recovery from the illness, or escape from the peril, under the presence of which it was made, or by the occurrence of any event which would operate as a revocation of a will made at the same time, but when the gift has been delivered to the donee, the rights of a bona fide purchaser from the donee before the revocation, shall not be affected by the revocation.~~

**Comment.** Former Section 1151 is superseded by Section 5704 of the Probate Code.

**Civil Code § 1152 (repealed). Effect of previous will**

~~1152. A gift in view of death is not affected by a previous will; nor by a subsequent will, unless it expresses an intention to revoke the gift.~~

**Comment.** Former Section 1152 is continued in substance in Section 5704 of the Probate Code.

**Civil Code § 1153 (repealed). Rights of creditors of the giver**

~~1153. A gift in view of death must be treated as a legacy, so far as it relates only to the creditors of the giver.~~

**Comment.** Former Section 1153 is continued in substance in Section 5705 of the Probate Code.

**Prob. Code § 250 (amended). Effect of homicide**

250. (a) A person who feloniously and intentionally kills the decedent is not entitled to any of the following:

(1) Any property, interest, or benefit under the will of the decedent, including any general or special power of appointment conferred by the will on the killer and any nomination of the killer as executor, trustee, or guardian made by the will.

(2) Any property of the decedent by intestate succession.

(3) Any of the decedent's quasi-community property the killer would otherwise acquire under Section 101 or 102 upon the death of the decedent.

(4) *Any property of the decedent under Part 5 (commencing with Section 5700) of Division 5.*

(4) (5) Any property of the decedent under Part 3 (commencing with Section 6500) of Division 6.

(b) In the cases covered by subdivision (a):

(1) The estate of the decedent passes as if the killer had predeceased the decedent and Section 6147 does not apply.

(2) Property appointed by the will of the decedent to, or for the benefit of, the killer passes as if the killer had predeceased the decedent, and Section 1389.4 of the Civil Code does not apply.



(3) Provisions of the will of the decedent nominating the killer as executor, trustee, or guardian shall be interpreted as if the killer had predeceased the decedent.

**Comment.** Section 250 is amended to add a reference in subdivision (a) to the provisions relating to gifts in view of impending death (Prob. Code §§ 5700-5705). This is consistent with Section 253.

**Prob. Code §§ 5700-5705 (added).** Gifts in view of impending death

## **PART 5. GIFTS IN VIEW OF IMPENDING DEATH**

### **§ 5700. Gift defined**

5700. As used in this part, “gift” means a transfer of personal property made voluntarily and without consideration.

**Comment.** Section 5700 continues the effect of prior law, when the provisions relating to gifts in view of impending death were located in the Civil Code. As defined in Section 5700, “gift” has the same meaning as defined in Section 1146 of the Civil Code.

### **§ 5701. Application of general law of gifts**

5701. Except as provided in this part, a gift in view of impending death is subject to the general law relating to gifts of personal property.

**Comment.** Section 5701 codifies case law. See 4 B. Witkin, *Summary of California Law Personal Property* § 109, at 100-01 (9th ed. 1987). See also Civil Code §§ 1146-1148 (gifts of personal property).

The same essentials of intent, delivery, and acceptance apply to a gift in view of impending death as to gifts of personal property generally. 4 B. Witkin, *supra*. Thus, for example, a verbal gift is not valid unless the means of obtaining possession and control of the property are given, or, if the property is capable of delivery, unless there is actual, constructive, or symbolic delivery of the property to the donee. See Civil Code § 1147.

### **§ 5702. Gift in view of impending death defined**

5702. (a) A gift in view of impending death is one which is made in contemplation, fear, or peril of impending death, whether from illness or other cause, and with intent that it shall be revoked if the giver recovers from the illness or escapes from the peril.

(b) A reference in a statute to a gift in view of death means a gift in view of impending death.

**Comment.** Subdivision (a) of Section 5702 continues the substance of former Section 1149 of the Civil Code, with two exceptions:

(1) Section 5702 is phrased in terms of condition subsequent rather than condition precedent. If the giver intends the gift to become absolute only upon the giver's death, with title passing at the instant of death (condition precedent), the gift is testamentary. J. Cribbett & C. Johnson, *Principles of the Law of Property* 156 (3d ed. 1989). In such cases, the courts hold the attempted gift in view of death to be ineffective, and the property must be restored to the decedent's estate. See *Yates v. Dundas*, 80 Cal. App. 2d 468, 182 P.2d 305 (1947). If the condition is subsequent, with the donee's title vesting immediately on delivery, subject to revocation if the giver survives the peril, the gift is not testamentary and can be sustained. J. Cribbett & C. Johnson, *supra*; see *Yates v. Dundas*, *supra*.

(2) Section 5702 changes the terminology to refer to a gift in view of "impending" death, and to define such a gift as one made in contemplation, fear, or peril of "impending" death. This codifies case law. See, e.g., *Rosenberg v. Broy*, 190 Cal. App. 2d 591, 598, 12 Cal. Rptr. 103 (1961); 4 B. Witkin, *Summary of California Law Personal Property* § 108, at 100 (9th ed. 1987). This negates a possible construction that such a gift is any gift made in contemplation of death, whether imminent or remote, such as a gift to reduce estate taxes or to avoid probate. *Cf. In re Estate of Pauson*, 186 Cal. 358, 199 P. 331 (1921) (construing inheritance tax law).

Subdivision (b) is new.

A gift in view of impending death of community or quasi-community property is subject to the rights of the giver's spouse. See Civil Code § 5125; Prob. Code §§ 100-102.

To make an effective gift in view of impending death, the giver must have legal capacity. *LaMar v. Bank of America Nat'l Trust & Sav. Ass'n*, 218 Cal. 252, 22 P.2d 689 (1933); see *Larsen v. Van Dieken*, 34 Cal. App. 2d 352, 93 P.2d 563 (1939).

A gift in view of impending death is not nullified because the giver dies by suicide. *Berl v. Rosenberg*, 169 Cal. App. 2d 125, 130, 336 P.2d 975 (1959).

### § 5703. Presumption of gift in view of impending death

5703. A gift made during the last illness of the giver, or under circumstances which would naturally impress the giver with an expectation of speedy death, is presumed to be a gift in view of impending death.

**Comment.** Section 5703 continues the substance of former Section 1150 of the Civil Code.

**§ 5704. Revocation of gift in view of impending death**

5704. (a) A gift in view of impending death is revoked by:

(1) The giver's recovery from the illness, or escape from the peril, under the presence of which it was made.

(2) The death of the donee before the death of the giver.

(b) A gift in view of impending death may be revoked by:

(1) The giver at any time.

(2) The giver's will if the will expresses an intention to revoke the gift.

(c) A gift in view of impending death is not affected by a previous will of the giver.

(d) Notwithstanding subdivisions (a) and (b), when the gift has been delivered to the donee, the rights of a purchaser or encumbrancer, acting before the revocation in good faith, for a valuable consideration, and without knowledge of the conditional nature of the gift, are not affected by the revocation.

**Comment.** Section 5704 continues the substance of former Sections 1151 and 1152 of the Civil Code, with three exceptions:

(1) The provision in former Section 1151 of the Civil Code that a gift in view of death is revoked by the occurrence of an event which would operate as a revocation of a will made at the same time is not continued.

(2) Paragraph (2) of subdivision (a) (revocation by death of donee) is new and codifies the case law rule of other U.S. jurisdictions. See 38 *Am. Jur. 2d Gifts* § 90, at 889 (1968).

(3) The protection in subdivision (d) for an encumbrancer is new. The language "in good faith, for a valuable consideration, and without knowledge of the conditional nature of the gift" replaces the former reference to one who is "bona fide"; this change is nonsubstantive.

**§ 5705. Rights of creditors of the giver**

5705. A gift in view of impending death is subject to Section 9653.

**Comment.** Section 5705 continues the substance of former Section 1153 of the Civil Code.

**Prob. Code § 9653 (technical amendment). Duty to recover property transferred in fraud of creditors**

9653. (a) On application of a creditor of the decedent or the estate, the personal representative shall commence and prosecute an action for the recovery of real or personal property of the decedent for the benefit of creditors if the personal representative has insufficient assets to pay creditors and the decedent during lifetime did either of the following:

(1) Made a conveyance of the property, or any right or interest in the property, that is fraudulent as to creditors under the Uniform Fraudulent Transfer Act (Chapter 1 (commencing with Section 3439) of Title 2 of Part 2 of Division 4 of the Civil Code).

(2) Made a gift of the property in view of *impending* death.

(b) A creditor making application under this section shall pay such part of the costs and expenses of the suit and attorney's fees, or give an undertaking to the personal representative for that purpose, as the personal representative and the creditor agree, or, absent an agreement, as the court or judge orders.

(c) The property recovered under this section shall be sold for the payment of debts in the same manner as if the decedent had died seised or possessed of the property. The proceeds of the sale shall be applied first to payment of the costs and expenses of suit, including attorney's fees, and then to payment of the debts of the decedent in the same manner as other property in possession of the personal representative. After all the debts of the decedent have been paid, the remainder of the proceeds shall be paid to the person from whom the property was recovered. The property may be sold in its entirety or in such portion as necessary to pay the debts.

**Comment.** Paragraph (2) of subdivision (a) of Section 9653 is amended to refer to a gift in view of "impending" death, consistent with Sections 5701-5705.

STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

**RECOMMENDATION**

relating to

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

**November 1990**

**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 TOD Beneficiary Designation for Vehicles and Certain Other State-Registered Property*, 20 Cal. L. Revision Comm'n Reports 2883 (1990).

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

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**SANFORD M. SKAGGS**

**ANN E. STODDEN**

November 29, 1990

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

This recommendation proposes that the owner of certain state-registered property (motor vehicle, undocumented vessel, manufactured home, mobilehome, commercial coach, truck camper, or floating home) be permitted to designate in the certificate of title the person who will receive the property on death of the owner.

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

Respectfully submitted,

**Roger Arnebergh**  
*Chairperson*





## RECOMMENDATION

Under existing California law, a person may designate a beneficiary to receive various kinds of property or benefits on the person's death. The beneficiary designation may be made in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature.<sup>1</sup> These "nonprobate transfers" permit the owner, by designating a transfer-on-death (TOD) beneficiary, to avoid the expense and delay of a court-supervised probate proceeding.

California law also permits transfer at death, without probate, of certain state-registered property (motor vehicle, undocumented vessel, manufactured home, mobilehome, commercial coach, truck camper, or floating home) if the decedent leaves no other property requiring probate.<sup>2</sup>

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1. Prob. Code § 5000. See also Educ. Code §§ 23702, 23807 (teachers' death benefits); Gov't Code §§ 21332-21335 (public employees' death benefits); Prob. Code §§ 5140, 5302 (account in a financial institution); 31 C.F.R. § 315.79(c) (U.S. savings bond in beneficiary form).

2. Health & Safety Code § 18102 (manufactured home, mobilehome, commercial coach, truck camper, floating home); Veh. Code §§ 5910 (vehicle), 9916 (undocumented vessel). Although the procedure for transferring these kinds of property after the death of the owner is simple and expeditious, it is of limited application because it may only be used if the owner has no other property requiring probate. Probate will usually be unnecessary if the estate value is \$60,000 or less. See Prob. Code §§ 13050, 13100. For these estates, the decedent's successors may use an affidavit procedure to collect personal property and a summary court proceeding to get title to real property. See Prob. Code §§ 13050, 13100-13157. The following property is excluded in determining whether the estate value is \$60,000 or less: Property held by the decedent as a joint tenant, property in which the decedent had a life or other interest terminable upon the decedent's death, property which passed to the decedent's surviving spouse by will or intestate succession, a multiple-party account in a financial institution to which the decedent was a party at death, the state-registered property described above, amounts due to the decedent for services in the armed forces of the United States, and compensation not exceeding \$5,000 owing to the decedent for employment. Prob. Code § 13050.

However, California does not permit the registered owner of a motor vehicle or other state-registered property to register the property in TOD beneficiary form — that is, a form that designates on the certificate of title the person who is to receive the property on death of the owner.

The primary advantage of registering property in TOD form is the avoidance of the time and expense of probate. A typical probate proceeding may last a year or more. Expenses can range from two to five percent of the value of the property passing through probate.<sup>3</sup> When property is placed in TOD form, there is no need for the property to pass through probate, and there is usually no need for an attorney to transfer title to the property.

Under existing law, some owners now avoid probate by putting title to their motor vehicle or other state-registered property in co-ownership with the intended beneficiary. However, TOD registration has the advantage of permitting the owner to revoke or change the beneficiary during lifetime. The owner thus maintains total control over the property. Creating a co-ownership, on the other hand, requires the owner to give up some control over the property during his or her lifetime.<sup>4</sup> Co-ownership also has the disadvantage of

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3. For an estate of one million dollars or less, the statutory fee of the probate attorney for ordinary services ranges from four percent on the first \$15,000 of estate value to two percent on the last \$900,000. The personal representative is entitled by statute to a fee in the same amount, also based on the value of the estate. The court may allow an additional fee to the attorney or personal representative for "extraordinary services." See Prob. Code §§ 10800-10805 (personal representative), 10810 (attorney). An additional charge (not less than \$75) is made by the probate referee for services in appraising the estate. See Prob. Code §§ 8961, 8963. These fees and charges are in addition to the fees charged for filing the probate proceeding with the court. See Gov't Code § 26827.

4. Under existing California law, the owner of a motor vehicle or undocumented vessel may create a co-ownership with the intended beneficiary either by using the conjunctive "and" form or by using the alternative "or" form. Veh. Code §§ 4150.5, 5600.5 (motor vehicle), 9852.5 (undocumented vessel). If the "and" form is used, either co-owner can dispose of the property during lifetime only with the consent and signature of the other co-owner. *Id.* If the "or" form is used, either co-owner may dispose of the property without the consent or signature of the other co-owner. *Id.* If the intended death beneficiary takes advantage of this provision and disposes of the property while the transferor is still living, the transferor's purpose in creating the co-ownership will be frustrated.

exposing the intended death beneficiary to potential owner's liability for damages arising from negligent operation of the property by someone else.<sup>5</sup>

TOD registration of state-registered property should be authorized in California to permit the owner to designate a person to receive the property at death without giving up control of the property during lifetime and without exposing the intended death beneficiary to potential owner's liability during the transferor's lifetime. This would not be a novel concept in California, because California already recognizes TOD designations in other contexts.<sup>6</sup> At least one other state — Missouri — authorizes TOD designations for motor vehicles.<sup>7</sup> Based on the Missouri experience, we may expect the TOD form for motor vehicle registration to be popular in California.<sup>8</sup>

The agencies responsible for administering this system in California will be the Department of Motor Vehicles<sup>9</sup> and the

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In the case of a manufactured home, mobilehome, commercial coach, truck camper, or floating home, the transferor must use the "and" form to pass title to the intended beneficiary at death. See Health & Safety Code § 18080. By so doing, the transferor gives up the right unilaterally to transfer the property, because the signature of the other co-owner is required. *Id.*

5. See Harb. & Nav. Code § 661; Veh. Code § 17150.

6. See *supra* note 1 and accompanying text.

7. Missouri enacted legislation in 1987 to permit the owner of a motor vehicle to designate in the title document a person to receive the property on the owner's death. Mo. Ann. Stat. § 301.681 (Vernon Supp. 1990). A sample of the Missouri TOD application form and title document is set out in the appendix to this recommendation. Missouri has had no serious legal or practical problems with its TOD registration system. Telephone interview with Leo E. Eickhoff, Jr., Vice Chairman of the Probate and Trust Committee of the Missouri Bar.

8. Missouri has processed about 39,000 applications for TOD designations in motor vehicle registrations in the three years since Missouri enacted legislation to authorize it. Letter from James B. Callis, Administrator of Missouri Motor Vehicle Bureau, to California Law Revision Commission (Oct. 26, 1990) (on file in office of California Law Revision Commission). According to the U.S. Census Bureau, as of July 1, 1989, California had a population of 29,063,000, and Missouri had a population of 5,159,000, a ratio of 5.65 Californians for every Missourian. Based on this ratio, we may estimate that there will be about 220,000 TOD registrations of motor vehicles in California in the first three years after enactment of authorizing legislation.

9. The Department of Motor Vehicles is responsible for registration and titling of motor vehicles and undocumented vessels. See Veh. Code §§ 4000-9982.

Department of Housing and Community Development.<sup>10</sup> Enactment of the recommended legislation would require both agencies to reprogram their data processing systems to accommodate the new TOD form of title.

The Missouri statute permits a motor vehicle owner to designate only one TOD beneficiary.<sup>11</sup> This was done to minimize reprogramming costs. The Administrator of the Missouri Motor Vehicle Bureau has advised the Commission that the implementation costs in Missouri were minimal.<sup>12</sup> Implementation costs in California should be minimized by the provision of the recommended legislation that limits the TOD designation to one beneficiary, following the Missouri example.<sup>13</sup>

The Commission recommends enactment of legislation to authorize the owner of a motor vehicle, undocumented vessel, manufactured home, mobilehome, commercial coach, truck camper, or floating home to make a TOD designation in the title document. The responsible department should be authorized to prescribe a reasonable fee for registering ownership in TOD form, not to exceed the department's estimate of the additional cost to the department of providing this form of title.

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10. The Department of Housing and Community Development is responsible for registration and titling of manufactured homes, mobilehomes, commercial coaches, truck campers, and floating homes. See Health & Safety Code §§ 18000-18153.

11. See Mo. Ann. Stat. § 301.681 (Vernon Supp. 1990).

12. Letter from James B. Callis, Administrator of Missouri Motor Vehicle Bureau, to California Law Revision Commission (Oct. 26, 1990) (on file in office of California Law Revision Commission). No cost was involved to revise the title certificate to include TOD registration because the Missouri Motor Vehicle Bureau was already working on a new form when the legislation was enacted. Telephone interview with Leo E. Eickhoff, Jr., Vice Chairman of the Probate and Trust Committee of the Missouri Bar. Also, there were no significant costs of reprogramming in Missouri. The TOD form generally takes the place of some form of co-ownership, so two names are already needed. The only addition needed in the data processing system are the letters "TOD." *Id.*

13. The California Department of Housing and Community Development has advised that limiting the TOD beneficiary to one person will avoid the substantial cost of expanding the owner name section to accommodate multiple beneficiaries. Letter from Maureen Higgins, Director of California Department of Housing and Community Development, to Robert Murphy (July 27, 1990) (on file in office of California Law Revision Commission).

## PROPOSED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following additions and amendments:

**Health & Safety Code § 18080.2 (added). Ownership of manufactured home, mobilehome, commercial coach, truck camper, or floating home in beneficiary form**

18080.2. (a) Ownership registration and title to a manufactured home, mobilehome, commercial coach, truck camper, or floating home subject to registration may be held in beneficiary form that includes a direction to transfer ownership of the manufactured home, mobilehome, commercial coach, truck camper, or floating home to a designated beneficiary on death of the sole owner or last surviving coowner. Ownership registration and title issued in beneficiary form shall include, after the name of the owner or names of the coowners, the words "transfer on death to" or the abbreviation "TOD" followed by the name of the beneficiary or beneficiaries.

(b) During the lifetime of a sole owner or of any coowner, the signature or consent of a beneficiary is not required for any transaction relating to the manufactured home, mobilehome, commercial coach, truck camper, or floating home for which ownership registration and title in beneficiary form has been issued.

(c) The department may prescribe a reasonable fee for registering ownership of a manufactured home, mobilehome, commercial coach, truck camper, or floating home in beneficiary form, not to exceed the department's estimate of the additional cost of providing this form of title.

**Comment.** Section 18080.2 is new. Subdivisions (a) and (b) are drawn from Missouri law. See Mo. Ann. Stat. § 301.681 (Vernon Supp. 1990). Subdivision (c) is drawn from Sections 18080.7(a) and 18085(a). The language of Section 18080.2 is conformed to the usage in this article. See, e.g., Health & Safety Code § 18080.

See also Health & Safety Code § 18102.2; Veh. Code §§ 4150.7, 5910.5, 9852.7, 9916.5.

**Health & Safety Code § 18102.2 (added). Transfer of manufactured home, mobilehome, commercial coach, truck camper, or floating home owned in beneficiary form**

**18102.2. (a) On death of a sole owner or the last surviving coowner of a manufactured home, mobilehome, commercial coach, truck camper, or floating home owned in beneficiary form, the manufactured home, mobilehome, commercial coach, truck camper, or floating home belongs to the surviving beneficiary, if any. If there is no surviving beneficiary, the manufactured home, mobilehome, commercial coach, truck camper, or floating home belongs to the estate of the deceased owner or of the last coowner to die.**

**(b) A surviving beneficiary who becomes owner of a manufactured home, mobilehome, commercial coach, truck camper, or floating home under subdivision (a) is not liable for imputed negligence as owner until record ownership of the manufactured home, mobilehome, commercial coach, truck camper, or floating home is transferred to the beneficiary.**

**(c) Ownership registration and title issued in beneficiary form may be revoked or the beneficiary changed at any time before the death of a sole owner or of the last surviving coowner by either of the following methods:**

**(1) By sale of the manufactured home, mobilehome, commercial coach, truck camper, or floating home, with proper assignment and delivery of the certificate of title to another person.**

**(2) By application for a change in the registered owner without designation of a beneficiary or with the designation of a different beneficiary.**

**(d) Except as provided in subdivision (c), designation of a beneficiary in ownership registration and title issued in beneficiary form may not be changed or revoked by will, by any other instrument, by a change of circumstances, or otherwise.**

(e) The beneficiary's interest in the manufactured home, mobilehome, commercial coach, truck camper, or floating home at death of the owner or last surviving coowner is subject to any contract of sale, assignment, or security interest to which the owner or coowners were subject during their lifetimes.

(f) The surviving beneficiary may secure a transfer of ownership for the manufactured home, mobilehome, commercial coach, truck camper, or floating home upon presenting to the department all of the following:

(1) The appropriate certificate of title and registration card, if available.

(2) A certificate under penalty of perjury stating the date and place of the decedent's death and that the declarant is entitled to the manufactured home, mobilehome, commercial coach, truck camper, or floating home as the designated beneficiary.

(3) If required by the department, a certificate of the death of the decedent.

(g) After the death of the owner or last surviving coowner, the surviving beneficiary may transfer his or her interest in the manufactured home, mobilehome, commercial coach, truck camper, or floating home to another person without securing transfer of ownership into his or her own name by appropriately signing the certificate of title for the manufactured home, mobilehome, commercial coach, truck camper, or floating home and delivering the document to the transferee for forwarding to the department with appropriate fees.

(h) A transfer at death pursuant to this section is effective by reason of this section, and shall not be deemed to be a testamentary disposition of property. The right of the designated beneficiary to the manufactured home, mobilehome, commercial coach, truck camper, or floating home 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.

(i) A transfer at death pursuant to this section is subject to Section 9653 of the Probate Code.

(j) If there is no surviving beneficiary or coowner, the person or persons described in Section 18102 may secure transfer of the manufactured home, mobilehome, commercial coach, truck camper, or floating home as provided in that section.

(k) The department may prescribe forms for use pursuant to this section.

**Comment.** Section 18102.2 is new. Subdivisions (a) and (c) through (e) are drawn from Missouri law. See Mo. Ann. Stat. § 301.681 (Vernon Supp. 1990). Subdivision (f) is drawn from Health and Safety Code Section 18102(b) and Vehicle Code Sections 5910(b) and 9916(b). Subdivision (g) is drawn from Health and Safety Code Section 18100.5(a)(4). Subdivision (h) is drawn from Probate Code Section 5304. Subdivision (i) is comparable to Probate Code Section 5705 (gift in view of impending death), and Vehicle Code Sections 5910.5(i) and 9916.5(i). Subdivision (k) is drawn from Vehicle Code Section 5910(c). See also Health & Safety Code § 18080.2; Veh. Code §§ 4150.7, 5910.5, 9852.7, 9916.5.

**Health & Safety Code § 18102.3 (added). Transfer as discharge of department**

18102.3. (a) If the department makes a transfer pursuant to Section 18102.2, the department is discharged from all liability, whether or not the transfer is consistent with the beneficial ownership of the manufactured home, mobilehome, commercial coach, truck camper, or floating home transferred.

(b) The protection provided by subdivision (a) does not extend to a transfer made after the department has been served with a court order restraining the transfer. No other notice or information shown to have been available to the department shall affect its right to the protection afforded by subdivision (a).



(c) The protection provided by this section has no bearing on the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of the manufactured home, mobilehome, commercial coach, truck camper, or floating home.

(d) The protection provided by this section is in addition to, and not exclusive of, any other protection provided to the department by any other provision of law.

**Comment.** Section 18102.3 is drawn from Probate Code Section 5405 (Multiple-Party Accounts Law).

**Veh. Code § 4150.7 (added). Ownership of vehicle in beneficiary form**

4150.7. (a) Ownership of title to a vehicle subject to registration may be held in beneficiary form that includes a direction to transfer ownership of the vehicle to a designated beneficiary on death of the sole owner or last surviving coowner. A certificate of ownership issued in beneficiary form shall include, after the name of the owner or names of the coowners, the words “transfer on death to” or the abbreviation “TOD” followed by the name of the beneficiary.

(b) During the lifetime of a sole owner or of any coowner, the signature or consent of a beneficiary is not required for any transaction relating to the vehicle for which a certificate of ownership in beneficiary form has been issued.

(c) The department may prescribe a reasonable fee for registering ownership of a vehicle in beneficiary form, not to exceed the department’s estimate of the additional cost of providing this form of title.

**Comment.** Section 4150.7 is new. Subdivisions (a) and (b) are drawn from Missouri law. See Mo. Ann. Stat. § 301.681 (Vernon Supp. 1990). Subdivision (c) is drawn from Health and Safety Code Section 18080.7(a). See also Health & Safety Code §§ 18080.2, 18102.2; Veh. Code §§ 5910.5, 9852.7, 9916.5.

**Veh. Code § 5910.5 (added). Transfer of vehicle owned in beneficiary form**

5910.5. (a) On death of a sole owner or the last surviving coowner of a vehicle owned in beneficiary form, the vehicle belongs to the surviving beneficiary, if any. If there is no surviving beneficiary, the vehicle belongs to the estate of the deceased owner or of the last coowner to die.

(b) A surviving beneficiary who becomes owner of a vehicle under subdivision (a) is not liable under Section 17150 until record ownership of the vehicle is transferred to the beneficiary.

(c) A certificate of ownership in beneficiary form may be revoked or the beneficiary changed at any time before the death of a sole owner or of the last surviving coowner by either of the following methods:

(1) By sale of the vehicle with proper assignment and delivery of the certificate of ownership to another person.

(2) By application for a new certificate of ownership without designation of a beneficiary or with the designation of a different beneficiary.

(d) Except as provided in subdivision (c), designation of a beneficiary in a certificate of ownership issued in beneficiary form may not be changed or revoked by will, by any other instrument, by a change of circumstances, or otherwise.

(e) The beneficiary's interest in the vehicle at death of the owner or last surviving coowner is subject to any contract of sale, assignment, or security interest to which the owner or coowners were subject during their lifetimes.

(f) The surviving beneficiary may secure a transfer of ownership for the vehicle upon presenting to the department all of the following:

(1) The appropriate certificate of ownership and registration card, if available.

(2) A certificate under penalty of perjury stating the date and place of the decedent's death and that the declarant is entitled to the vehicle as the designated beneficiary.

(3) If required by the department, a certificate of the death of the decedent.

(g) After the death of the owner or last surviving coowner, the surviving beneficiary may transfer his or her interest in the vehicle to another person without securing transfer of ownership into his or her own name by appropriately signing the certificate of ownership for the vehicle and delivering the document to the transferee for forwarding to the department with appropriate fees.

(h) A transfer at death pursuant to this section is effective by reason of this section, and shall not be deemed to be a testamentary disposition of property. The right of the designated beneficiary to the vehicle 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.

(i) A transfer at death pursuant to this section is subject to Section 9653 of the Probate Code.

(j) If there is no surviving beneficiary or coowner, the person or persons described in Section 5910 may secure transfer of the vehicle as provided in that section.

(k) The department may prescribe forms for use pursuant to this section.

**Comment.** Section 5910.5 is new. Subdivisions (a) and (c) through (e) are drawn from Missouri law. See Mo. Ann. Stat. § 301.681 (Vernon Supp. 1990). Subdivision (b) codifies case law. See *Bunch v. Kin*, 2 Cal. App. 2d 81, 85, 37 P.2d 744 (1934). Subdivision (f) is drawn from Health and Safety Code Section 18102(b) and Vehicle Code Sections 5910(b) and 9916(b). Subdivision (h) is drawn from Probate Code Section 5304. Subdivision (i) is comparable to Health and Safety Code Section 18102.2(i), Probate Code Section 5705 (gift in view of impending death), and Vehicle Code Section 9916.5(i). Subdivision (k) is drawn from Vehicle Code Section 5910(c). See also Health & Safety Code §§ 18080.2, 18102.2; Veh. Code §§ 4150.7, 9852.7, 9916.5.

**Veh. Code § 5910.7 (added). Transfer as discharge of department**

5910.7. (a) If the department makes a transfer pursuant to Section 5910.5, the department is discharged from all liability, whether or not the transfer is consistent with the beneficial ownership of the vehicle transferred.

(b) The protection provided by subdivision (a) does not extend to a transfer made after the department has been served with a court order restraining the transfer. No other notice or information shown to have been available to the department shall affect its right to the protection afforded by subdivision (a).

(c) The protection provided by this section has no bearing on the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of the vehicle.

(d) The protection provided by this section is in addition to, and not exclusive of, any other protection provided to the department by any other provision of law.

**Comment.** Section 5910.7 is drawn from Probate Code Section 5405 (Multiple-Party Accounts Law). See also Health & Safety Code § 18102.3; Veh. Code 9916.7.

**Veh. Code § 9852.7 (added). Ownership of vessel in beneficiary form**

9852.7. (a) Ownership of an undocumented vessel subject to registration may be held in beneficiary form that includes a direction to transfer ownership of the vessel to a designated beneficiary on death of the sole owner or last surviving coowner. A certificate of ownership issued in beneficiary form shall include, after the name of the owner or names of the coowners, the words “transfer on death to” or the abbreviation “TOD” followed by the name of the beneficiary.

(b) During the lifetime of a sole owner or of any coowner, the signature or consent of a beneficiary is not required for any transaction relating to the vessel for which a certificate of ownership in beneficiary form has been issued.

(c) The department may prescribe a reasonable fee for registering ownership of a vessel in beneficiary form, not to exceed the department's estimate of the additional cost of providing this form of title.

**Comment.** Section 9852.7 is new. Subdivisions (a) and (b) are drawn from Missouri law. See Mo. Ann. Stat. § 301.681 (Vernon Supp. 1990). Subdivision (c) is drawn from Health and Safety Code Section 18080.7(a). See also Health & Safety Code §§ 18080.2, 18102.2; Veh. Code §§ 4150.7, 5910.5, 9916.5.

**Veh. Code § 9916.5 (added). Transfer of vessel owned in beneficiary form**

9916.5. (a) On death of a sole owner or the last surviving coowner of a vessel numbered under this division and owned in beneficiary form, the vessel belongs to the surviving beneficiary, if any. If there is no surviving beneficiary, the vessel belongs to the estate of the deceased owner or of the last coowner to die.

(b) A surviving beneficiary who becomes owner of a vessel under subdivision (a) is not liable under Section 661 of the Harbors and Navigation Code until record ownership of the vessel is transferred to the beneficiary.

(c) A certificate of ownership in beneficiary form may be revoked or the beneficiary changed at any time before the death of a sole owner or of the last surviving coowner by either of the following methods:

(1) By sale of the vessel with proper assignment and delivery of the certificate of ownership to another person.

(2) By application for a new certificate of ownership without designation of a beneficiary or with the designation of a different beneficiary.

(d) Except as provided in subdivision (c), designation of a beneficiary in a certificate of ownership issued in beneficiary form may not be changed or revoked by will, by any other instrument, by a change of circumstances, or otherwise.

(e) The beneficiary's interest in the vessel at death of the owner or last surviving coowner is subject to any contract of

sale, assignment, or security interest to which the owner or coowners were subject during their lifetimes.

(f) The surviving beneficiary may secure a transfer of ownership for the vessel upon presenting to the department all of the following:

(1) The appropriate certificate of ownership and certificate of number, if available.

(2) A certificate under penalty of perjury stating the date and place of the decedent's death and that the declarant is entitled to the vessel as the designated beneficiary.

(3) If required by the department, a certificate of the death of the decedent.

(g) After the death of the owner or last surviving coowner, the surviving beneficiary may transfer his or her interest in the vessel to another person without securing transfer of ownership into his or her own name by appropriately signing the certificate of ownership for the vessel and delivering the document to the transferee for forwarding to the department with appropriate fees.

(h) A transfer at death pursuant to this section is effective by reason of this section, and shall not be deemed to be a testamentary disposition of property. The right of the designated beneficiary to the vessel 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.

(i) A transfer at death pursuant to this section is subject to Section 9653 of the Probate Code.

(j) If there is no surviving beneficiary or coowner, the person or persons described in Section 9916 may secure transfer of the vessel as provided in that section.

(k) The department may prescribe forms for use pursuant to this section.

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

**Veh. Code § 9916.7 (added). Transfer as discharge of department**

9916.7. (a) If the department makes a transfer pursuant to Section 9916.5, the department is discharged from all liability, whether or not the transfer is consistent with the beneficial ownership of the vessel transferred.

(b) The protection provided by subdivision (a) does not extend to a transfer made after the department has been served with a court order restraining the transfer. No other notice or information shown to have been available to the department shall affect its right to the protection afforded by subdivision (a).

(c) The protection provided by this section has no bearing on the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of the vessel.

(d) The protection provided by this section is in addition to, and not exclusive of, any other protection provided to the department by any other provision of law.

**Comment.** Section 9916.7 is drawn from Probate Code Section 5405 (Multiple-Party Accounts Law). See also Health & Safety Code § 18102.3; Veh. Code 5910.7.

## CONFORMING REVISION

### **Prob. Code § 9653 (amended). Duty to recover certain property transferred by the decedent**

9653. (a) On application of a creditor of the decedent or the estate, the personal representative shall commence and prosecute an action for the recovery of real or personal property of the decedent for the benefit of creditors if the personal representative has insufficient assets to pay creditors and the decedent during lifetime did ~~either~~ *any* of the following *with respect to the property*:

(1) Made a conveyance of the property, or any right or interest in the property, that is fraudulent as to creditors under the Uniform Fraudulent Transfer Act (Chapter 1 (commencing with Section 3439) of Title 2 of Part 2 of Division 4 of the Civil Code).

(2) Made a gift of the property in view of death.

(3) *Made a direction to transfer a vehicle, undocumented vessel, manufactured home, mobilehome, commercial coach, truck camper, or floating home to a designated beneficiary on the decedent's death pursuant to Section 18102.2 of the Health and Safety Code, or Section 5910.5 or 9916.5 of the Vehicle Code, and the property has been transferred as directed.*

(b) A creditor making application under this section shall pay such part of the costs and expenses of the suit and attorney's fees, or give an undertaking to the personal representative for that purpose, as the personal representative and the creditor agree, or, absent an agreement, as the court or judge orders.

(c) The property recovered under this section shall be sold for the payment of debts in the same manner as if the decedent had died seised or possessed of the property. The proceeds of the sale shall be applied first to payment of the costs and expenses of suit, including attorney's fees, and then to payment of the debts of the decedent in the same manner as



other property in possession of the personal representative. After all the debts of the decedent have been paid, the remainder of the proceeds shall be paid to the person from whom the property was recovered. The property may be sold in its entirety or in such portion as necessary to pay the debts.

**Comment.** Section 9653 is amended to add paragraph (3) to subdivision (a).



INSTRUCTIONS TO SELLER Complete the mileage book as of the date of sale or transfer. Sign as seller before a Notary Public AFTER THE PURCHASER(S), LIENHOLDER, SALE PRICE AND MILEAGE spaces are completed. All owners must sign as SELLERS. INSTRUCTIONS TO PURCHASER You must apply for a new Certificate of Title within 30 days from the date of purchase or pay a delinquent penalty. All items on the front of the Certificate of Title must be released before you apply for a new Certificate of Title. WARNINGS: ALTERATIONS, ERASURES, OR MISTREATMENT OF LAMINATION WILL VOID THIS CERTIFICATE OF TITLE. ASSIGNMENT OF TITLE: Use hereby assign and warrant Certificate of Title of the vehicle described on the front of the Certificate of Title subject to the following lien(s) or encumbrance(s), if any, and none other. (Use further certify the accuracy of the sale price and message as specified below.)

PURCHASER(S) NAME MARIE ZIECHER TOD SALE PRICE \$ NONE  
ADDRESS ROSALIE EICKHOFF, 12403 BALLAS MEADOWS, STAGNIS  
LIENHOLDER(S) NAME MO 63131 DATE OF LIEN NONE

ADDRESS \_\_\_\_\_

"I certify to the best of my knowledge that the odometer reading is and reflects the actual mileage of the vehicle unless one of the following statements is checked":  
 1. The mileage is in excess of 99 999 miles.  
 2. The odometer reading is not actual mileage. (Attach explanatory affidavit)

SIGNATURE OF SELLER(S) [Signature] My Commission Expires 15th day of Oct 1997

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_ 1997  
NOTARY PUBLIC \_\_\_\_\_ My Commission Expires \_\_\_\_\_

REASSIGNMENT BY REGISTERED DEALER I/we hereby assign and warrant Certificate of Title of the vehicle described on the front of this Certificate of Title subject to the following lien(s) or encumbrance(s), if any, and none other. (Use further certify the accuracy of the sale price and message as specified below.)

PURCHASER(S) NAME \_\_\_\_\_ SALE PRICE \$ \_\_\_\_\_

ADDRESS \_\_\_\_\_

LIENHOLDER(S) NAME \_\_\_\_\_ DATE OF LIEN \_\_\_\_\_

ADDRESS \_\_\_\_\_

"I certify to the best of my knowledge that the odometer reading is and reflects the actual mileage of the vehicle unless one of the following statements is checked":  
 1. The mileage is in excess of 99 999 miles.  
 2. The odometer reading is not actual mileage. (Attach explanatory affidavit)

SIGNATURE OF DEALER OR AGENT \_\_\_\_\_ DEALER'S NUMBER \_\_\_\_\_

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_

NOTARY PUBLIC \_\_\_\_\_ My Commission Expires \_\_\_\_\_

REASSIGNMENT BY REGISTERED DEALER I/we hereby assign and warrant Certificate of Title of the vehicle described on the front of this Certificate of Title subject to the following lien(s) or encumbrance(s), if any, and none other. (Use further certify the accuracy of the sale price and message as specified below.)

PURCHASER(S) NAME \_\_\_\_\_ SALE PRICE \$ \_\_\_\_\_

ADDRESS \_\_\_\_\_

LIENHOLDER(S) NAME \_\_\_\_\_ DATE OF LIEN \_\_\_\_\_

ADDRESS \_\_\_\_\_

"I certify to the best of my knowledge that the odometer reading is and reflects the actual mileage of the vehicle unless one of the following statements is checked":  
 1. The mileage is in excess of 99 999 miles.  
 2. The odometer reading is not actual mileage. (Attach explanatory affidavit)

SIGNATURE OF DEALER OR AGENT \_\_\_\_\_ DEALER'S NUMBER \_\_\_\_\_

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_

NOTARY PUBLIC \_\_\_\_\_ My Commission Expires \_\_\_\_\_

REASSIGNMENT BY REGISTERED DEALER I/we hereby assign and warrant Certificate of Title of the vehicle described on the front of this Certificate of Title subject to the following lien(s) or encumbrance(s), if any, and none other. (Use further certify the accuracy of the sale price and message as specified below.)

PURCHASER(S) NAME \_\_\_\_\_ SALE PRICE \$ \_\_\_\_\_

ADDRESS \_\_\_\_\_

LIENHOLDER(S) NAME \_\_\_\_\_ DATE OF LIEN \_\_\_\_\_

ADDRESS \_\_\_\_\_

"I certify to the best of my knowledge that the odometer reading is and reflects the actual mileage of the vehicle unless one of the following statements is checked":  
 1. The mileage is in excess of 99 999 miles.  
 2. The odometer reading is not actual mileage. (Attach explanatory affidavit)

SIGNATURE OF DEALER OR AGENT \_\_\_\_\_ DEALER'S NUMBER \_\_\_\_\_

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_

NOTARY PUBLIC \_\_\_\_\_ My Commission Expires \_\_\_\_\_



MISSOURI DEPARTMENT OF REVENUE  
APPLICATION FOR MISSOURI TITLE AND LICENSE

<b>TYPE ONLY</b>	
<input type="checkbox"/> CASH	
IF JUNK, COMPLETE SHADED PORTIONS ONLY	

<b>TITLE TYPE</b>	ORIGINAL <input checked="" type="checkbox"/> REPOSSESSED <input type="checkbox"/>	DUPLICATE <input type="checkbox"/> MECHANICAL LIEN <input type="checkbox"/>	NON-NEGOTI <input type="checkbox"/> SALVAGE <input type="checkbox"/>	CORRECTED <input type="checkbox"/> DUP SALVAGE <input type="checkbox"/>	JUNK <input type="checkbox"/> DUP JUNK <input type="checkbox"/>	<input type="checkbox"/> TENANTS IN COMMON <input checked="" type="checkbox"/> TRANSFER ON DEATH (FOD)	BRAND CODE	
OWNER'S NAME - LAST FIRST MIDDLE							R E C P O N L Y	
STREET ADDRESS N.E. OR P.O. BOX NUMBER						COUNTY	CLASS PROBATE NO	
CITY					STATE	ZIP CODE	UNIT NO	
YEAR	MAKE	VEHICLE IDENTIFICATION NUMBER			BODY STYLE	FUEL		
CYL	HP	REG N D U F	USE	PREVIOUS TITLE NUMBER	STATE	RELEASE	CODE BT T N TO	
KIND OF VEHICLE	ZONE	CA. WT. OR SEAT CAP	EXCH. P	TAB NUMBER	EXP. MO.	EXP. YR.	PRICE	
<input type="checkbox"/> FIRST LIEN/DATE				<input type="checkbox"/> MAIL TO		PURCHASE DATE	TRADE IN	
NAME							NET PRICE	
STREET ADDRESS N.E. OR P.O. BOX							\$	
CITY					STATE	ZIP	LICENSE FEE	
<input type="checkbox"/> MCHD/D/DATE							\$	
STREET ADDRESS N.E. OR P.O. BOX							ADDITIONAL. HP	
CITY					STATE	ZIP	\$	
<input type="checkbox"/> TRADE IN	YEAR	MAKE	VEHICLE IDENTIFICATION NUMBER			TRANSFER FEE	\$	
<input type="checkbox"/> ANZ OR	TITLE NUMBER		STATE	LICENSE NUMBER	EXP. YR.	EXP. MO.	FAILURE TO TRANS. PENALTY	
<input type="checkbox"/> LICENSE TRANS.							\$	
I CERTIFY THAT THE FACTS HEREIN ARE TRUE TO THE BEST OF MY KNOWLEDGE							PENALTY	
SIGNATURE OF OWNER X							\$	
MO. DEALER NUMBER		DEALER NAME					TITLE PENALTY	\$
CITY					STATE	ZIP CODE	TITLE FEE	
I CERTIFY THAT THE FACTS HEREIN ARE TRUE TO THE BEST OF MY KNOWLEDGE							\$	
SIGNATURE OF DEALER OR REPRESENTATIVE							STATE TAX	
CITY/COUNTY					SITE CODE	LOCK. TAX	\$	
REMARKS							EXPEDITIOUS TITLE FEE	
IF THIS MOTOR VEHICLE IS REGISTERED BY THE TAX APPLICATION FOR TITLE IS MADE THE SIGNATURE ABOVE SHALL CERTIFY THAT I HAVE AND WILL MAINTAIN DURING THE PERIOD OF REGISTRATION, FINANCIAL RESPONSIBILITY WITH RESPECT TO EACH MOTOR VEHICLE I OWN, LICENSE OR OPERATE ON THE STREETS OR HIGHWAYS. A FALSE STATEMENT IN THIS APPLICATION IS A VIOLATION OF THE LAW AND MAY BE PUNISHED BY FINE OR IMPRISONMENT OR BOTH (281.420 RSMO).							TOTAL	
LICENSE PLATE NUMBER		F0634181			FINANCED BY		DISTRIBUTION AMOUNT	
REGISTRATION ONLY							\$	

## COMMENTS TO OTHER PROVISIONS OF 1991 GENERAL PROBATE BILL

*Note.* This report contains Comments to revisions included in the 1991 general probate bill that are not included in any of the other recommendations in this publication.

### **Fin. Code § 2051 (amended). Rights of trust parties on sale of trust business**

**Comment.** Subdivision (b) is added to Section 2051 to clarify the rules concerning removal and replacement of trustees following the transfer of a trust business from one trustee to another. Subdivision (b) replaces the provision formerly appearing in the last clause of this section and incorporates the general rules governing removal and replacement of trustees provided in the Trust Law. See, e.g., Prob. Code §§ 15640, 15642, 15660, 17200(b)(10).

### **Prob. Code § 3909 (technical amendment). Uniform Transfers to Minors Act**

**Comment.** Subdivision (a)(2) of Section 3909 is amended to make a technical revision to fill a gap in the statute. The amendment covers the situation where a security held in the name of a broker, financial institution, or its nominee is to be transferred to a broker or financial institution for credit to an account in the name of the transferor, an adult other than the transferor, or a trust company, as custodian for a designated minor.

### **Prob. Code § 7240 (amended). Appealable orders and refusals to make orders**

**Comment.** Subdivision (l) of Section 7240 is amended to allow an appeal from an order directing or allowing payment of a personal representative's compensation, or from the refusal to make such an order.

### **Prob. Code § 8570 (technical amendment). "Nonresident personal representative" defined**

**Comment.** Section 8570 is amended to change "the state" to "this state" in three places. This change is nonsubstantive.

### **Prob. Code § 8575 (technical amendment). Proof of service**

**Comment.** Subdivision (b) of Section 8575 is amended to change "the state" to "this state." This change is nonsubstantive.

**Prob. Code § 13101 (amended). Furnishing affidavit or declaration**

**Comment.** Paragraph (9) of subdivision (a) of Section 13101 is amended to change “a right” to “a superior right.” This conforms Section 13101 to Section 13200(a)(9) (affidavit procedure for real property of small value), and is nonsubstantive.

## COMMENTS TO 1991 PROBATE URGENCY CLEAN-UP BILL

*Note.* The Commission is recommending technical clean-up amendments, additions, and repeals in the new Probate Code, to become operative at the same time as the new Probate Code — July 1, 1991. The Comments to the amendments, additions, and repeals are set out below. In addition, several sections of the repealed Probate Code (repealed by 1990 Cal. Stat. ch. 79) that were revived by amendment after enactment of 1990 Cal. Stat. ch. 79, and thus “chaptered out” the repealing effect of Chapter 79, are again repealed as explained in Comments below.

### **Prob. Code § 20 (technical amendment). Application of definitions**

**Comment.** Section 20 is amended to delete “(a).” There is no other subdivision in the section.

### **Prob. Code § 900 (repealed). Application of repealed sections and new sections**

**Comment.** Former Section 900 is repealed as unnecessary in view of Section 10850 (application of provisions of this part).

### **Repealed Prob. Code § 1513.1 (repealed). Assessment for expense of county investigation and review**

**Comment.** Section 1513.1 of the repealed Probate Code, as amended by 1990 Cal. Stat. ch. 1208, is repealed. The former section is continued, as amended, in Section 1513.1 of the new Probate Code.

### **Prob. Code § 1513.1 (amended). Assessment for expense of county investigation and review**

**Comment.** Section 1513.1 is amended to delete subdivision (a) and language in subdivision (b) relating to determination by the Controller of the statewide average cost per investigation or review by the court investigator, probation officer, or domestic relations officer incurred by each county. This requirement was deleted from Section 1513.1 of the repealed Probate Code by 1990 Cal. Stat. ch. 1208. This amendment preserves the effect of that legislation.

### **Repealed Prob. Code § 1517 (repealed). Application of part**

**Comment.** Section 1517 of the repealed Probate Code, as added by 1990 Cal. Stat. ch. 1530, is repealed. The former section is continued in Section 1517 of the new Probate Code.

### **Prob. Code § 1517 (added). Application of part**

**Comment.** Section 1517 continues former Section 1517 which was added to the repealed Probate Code by 1990 Cal. Stat. ch. 1530.

**Repealed Prob. Code § 1821 (repealed). Contents of petition**

**Comment.** Section 1821 of the repealed Probate Code, as amended by 1990 Cal. Stat. ch. 1208, is repealed. The former section is continued, as amended, in Section 1821 of the new Probate Code.

**Prob. Code § 1821 (amended). Contents of petition**

**Comment.** Section 1821 is amended to conform it to amendments made to Section 1821 of the repealed Probate Code by 1990 Cal. Stat. ch. 1208. Subdivision (i), which is deleted from Section 1821, is continued in substance in Section 1831.

**Repealed Prob. Code § 1822 (repealed). Notice of hearing**

**Comment.** Section 1822 of the repealed Probate Code, as amended by 1990 Cal. Stat. ch. 1598, is repealed. The former section is continued, as amended, in Section 1822 of the new Probate Code.

**Prob. Code § 1822 (amended). Notice of hearing**

**Comment.** Section 1822 is amended to preserve the substance of amendments made to Section 1822 of the repealed Probate Code by 1990 Cal. Stat. ch. 1598. The language in former subdivision (f), redesignated as new subdivision (e), requiring notice to the regional center if “the petition is for the appointment of a limited conservator” is revised to require the notice if “the proposed conservatee is a person with developmental disabilities.” This revision is necessary because, under Section 1827.5 as revised, the regional center must make an assessment of a person with developmental disabilities if the proceeding is for limited conservatorship, and may do so if the proceeding is for general conservatorship.

**Repealed Prob. Code § 1827.5 (repealed). Assessment of proposed limited conservatee at regional center**

**Comment.** Section 1827.5 of the repealed Probate Code, as amended by 1990 Cal. Stat. ch. 1598, is repealed. The former section is continued, as amended, in Section 1827.5 of the new Probate Code.

**Prob. Code § 1827.5 (amended). Assessment of proposed limited conservatee at regional center**

**Comment.** Section 1827.5 is amended to conform to amendments made to Section 1827.5 of the repealed Probate Code by 1990 Cal. Stat. ch. 1598.

**Repealed Prob. Code § 1831 (repealed). General plan**

**Comment.** Section 1831 of the repealed Probate Code, as added by 1990 Cal. Stat. ch. 1208, is repealed. The former section is continued in Section 1831 of the new Probate Code.



**Prob. Code § 1831 (added). General plan**

**Comment.** Section 1831 is added to preserve Section 1831 of the repealed Probate Code which was added by 1990 Cal. Stat. ch. 1208. Section 1831 continued the substance of subdivision (i) of Section 1821, so the addition of Section 1831 was nonsubstantive.

**Repealed Prob. Code § 1851 (repealed). Visitation and findings by court investigator**

**Comment.** Section 1851 of the repealed Probate Code, as amended by 1990 Cal. Stat. ch. 1208, is repealed. The former section is continued, as amended, in Section 1851 of the new Probate Code.

**Prob. Code § 1851 (amended). Visitation and findings by court investigator**

**Comment.** Section 1851 is amended to add subdivisions (d) and (e). These subdivisions were added to Section 1851 of the repealed Probate Code by 1990 Cal. Stat. ch. 1208. This amendment preserves the effect of that legislation.

**Repealed Prob. Code § 1851.5 (repealed). Assessment of estate for investigation expense**

**Comment.** Section 1851.5 of the repealed Probate Code, as amended by 1990 Cal. Stat. ch. 1208, is repealed. The former section is continued, as amended, in Section 1851.5 of the new Probate Code.

**Prob. Code § 1851.5 (amended). Assessment of estate for investigation expense**

**Comment.** Section 1851.5 is amended to delete subdivision (a) and language in subdivision (b) relating to determination by the Controller of the statewide average cost per investigation or review by a court investigator. This requirement was deleted from Section 1851.5 of the repealed Probate Code by 1990 Cal. Stat. ch. 1208. This amendment preserves the effect of that legislation.

**Repealed Prob. Code § 1875 (repealed). Good faith purchaser or encumbrancer of real property**

**Comment.** Section 1875 of the repealed Probate Code, as amended by 1990 Cal. Stat. ch. 1208, is repealed. The former section is continued, as amended, in Section 1875 of the new Probate Code.

**Prob. Code § 1875 (amended). Good faith purchaser or encumbrancer of real property**

**Comment.** Section 1875 is amended to add a reference to temporary conservatorship. This reference was added to Section 1875 of the repealed

Probate Code by 1990 Cal. Stat. ch. 1208. This amendment preserves the effect of that legislation.

**Prob. Code § 6247 (amended). Will includes only texts of clauses as they exist when will executed**

**Comment.** Section 6247 is amended to add references in subdivision (b) to Sections 6243, 6245, and 6246. These references were included in 1990 Cal. Stat. ch. 79, but were superseded by a later enactment, 1990 Cal. Stat. ch. 710. This amendment preserves the effect of both enactments.

**Prob. Code § 7622 (amended). Manner of administration; compensation of public administrator**

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

**Prob. Code § 7662 (technical amendment). Priority for payments from estate**

**Comment.** Section 7662 is amended to correct a typographical error.

**Prob. Code § 8907 (amended). Fee for appraisal by personal representative**

**Comment.** Section 8907 is amended to add a reference to compensation of the attorney for the personal representative. This restores the substance of a portion of former Section 8907 of the repealed Probate Code.

**Prob. Code § 9050 (technical amendment). Notice required**

**Comment.** Section 9050 is amended to add the introductory clause to subdivision (a). This restores language in Section 9050 as enacted by 1990 Cal. Stat. ch. 79 which was superseded by a later enactment, 1990 Cal. Stat. ch. 140.

**Prob. Code § 10589 (amended). Court supervision and notice of hearing required if personal representative has notice of objection**

**Comment.** Section 10589 is amended to delete language that was included to conform to the agreed fee system for probate attorney fees. The new Probate Code retains the statutory fee system. The deleted language is inconsistent with the statutory fee system.

**Prob. Code § 10800 (amended). Compensation for ordinary services**

**Comment.** Section 10800 is amended to add the word "value" which was inadvertently omitted from subdivision (b).

**Prob. Code § 10801 (amended). Additional compensation for extraordinary services**

**Comment.** Section 10801 is amended to add subdivision (b). Subdivision (b) continues the substance of the last paragraph of former Section 902 of the repealed Probate Code.

**Prob. Code § 10810 (repealed). Compensation of estate attorney**

**Comment.** Section 10810 is continued in substance in new Sections 10810-10814. Former Section 10810 provided that attorneys for personal representatives shall be allowed as compensation for ordinary services the same amounts as are allowed as compensation to personal representatives, and such further amount as the court deems just and reasonable for extraordinary services. New Sections 10810-10814 parallel the comparable provisions of new law applicable to personal representatives. See Sections 10800-10805.

**Prob. Code §§ 10810-10814 (added). Compensation of estate attorney**

**Comment to Article 2.** Sections 10810-10814 continue the effect of the first sentence of former Section 10810 which provided that attorneys for personal representatives shall be allowed as compensation for ordinary services the same amounts as are allowed as compensation to personal representatives, and such further amount as the court deems just and reasonable for extraordinary services.

**Prob. Code § 10810 (added). Compensation for ordinary services**

**Comment.** Section 10810 is new. It continues the effect of the first portion of the first sentence of former Section 910 of the repealed Probate Code, which provided that attorneys for personal representatives shall be allowed as compensation for ordinary services the same amounts as are allowed as compensation to personal representatives.

**Prob. Code § 10811 (added). Additional compensation for extraordinary services**

**Comment.** Section 10811 is new. It continues the substance of the last portion of the first sentence of former Section 910 of the repealed Probate Code.

**Prob. Code § 10812 (added). Compensation provided by decedent's will**

**Comment.** Section 10812 supersedes the portions of former Section 900 and 901 of the repealed Probate Code that permitted the estate attorney to renounce the compensation provided by the will and to receive the statutory compensation. Those portions applied to personal representatives, and were

made applicable to estate attorneys by the first sentence of former Section 910 of the repealed Probate Code. Instead, Section 10812, like Section 10802 (personal representative), imposes a requirement that court approval be obtained before the estate attorney may be relieved from the provisions of the will governing compensation.

**Prob. Code § 10813 (added). Agreement for higher compensation void**

**Comment.** Section 10813 continues the effect of former Section 903 of the repealed Probate Code which applied to personal representatives, and was made applicable to estate attorneys by the first sentence of former Section 910 of the repealed Probate Code. Section 10812 is comparable to Section 10803 (personal representatives).

**Prob. Code § 10814 (added). Apportionment of compensation**

**Comment.** Section 10814 continues the effect of the second sentence of former Section 901 of the repealed Probate Code which applied to personal representatives, and was made applicable to estate attorneys by the first sentence of former Section 910 of the repealed Probate Code. Section 10812 is comparable to Section 10805 (personal representatives).

## TABLE OF SOURCES

**Note.** The recommendations in this publication would be effectuated by enactment of several bills in the 1991 session of the Legislature. The following table gives the source of background material relating to a particular section in the recommendations and reports in this publication. In the column of page numbers, the first number is the beginning page where a section and its Comment appears. (In some cases, only the Comment is set out in the report included in this pamphlet; for the text of the section, refer to the bill.) The page numbers in parenthesis indicate the inclusive pages of the recommendation in which relevant material appears.

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