STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATIONS

relating to

Probate and Estate Planning

Non-Probate Transfers
Revision of the Powers of
Appointment Statute

December 1980

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

THE CALIFORNIA LAW REVISION COMMISSION

NOTE

The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 15 of the Commission's *Reports, Recommendations, and Studies* which is scheduled to be published late in 1981.

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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 Non-Probate Transfers,* 15 CAL. L. REVISION COMM'N REPORTS 1605 (1980).

STATE OF CALIFORNIA EDMUND G. BROWN JR., *Governor*

CALIFORNIA LAW REVISION COMMISSION

4000 Middlefield Road, Room D-2
Palo Alto, CA 94306
(415) 494-1335

December 18, 1980

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

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

The Commission recommends that California enact the substance of Article VI of the Uniform Probate Code with some substantive and technical revisions. Conforming revisions in existing California statutes also are recommended.

Article VI relates to multiple-party accounts in banks and other financial institutions and to "pay-on-death" provisions in contracts, deeds, and other written instruments. The enactment of Article VI in California will make it easier—particularly for those who have small estates—to transfer property upon death to designated beneficiaries without the need for probate.

Respectfully submitted,

BEATRICE P. LAWSON
Chairperson

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RECOMMENDATION

relating to

NON-PROBATE TRANSFERS

INTRODUCTION

The Legislature has directed the Law Revision Commission to make a study to determine whether the California Probate Code should be revised and to consider the Uniform Probate Code in the course of that study.[1] Pursuant to this directive, the Commission has studied Article VI of the Uniform Probate Code.[2] This article, entitled "Non-Probate Transfers," adds new methods and codifies a number of methods presently used for transferring property on death without a will.

THE UNIFORM PROBATE CODE PROVISIONS

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

Multiple-Party Accounts

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

(1) *The joint account.* A joint account is one payable on request to one or more of two or more parties. A right of survivorship exists in such an account whether or not mention is made in the deposit agreement of any right of survivorship unless there is clear and convincing evidence

[1] 1980 Cal. Stats. res. ch. 37.

[2] The fifth edition of the official 1977 text of the Uniform Probate Code with official comments is published by the West Publishing Company (February 1978). The Uniform Probate Code has been adopted in fourteen states: Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, and Utah. 8 Uniform Laws Annotated 99 (Supp. 1980).

of a contrary intention at the time the account is created. This is comparable to the familiar joint tenancy account used in California.[3]

(2) *The P.O.D. account.* This is an account payable on request (1) to one person during lifetime and on the death of that person to one or more P.O.D. payees or (2) to one or more persons during their lifetimes and on the death of all of them to one or more P.O.D. payees. This type of account is not presently authorized in California, but its objective can be accomplished under existing California law by the use of a "Totten" trust account.

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

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

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

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

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

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

[5] The UPC provisions do not apply to:

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

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

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

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

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

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

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

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

(1) *Joint account.* The amount on deposit at the death of a party to a joint account belongs to the surviving party or parties as against the estate of the deceased party unless there is clear and convincing evidence of a different intention at the time the account is created.[6] The right of survivorship continues between the surviving parties after the death of a party.

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

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

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

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

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

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

(2) A beneficiary designation in a trust account.

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

Rights of creditors and dependents of deceased depositor. The UPC provides that no multiple-party account is effective against an estate of a deceased person to transfer to a survivor sums needed to pay debts, taxes, and expenses of administration (including the statutory allowances to the surviving spouse, minor children, and dependent children) if other assets of the estate are insufficient. This is accomplished by giving the personal

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

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

representative of the deceased depositor the right to trace the proceeds of the account into the hands of the recipient. To facilitate the transfer by the financial institution of the funds after the death of the depositor, the UPC makes clear that this is a personal liability of the recipient to the executor or administrator of the estate of the deceased depositor; the bank or other financial institution is free to release the multiple-party account in accordance with its deposit agreement unless before payment the institution has been served with process in a proceeding by the personal representative to enforce the liability to the estate.

Pay-on-Death Provisions in Contracts and Instruments

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

RECOMMENDATIONS

The Law Revision Commission recommends that the substance of Article VI of the Uniform Probate Code be enacted in California with some substantive and technical revisions. The enactment of Article VI with these revisions will make it easier—particularly for those who have small

estates—to transfer property upon death to their designated beneficiaries without the need for probate.

Multiple-Party Accounts

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

Ownership of joint account. The UPC provides that a joint account belongs to the parties during their lifetimes in proportion to their net contributions unless there is clear and convincing evidence of a contrary intent. This adopts the gift tax rule of the Internal Revenue Service (IRS) in place of the existing California rule that a joint tenancy account belongs equally to the co-depositors.[9] For gift tax purposes, IRS has taken the position that no completed gift occurs upon the opening of the account; rather the gift occurs when the nondepositing tenant makes a withdrawal.[10] Adoption of the IRS concept is a desirable modification of existing law. Many lay persons have the erroneous understanding that creation of a joint tenancy account has no effect until death.[11] Often the person making a deposit names another as a joint tenant merely to facilitate the withdrawal of funds by the joint tenant for the depositor and the transfer of the funds to the joint tenant upon death of the depositor. The depositor often has no intent to make a gift of one-half of the funds to the other joint tenant merely by making the person a joint tenant. The depositor can, of course, clearly indicate a different intent (as by executing an instrument that makes clear the intent to make a gift) and then that intent will be given effect.

Right of survivorship. The UPC provides for a right of survivorship in a joint account (whether or not the account

[9] Wallace v. Riley, 23 Cal. App.2d 654, 667, 74 P.2d 807 (1937).

[10] See Treas. Reg. § 25.2511-1 (1958). See also Rev. & Tax. Code §§ 13671-13672 (California inheritance tax treatment of joint bank account).

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

is described as a "joint tenancy" or mentions any right of survivorship) which may be rebutted by clear and convincing evidence of a different intention.[12] This strengthens survivorship rights, since under existing law the presumption of survivorship arising from the joint tenancy form of the account may be overcome by a preponderance of the evidence.[13] Most persons who use joint accounts want the survivor or survivors to have all balances remaining at death, and the UPC presumption of survivorship for joint accounts gives effect to this intent.

Rights of creditors of deceased joint account holder. The UPC permits creditors of a deceased joint account holder to reach that person's share of the account if the other assets of the estate are insufficient. This would change the anachronistic California common law rule that a surviving joint tenant takes the joint tenancy funds free of the claims of the deceased joint tenant's creditors,[14] and would make the rule with respect to joint accounts consistent with existing law applicable to tentative trusts[15] and general powers of appointment.[16] The existing rule

[12] The legislation recommended by the Commission does not include the UPC requirement that the evidence of a different intention exist "at the time the account is created." Thus, the intention to negate survivorship may be shown to have existed after the account's creation, although the evidence must be clear and convincing.

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

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

[14] See Kilfoy v. Fritz, 125 Cal. App.2d 291, 294, 270 P.2d 579 (1954); *cf.* People v. Nogarr, 164 Cal. App.2d 591, 330 P.2d 858 (1958) (real property); Zeigler v. Bonnell, 52 Cal. App.2d 217, 126 P.2d 118 (1942) (real property).

[15] See 7 B. Witkin, Summary of California Law *Trusts* § 17, at 5380 (8th ed. 1974).

[16] See Civil Code § 1390.3(b) ("Upon the death of the donee, to the extent that his estate is inadequate to satisfy the claims of creditors of the estate and the expenses of administration of the estate, property subject to a general testamentary power of appointment or to a general power of appointment that was presently exercisable at the time of his death is subject to such claims and expenses to the same extent that it would be subject to the claims and expenses if the property had been owned by the donee"). See also Civil Code § 1390.4 (property subject to unexercised general power of appointment created by the donor in favor of himself subject to claims of creditors and to expenses of administration, whether or not presently exercisable).

gives the surviving joint tenant an unjustified windfall at the expense of the creditors of the deceased joint tenant. It would be fairer to creditors of the deceased joint tenant to permit them to reach the latter's share of the joint account funds, particularly in view of the modern and widespread use of credit cards and charge accounts.[17]

Tentative trust accounts. The UPC makes the tentative or "Totten" trust a more reliable estate planning device by making it more difficult for heirs of the depositor to break the trust: Under the UPC, the presumption that the account funds vest in the named beneficiary on the depositor's death can be overcome only by "clear and convincing" evidence, and the trust cannot be revoked or modified by the depositor's will. These UPC provisions will have the beneficial effect of reducing litigation after the depositor's death,[18] and will permit depositors to create tentative trusts with confidence. Under existing law, a tentative trust has sometimes been defeated on flimsy or circumstantial evidence that the depositor intended some other disposition of the proceeds.[19]

P.O.D. accounts. The UPC authorizes the "pay-on-death" account. Such an account is not now authorized in California. This new authority permits a depositor to use an account form which accomplishes his or her objective without the need to resort to trust theory or other legal fictions. When the depositor's intent in creating a multiple-party account is solely to provide for payment of the funds to a named beneficiary on the depositor's death, the "pay-on-death" account is superior to the joint account because the depositor retains sole ownership of the account funds during his or her lifetime. It is superior to the tentative or "Totten" trust account for such purpose because the effect of the "pay-on-death" account form will be more readily understood by lay persons who use it.

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[17] See Griffith, *Community Property in Joint Tenancy Form,* 14 Stan. L. Rev. 87, 96-97 (1961).

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

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

Community property rights. Article VI was drafted principally with common law states in mind.[20] If Article VI is to be enacted in California, a provision should be added to make clear its effect when community property funds are deposited in a joint account.

Under existing California law, when married persons deposit community funds into a joint tenancy bank account, a presumption arises that they thereby intended to transmute their community funds into a true common law joint tenancy.[21] If the presumption is overcome, the funds are treated as community property notwithstanding the joint tenancy form of the account. The result is a hybrid kind of property: community property in joint tenancy form.[22]

In most cases, when married persons put community funds into a joint tenancy account they do so to permit both spouses to make withdrawals during their lifetimes and to avoid the delay and expense of probate by taking advantage of the automatic survivorship feature; but they do not intend to give up the other advantages of community property.[23] The law should carry out this intent since it generally produces desirable results.[24]

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

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

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

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

[23] *Id.* at 90, 95, 106-09.

[24] See note 22 *supra*.

community property if probate proceedings are commenced.[25] The survivorship feature of community property in joint tenancy form is particularly advantageous where the decedent's estate is small and there are no unpaid debts or taxes: The surviving spouse may have immediate access to the funds and probate is unnecessary.[26] Creditors are not prejudiced since they may petition for probate[27] and prove their claims.

The Commission recommends that a provision be added to Article VI to make it easier for married persons who deposit community funds into a joint tenancy account simultaneously to have the advantages of community property and the survivorship feature of joint tenancy property as they generally intend. The provision would reverse the present unrealistic presumption of transmutation, and instead create a rebuttable[28] presumption that funds of married persons on deposit in an account to which they are both parties are presumed to be their community property, whether or not they are described in the deposit agreement as husband and wife.[29] This will preserve the testamentary power of each spouse to the extent of half of the funds,[30] and will permit division of the funds on dissolution of their marriage.[31]

Delay in payout by financial institution. A new provision should be added to the UPC article to apply to a

[25] Griffith, *Community Property in Joint Tenancy Form,* 14 Stan. L. Rev. 87, 96 (1961).

[26] See *id.*

[27] Prob. Code § 422.

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

[29] This would not change the rule with respect to inheritance taxes. See Rev. & Tax. Code § 13671.5 (funds in joint bank account having their source in community property treated as community property for inheritance tax purposes).

[30] See Prob. Code § 201.

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

P.O.D. account or Totten trust account.[32] In the case of such an account, on the death of the depositor, the new provision would require that the financial institution wait at least 60 days before paying the funds over to the P.O.D. payee or trust beneficiary unless the beneficiary is a spouse, minor or dependent child, executor, administrator, guardian, conservator, or trustee of the depositor. This will give the personal representative of the deceased depositor time to assert any claims against the account for payment of estate debts, taxes, and expenses of administration where the estate is otherwise insufficient.

Conforming revisions. The provisions of the Financial Code and Civil Code relating to joint tenancy account in financial institutions[33] should be revised to be consistent with the new provisions concerning multiple-party accounts. The provisions of the Financial Code which permit joint tenants to require more than one signature for withdrawals or on checks or receipts in the case of banks,[34] savings and loan associations,[35] federal savings and loan associations,[36] and credit unions[37] should be relocated in a single comprehensive provision in the new provisions concerning multiple-party accounts. The Financial Code provision which permits trust account funds to be paid to a minor beneficiary on the death of the trustee[38] should be revised to make such payment subject to the general rules concerning payment to a minor,[39] and moved from the Financial Code to the new statute.

Pay-on-Death Provisions in Contracts and Instruments

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

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[32] There would be no restriction on payment to a surviving joint account holder.

[33] See Civil Code § 683; Fin. Code §§ 852, 853, 7602, 7603, 7603.5, 7604, 7606, 11203, 11204, 11205, 11206, 11206.5, 14854.

[34] Fin. Code § 852 (third sentence).

[35] Fin. Code § 7603 (second sentence).

[36] Fin. Code § 11204 (third sentence).

[37] Fin. Code § 14854 (second sentence).

[38] Fin. Code § 853.

[39] Prob. Code §§ 3400-3413.

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

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

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

Enactment of this portion of the UPC would codify California case law that a promissory note may contain a provision for the cancellation of the debt on the death of the payee,[40] and that an employment contract may provide for ownership of a business to pass to the employee-manager on the death of the owner.[41] The UPC may expand California law by validating a provision in a promissory note that on the payee's death the note shall be paid to another person.[42] There appears to be no sound reason for holding these types of provisions in written instruments to be invalid merely because the instrument has not been executed in accordance with the formalities of the will statutes.[43] Experience with insurance contracts, revocable living trusts, multiple-party bank accounts, and United States government bonds with "pay-on-death" provisions demonstrates that the evils envisioned if will statutes are not rigidly enforced simply do not materialize.[44]

RECOMMENDED LEGISLATION

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

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[40] Bergman v. Ornbaun, 33 Cal. App.2d 680, 92 P.2d 654 (1939).

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

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

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

[44] Comment to Uniform Probate Code § 6-201.

An act to amend Section 683 of the Civil Code, to amend Sections 7603.5, 7606, 11206, and 11206.5 of, and to repeal Sections 852, 853, 7602, 7603, 7604, 11203, 11204, 11205, and 14854 of, the Financial Code, and to amend Section 647 of, and to add Division 5 (commencing with Section 6101) to, the Probate Code, relating to nonprobate transfers.

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

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

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

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

(b) Provisions of this section ~~shall~~ *do* not ~~restrict the creation of~~ *apply to* a joint ~~tenancy in a bank deposit as provided for in the Bank Act~~ *account in a financial institution if Part 1 (commencing with Section 6101) of Division 5 of the Probate Code applies to such account.*

Comment. Section 683 is amended to change the former reference to a joint tenancy in a bank deposit under the Bank Act to a reference to joint account in a financial institution under newly-enacted provisions of the Probate Code (Sections 6101-6117). Such accounts are governed by the new Probate Code sections and various provisions of the Financial Code.

Financial Code § 852 (repealed). Joint accounts

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

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

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

Comment. Former Section 852 is superseded by Part 1 (commencing with Section 6101) of Division 5 of the Probate Code relating to multiple-party accounts. The first two sentences of former Section 852 are superseded by Sections 6103, 6104, 6108, 6109, and 6116 of the Probate Code. The third sentence of former Section 852 is continued in Section 6108 of the Probate Code. The fourth and fifth sentences of former Section 852 are superseded by Section 6112 of the Probate Code.

Financial Code § 853 (repealed). Trust accounts

SEC. 3. Section 853 of the Financial Code is repealed.

~~853. Whenever any deposit is made in a bank by any person which in form is in trust for another, but no other or further notice of the existence and terms of a legal and valid trust is given in writing to the bank, in the event of the death of the trustee, the deposit or any part thereof may be paid to the person for whom the deposit was made, whether or not such person is a minor.~~

Comment. Former Section 853 is superseded by Sections 6111, 6114, and 6116 of the Probate Code.

Financial Code § 7602 (repealed). Joint tenants

SEC. 4. Section 7602 of the Financial Code is repealed.

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

Comment. Former Section 7602 is superseded by Part 1 (commencing with Section 6101) of Division 5 of the Probate Code relating to multiple-party accounts.

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

SEC. 5. Section 7603 of the Financial Code is repealed.

~~7603. Shares or investment certificates owned in joint tenancy and all dividends and interest thereon are held for the exclusive use of the joint tenants and may be paid to any of them during their lifetime or to the survivor or any one of the survivors of them after the death of one or more of the joint tenants. By written instructions of all joint tenants given to the association, they may require the signatures of more than one of such persons during their lifetimes or of more than one of the survivors after the death of any one of them on any notice of withdrawal, request for withdrawal, check endorsement or receipt, in which case the association shall pay withdrawals, dividends and~~

~~interest only in accordance with such instructions, but no such instructions shall limit the right of the sole survivor or of all of the survivors to receive withdrawal payments, dividends and interest. Payment as provided in this section and the receipt or acquittance of any joint tenant is a valid and sufficient release and discharge of such association for all payments made on account of shares or certificates owned in joint tenancy prior to the receipt by such association of notice in writing from any one of them not to make payments in accordance with the terms of such shares or certificates or of such written instructions. After receipt of such notice an association may refuse, without liability, to pay withdrawals, dividends or interest pending determination of the rights of the parties.~~

Comment. Former Section 7603 is superseded by Part 1 (commencing with Section 6101) of Division 5 of the Probate Code relating to multiple-party accounts. The first sentence of former Section 7603 is superseded by Sections 6103, 6104, 6108, 6109 and 6116 of the Probate Code. The second sentence of former Section 7603 is continued in Section 6108 of the Probate Code. The third and fourth sentences of former Section 7603 are superseded by Section 6112 of the Probate Code.

Financial Code § 7603.5 (technical amendment). Assignment or pledge of shares or certificates

SEC. 6. Section 7603.5 of the Financial Code is amended to read:

7603.5. *(a)* Shares or investment certificates ~~owned in joint tenancy~~ *held as a joint account* and any dividends or interest thereon may be assigned or pledged to the association by any one of the ~~joint tenants~~ *parties* during their lifetime or by the survivor or any one of the survivors of them after the death of one or more of the ~~joint tenants~~ *parties*, and such assignment or pledge may secure a loan from the association to any one or more of the ~~joint tenants~~ *parties* or to any one or more of the survivors of them after the death of one or more of them. By written instructions of all ~~joint tenants~~ *parties* given to the association, they may require the signatures of more than one of such persons

during their lifetime or of more than one of the survivors after the death of any one of them for any assignment or pledge, but no such instructions shall limit the right of the sole survivor or of all of the survivors to assign or pledge to the association the shares or investment certificates and any dividends and interest thereon. No assignment or pledge to the association by less than all of the ~~joint tenants~~ *parties* or by less than all of the survivors of the ~~joint tenants~~ *parties* shall operate to sever or terminate, either in whole or in part, the continuance of the ~~joint tenancy~~ *joint account*, subject to the effect of such pledge or assignment.

(b) As used in this section, "joint account" and "parties" have the meaning given those terms under Section 6101 of the Probate Code.

Comment. Section 7603.5 is amended to replace the former references to joint tenancy with a reference to "joint account" as defined in Section 6101 of the Probate Code, and to replace the former references to joint tenants with a reference to "parties" as defined in Section 6101 of the Probate Code. This expands the application of Section 7603.5 to include joint accounts in form other than the traditional common law joint tenancy account.

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

SEC. 7. Section 7604 of the Financial Code is repealed.

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

Comment. Former Section 7604 is superseded by Part 1 (commencing with Section 6101) of Division 5 of the Probate Code relating to multiple-party accounts. The conclusive presumption of former Section 7604 has been replaced by a rebuttable presumption under Section 6104 of the Probate Code:

The presumption of survivorship may be rebutted by clear and convincing evidence of a different intention. Prob. Code § 6104. However, the financial institution is protected from liability if it pays the account to the survivor. See Prob. Code §§ 6109, 6112.

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

SEC. 8. Section 7606 of the Financial Code is amended to read:

7606. When a person holding shares or investment certificates as trustee ~~or guardian~~ dies and ~~no notice of the terms, revocation, or termination of the trust or guardianship is given in writing to the association, the withdrawal or other value of the shares or investment certificates or any part thereof may be paid to the beneficiary or ward. If~~ no beneficiary ~~or ward~~ has been designated in writing to the association, the withdrawal or other value or any part thereof may be paid to the trustee's ~~or guardian's~~ executor or administrator. Such payment by any association is a valid and sufficient release and discharge of the association for the payment ~~whether or not such payment is made to a minor~~.

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

Insofar as the section dealt with payment to a trust beneficiary on the death of the trustee, the section is superseded by Section 6114 of the Probate Code. If the trust is a true trust (as distinguished from a Totten trust), the trust does not terminate on the death of the trustee and a new trustee may be appointed by the court. Civil Code § 2289; 7 B. Witkin, Summary of California Law *Trusts* § 30, at 5393 (8th ed. 1974).

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

SEC. 9. Section 11203 of the Financial Code is repealed.

~~11203. Whenever a person dies holding shares or share accounts of a federal savings and loan association as trustee or other fiduciary, in trust for a named beneficiary, and no written notice of the revocation or termination of the trust relationship has been given to the association, the repurchase value of the shares or share accounts, and dividends thereon, or other rights relating thereto, may be paid or delivered, in whole or in part, to the named beneficiary of such trust. The payment or delivery to any beneficiary pursuant to this section, or a receipt or acquittance signed by such beneficiary for any payment or delivery, whether or not such person is a minor, is a valid and sufficient release and discharge of the association for the payment or delivery so made.~~

Comment. Section 11203 is superseded by Section 6114 of the Probate Code. Section 11203 applied to Totten trusts, since the section provided for payment to the beneficiary on the death of the trustee. See 7 B. Witkin, Summary of California Law *Trusts* § 17, at 5379 (8th ed. 1974). If the trust is a true trust, it does not terminate on the death of the trustee and a new trustee may be appointed by the court. Civil Code § 2289; 7 B. Witkin, *supra* § 30, at 5393.

Financial Code § 11204 (repealed). Joint tenants

SEC. 10. Section 11204 of the Financial Code is repealed.

~~11204. When shares or share accounts in a federal savings and loan association are issued in the name of two or more persons, whether minor or adult, as joint tenants or~~

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

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

Comment. Former Section 11204 is superseded by Part 1 (commencing with Section 6101) of Division 5 of the Probate Code relating to multiple-party accounts. The first two sentences of former Section 11204 are superseded by Sections 6103, 6104, 6108, 6109, and 6116 of the Probate Code. The third sentence of former Section 11204 is continued in Section 6108 of the Probate Code. The fourth and fifth sentences of former Section 11204 are superseded by Section 6112 of the Probate Code.

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

SEC. 11. Section 11205 of the Financial Code is repealed.

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

Comment. Former Section 11205 is superseded by Part 1 (commencing with Section 6101) of Division 5 of the Probate Code relating to multiple-party accounts. The conclusive presumption of former Section 11205 has been replaced by a rebuttable presumption under Section 6104 of the Probate Code: The presumption of survivorship may be rebutted by clear and convincing evidence of a different intention. Prob. Code § 6104. However, the financial institution is protected against liability if it pays the account to the survivor. See Prob. Code §§ 6109, 6112.

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

SEC. 12. Section 11206 of the Financial Code is amended to read:

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

Comment. Section 11206 is amended to include forms of joint ownership other than joint tenancy or tenancy in common. See, *e.g.,* Prob. Code § 6101 ("joint account" defined to mean an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship).

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

SEC. 13. Section 11206.5 of the Financial Code is amended to read:

11206.5. *(a)* Savings accounts and share accounts of a federal savings and loan association ~~owned in joint tenancy~~

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

(b) As used in this section, "joint account" and "parties" have the meaning given those terms under Section 6101 of the Probate Code.

Comment. Section 11206.5 is amended to replace the former references to joint tenancy with a reference to "joint account" as defined in Section 6101 of the Probate Code, and to replace the former references to joint tenants with a reference to "parties" as defined in Section 6101 of the Probate Code. This expands the application of Section 11206.5 to include joint accounts in form other than the traditional common law joint tenancy account.

Financial Code § 14854 (repealed). Joint tenancy

SEC. 14. Section 14854 of the Financial Code is repealed.

~~14854. Shares or certificates for funds owned in joint tenancy and all dividends and interest thereon may be paid to any of the joint tenants during their lifetime or to the survivor or any one of the survivors of them after the death~~

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

Comment. Former Section 14854 is superseded by Part 1 (commencing with Section 6101) of Division 5 of the Probate Code relating to multiple-party accounts. The first sentence of former Section 14854 is superseded by Sections 6103, 6104, 6108, 6109, and 6116 of the Probate Code. The second sentence of former Section 14854 is continued in Section 6108 of the Probate Code. The third and fourth sentences of former Section 14854 are superseded by Section 6112 of the Probate Code.

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

SEC. 15. Section 647 of the Probate Code is amended to read:

647. For the purposes of this article ~~, any~~ *:*

(a) Any property or interest therein or lien thereon which, at the time of the decedent's death, was held by ~~him~~ *the decedent* as joint tenant, or in which ~~he~~ *the decedent*

had a life or other estate terminable upon ~~his~~ *the decedent's* death, shall be excluded in determining the estate of the decedent or its value.

(b) A multiple-party account to which the decedent was a party at the time of the decedent's death shall be excluded in determining the estate of the decedent or its value, whether or not all or a portion of the sums on deposit are community property, to the extent that the sums on deposit belong after the death of the decedent to a surviving party, P.O.D. payee, or beneficiary. As used in this subdivision, the terms "multiple-party account," "party," "P.O.D. payee," and "beneficiary" have the meaning given those terms by Section 6101.

Comment. Section 647 is amended to add subdivision (b). Subdivision (b) is a special application of subdivision (a) and continues prior law by making clear that funds in a multiple-party account as defined in Section 6101 are excluded in determining the estate of the decedent or its value under this article to the extent that the funds belong after the death of the decedent to a surviving party, P.O.D. payee, or beneficiary. Under prior law, joint tenancy accounts were expressly excluded from the decedent's estate for the purpose of this article, and Totten trust accounts were presumably also excluded as an estate terminable upon the decedent's death.

Subdivision (b) excludes multiple-party account funds whether or not they are community property under Section 6106.5 to the extent that the funds pass to a surviving party, P.O.D. payee, or beneficiary. Under prior law, when community funds were deposited into the spouses' joint tenancy account, there was a presumption of an intent to transmute the funds into true joint tenancy (see *In re* McCoin, 9 Cal. App.2d 480, 50 P.2d 114 (1935)), with the result that on the death of one spouse the funds would be excluded from the decedent's estate for the purpose of this article. To this extent, the effect of subdivision (b) on community property funds deposited into the spouses' joint account is generally the same as under prior law.

To the extent that the funds do not belong after the death of the decedent to a surviving party, P.O.D. payee, or beneficiary (as, for example, a community property interest which is given to someone else by the will of the decedent, or an interest in community property claimed as a statutory intestate share by a surviving spouse who is not a party to the account—see Section

201), the funds are includable in the decedent's estate for the purpose of this article. See Estate of Pezzola, 112 Cal. App.3d 752, ___ Cal. Rptr. ___ (1980).

Probate Code §§ 6101-6201 (added). Non-probate transfers

SEC. 16. Division 5 (commencing with Section 6101) is added to the Probate Code, to read:

DIVISION 5. NONPROBATE TRANSFERS

PART 1. MULTIPLE-PARTY ACCOUNTS

CHAPTER 1. DEFINITIONS AND GENERAL PROVISIONS

§ 6101. Definitions

6101. In this division, unless the context otherwise requires:

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

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

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

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

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

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

(f) "Net contribution" of a party to a joint account as of any given time is the sum of all deposits thereto made by or for him or her, less all withdrawals made by or for him or her which have not been paid to or applied to the use of any other party, plus a pro rata share of any interest or dividends included in the current balance. The term includes, in addition, any proceeds of deposit life insurance added to the account by reason of the death of the party whose net contribution is in question.

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

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

(i) "Proof of death" includes a death certificate or record or report which is prima facie evidence of death under Section 10577 of the Health and Safety Code, Sections 1530 to 1532, inclusive, of the Evidence Code, or other statute of this state.

(j) "P.O.D. account" means an account payable on request to one person during lifetime and on his or her

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

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

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

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

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

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

LAW REVISION COMMISSION COMMENT

Section 6101 is the same as Section 6-101 of the Uniform Probate Code with some technical modifications:

(1) A reference to a "levying" creditor is substituted in subdivision (g) for the reference in the UPC to an "attaching" creditor; "attaching creditor" might be construed in California to

be restricted to one who levies under a writ of attachment (prejudgment) and not to include one who levies under a writ of execution (postjudgment).

(2) The reference to UPC Section 1-107 has been replaced in subdivision (i) by a reference to the statutes of this state that make a death certificate or record or report prima facie evidence of death.

UNIFORM PROBATE CODE COMMENT

This and the sections which follow are designed to reduce certain questions concerning many forms of joint accounts and the so-called Totten trust account. An account "payable on death" is also authorized.

As may be seen from examination of the sections that follow, "net contribution" as defined by subsection (f) has no application to the financial institution-depositor relationship. Rather, it is relevant only to controversies that may arise between parties to a multiple-party account.

Various signature requirements may be involved in order to meet the withdrawal requirements of the account. A "request" involves compliance with these requirements. A "party" is one to whom an account is presently payable without regard for whose signature may be required for a "request."

§ 6102. Ownership as between parties and others; protection of financial institutions

6102. (a) The provisions of Chapter 2 (commencing with Section 6103) concerning beneficial ownership as between parties, or as between parties and P.O.D. payees or beneficiaries of multiple-party accounts, are relevant only to controversies between these persons and their creditors and other successors, and have no bearing on the power of withdrawal of these persons as determined by the terms of account contracts.

(b) The provisions of Chapter 3 (commencing with Section 6108) govern the liability of financial institutions who make payments pursuant to that chapter and their set-off rights.

LAW REVISION COMMISSION COMMENT

Section 6102 is the same in substance as Section 6-102 of the Uniform Probate Code.

UNIFORM PROBATE CODE COMMENT

This section organizes the sections which follow into those dealing with the relationship between parties to multiple-party accounts, on the one hand, and those relating to the financial institution-depositor (or party) relationship, on the other. By keeping these relationships separate, it is possible to achieve the degree of definiteness that financial institutions must have in order to be induced to offer multiple-party accounts for use by their customers, while preserving the opportunity for individuals involved in multiple-party accounts to show various intentions that may have attended the original deposit, or any unusual transactions affecting the account thereafter. The separation thus permits individuals using accounts of the type dealt with by these sections to avoid unconsidered and unwanted definiteness in regard to their relationship with each other. In a sense, the approach is to implement a layman's wish to "trust" a co-depositor by leaving questions that may arise between them essentially unaffected by the form of the account.

CHAPTER 2. OWNERSHIP BETWEEN PARTIES AND THEIR CREDITORS AND SUCCESSORS

§ 6103. Ownership during lifetime

6103. (a) A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

(b) A P.O.D. account belongs to the original payee during his or her lifetime and not to the P.O.D. payee or payees; if two or more parties are named as original payees, during their lifetimes rights as between them are governed by subdivision (a).

(c) Unless a contrary intent is manifested by the terms of the account or the deposit agreement or there is other clear and convincing evidence of an irrevocable trust, a trust account belongs beneficially to the trustee during his or her lifetime, and if two or more parties are named as trustee on the account, during their lifetimes beneficial rights as between them are governed by subdivision (a). If there is an irrevocable trust, the account belongs beneficially to the beneficiary.

LAW REVISION COMMISSION COMMENT

Section 6103 is the same as Section 6-103 of the Uniform Probate Code. The presumption under subdivision (a) that a joint account belongs to the parties during their lifetimes in proportion to the net contributions by each changes the rule under former law. Under former law, if the joint account provided for rights of survivorship, the account was presumed to be a joint tenancy and each joint tenant was presumed to have an equal interest in the account. Wallace v. Riley, 23 Cal. App.2d 654, 667, 74 P.2d 807 (1937).

Subdivision (b) is new; payable-on-death accounts were not authorized under former California law. See 1 W. Bowe & D. Parker, Page on the Law of Wills § 6.18, at 270-71 (3d ed. 1960).

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

When a husband and wife are parties to a multiple-party account, their funds on deposit are presumed to be community property funds notwithstanding the form of the account. See Section 6106.5. Accordingly, unless the presumption is rebutted, during their lifetimes their interests are present, existing, and equal. See Civil Code § 5105.

UNIFORM PROBATE CODE COMMENT

This section reflects the assumption that a person who deposits funds in a multiple-party account normally does not intend to make an irrevocable gift of all or any part of the funds represented by the deposit. Rather, he usually intends no present change of beneficial ownership. The assumption may be disproved by proof that a gift was intended. Read with Section 6-101 [(f)] which defines "net contributions," the section permits parties to certain kinds of multiple-party accounts to be as definite, or as indefinite, as they wish in respect to the matter of how beneficial ownership should be apportioned between them. It is important to note that the section is limited to describe ownership of an account while original parties are alive. Section 6-104 prescribes what happens to beneficial ownership on the death of a party. The section does not undertake to describe the situation between parties if one withdraws more than he is then

entitled to as against the other party. Sections 6-108 and 6-112 protect a financial institution in such circumstances without reference to whether a withdrawing party may be entitled to less than he withdraws as against another party. Presumably, overwithdrawal leaves the party making the excessive withdrawal liable to the beneficial owner as a debtor or trustee. Of course, evidence of intention by one to make a gift to the other of any sums withdrawn by the other in excess of his ownership should be effective.

The final Code contains no provision dealing with division of the account when the parties fail to prove net contributions. The omission is deliberate. Undoubtedly a court would divide the account equally among the parties to the extent that net contributions cannot be proven; but a statutory section explicitly embodying the rule might undesirably narrow the possibility of proof of partial contributions and might suggest that gift tax consequences applicable to creation of a joint tenancy should attach to a joint account. The theory of these sections is that the basic relationship of the parties is that of individual ownership of values attributable to their respective deposits and withdrawals; the right of survivorship which attaches unless negated by the form of the account really is a right to the values theretofore owned by another which the survivor receives for the first time at the death of the owner. That is to say, the account operates as a valid disposition at death rather than as a present joint tenancy.

§ 6104. Right of survivorship

6104. (a) Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention. If there are two or more surviving parties, their respective ownerships during lifetime shall be in proportion to their previous ownership interests under Section 6103 augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before his or her death; and the right of survivorship continues between the surviving parties.

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

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

(2) On death of the sole original payee or of the survivor of two or more original payees, any sums remaining on deposit belong to the P.O.D. payee or payees if surviving, or to the survivor of them if one or more die before the original payee; if two or more P.O.D. payees survive, there is no right of survivorship in the event of death of a P.O.D. payee thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

(c) If the account is a trust account:

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

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

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

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

LAW REVISION COMMISSION COMMENT

Section 6104 is the same as Section 6-104 of the Uniform Probate Code except that Section 6104 omits the UPC requirement that the intent that there be no rights of survivorship exist "at the time the account is created." Thus, under Section 6104 the intention to negate survivorship may be shown to have existed after the time of creation of the account, although the evidence must be clear and convincing.

Subdivision (a) of Section 6104 creates a right of survivorship in a joint account whether or not the account is described as a "joint tenancy" or mentions any right of survivorship. See Section 6101(d). The right of survivorship created by subdivision (a) may be rebutted by clear and convincing evidence of a different intention. This strengthens survivorship rights, since under prior law the presumption of survivorship arising from the joint tenancy form of the account could be overcome by a preponderance of the evidence. See Schmedding v. Schmedding, 240 Cal. App.2d 312, 315-16, 49 Cal. Rptr. 523 (1966) (presumption rebuttable); Evid. Code § 115 (except as otherwise provided by law, burden of proof requires preponderance of evidence); Comment to Evid. Code § 606 (ordinarily party against whom a rebuttable presumption operates must overcome the presumption by a preponderance of the evidence).

If parties to a joint account are married to each other, the account funds are presumed to be their community property. See Section 6106.5. If the presumption is not rebutted, upon the death of one of the spouses without a will, the surviving spouse takes the community property funds by intestate succession. The will of the deceased spouse may dispose of one-half of the community funds. Section 201. If the deceased spouse purports to dispose of more than one-half of the community funds by the will, the surviving spouse may have the disposition set aside to the extent of his or her one-half interest in the funds. 7 B. Witkin, Summary of California Law *Community Property* § 60, at 5150-51 (8th ed. 1974). If the surviving spouse is required by the decedent's will to forego his or her statutory community property rights in order to receive benefits under the will, he or she will be put to an election. See Brawerman, *Handling Surviving Spouse's Share of Marital Property,* in California Will Drafting § 8.7, at 229 (Cal. Cont. Ed. Bar 1965); Brown, *The Widow's Election,* in Estate Planning for the General Practitioner § 6.2, at 227-29 (Cal. Cont. Ed. Bar 1979). If the surviving spouse elects against the will, he or she is entitled to one-half of the community funds; the other half is subject to the testamentary disposition of the deceased spouse. See Section 201.

Community funds may be deposited in an account held jointly by one of the spouses and a third person, with the other spouse not being a party to the account. Also community funds may be deposited in an account by one spouse as a trustee for a beneficiary who is not the other spouse or in a P.O.D. account

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

Even though the funds in a multiple-party account may be community funds under Section 6106.5, the financial institution may rely on the form of the account as a joint account, P.O.D. account, or trust account and may make payment pursuant to Chapter 3 (commencing with Section 6108), and is protected from liability in so doing. See Section 6112. The nature of the property rights in such funds is to be determined among the competing claimants, and the financial institution has no interest in this controversy. See Section 6102.

Subdivision (b) is new; payable-on-death accounts were not authorized under former California law. See 1 W. Bowe & D. Parker, Page on the Law of Wills § 6.18, at 270-71 (3d ed. 1960).

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

Subdivision (e) changes the rule applicable to a tentative or "Totten" trust under prior California law by preventing revocation or modification of the trust by will. See Brucks v. Home Fed. Sav. & Loan Ass'n, 36 Cal.2d 845, 852-53, 228 P.2d 545 (1951) (testamentary plan wholly inconsistent with terms of tentative trust revokes the trust). Subdivision (e) does not take away testamentary power over account funds that are community property. See Section 201. See also Section 6106.5 (presumption of community property where joint account holders are married to each other).

Nothing in Section 6104 prevents the court, for example, from enforcing a promise by the surviving beneficiary to share the

account funds with someone else. *Cf.* Jarkieh v. Badagliacco, 75 Cal. App.2d 505, 170 P.2d 994 (1946).

UNIFORM PROBATE CODE COMMENT

The effect of (a) of this section, when read with the definition of "joint account" in 6-101 [(d)], is to make an account payable to one or more of two or more parties a survivorship arrangement unless "clear and convincing evidence of a different intention" is offered.

The underlying assumption is that most persons who use joint accounts want the survivor or survivors to have all balances remaining at death. This assumption may be questioned in states like Michigan where existing statutes and decisions do not provide any safe and wholly practical method of establishing a joint account which is not survivorship. See Leib v. Genesee Merchants Bank, 371 Mich. 89, 123 N.W.(2d) 140 (1962). But, use of a form negating survivorship would make (d) of this section applicable. Still, the financial institution which paid after the death of a party would be protected by 6-108 and 6-109. Thus, a safe nonsurvivorship account form is provided. Consequently, the presumption stated by this section should become increasingly defensible.

The section also is designed to apply to various forms of multiple-party accounts which may be in use at the effective date of the legislation. The risk that it may turn nonsurvivorship accounts into unwanted survivorship arrangements is meliorated by various considerations. First of all, there is doubt that many persons using any form of multiple name account would not want survivorship rights to attach. Secondly, the survivorship incidents described by this section may be shown to have been against the intention of the parties. Finally, it would be wholly consistent with the purpose of the legislation to provide for a delayed effective date so that financial institutions could get notices to customers advising them that review of their accounts may be desirable because of the legislation.

Subsection (c) accepts the New York view that an account opened by "A" in his name as "trustee for B" usually is intended by A to be an informal will of any balance remaining on deposit at his death. The section is framed so that accounts with more than one "trustee," or more than one "beneficiary" can be accommodated. Section 6-103(c) would apply to such an account during the lifetimes of "all parties." "Party" is defined by 6-101 [(g)] so as to exclude a beneficiary who is not described by the account as having a present right of withdrawal.

In the case of a trust account for two or more beneficiaries, the section prescribes a presumption that all beneficiaries who survive the last "trustee" to die own equal and undivided interests in the account. This dovetails with Sections 6-111 and 6-112 which give the financial institution protection only if it pays to all beneficiaries who show a right to withdraw by presenting appropriate proof of death. No further survivorship between surviving beneficiaries of a trust account is presumed because these persons probably have had no control over the form of the account prior to the death of the trustee. The situation concerning further survivorship between two or more surviving parties to a joint account is different.

In 1975, the Joint Editorial Board recommended expansion of subsections (b) and (c) so that the subsections now deal explicitly with cases involving multiple original payees in P.O.D. accounts, and multiple trustees in trust accounts. These changes were conceived to clarify, rather than to change, the text.

§ 6105. Effect of written notice to financial institution

6105. The provisions of Section 6104 as to rights of survivorship are determined by the form of the account at the death of a party. Subject to the requirements, if any, under the terms of the account or the deposit agreement, this form may be altered by written order given by a party to the financial institution to change the form of the account or to stop or vary payment under the terms of the account. The order or request must be signed by a party, received by the financial institution during the party's lifetime, and not countermanded by other written order of the same party during his or her lifetime.

LAW REVISION COMMISSION COMMENT

Section 6105 is the same as Section 6-105 of the Uniform Probate Code except that Section 6105 permits the financial institution and the depositor by agreement to determine the procedure for changing the form of the account or stopping or varying payment under the account. Section 6105 does not affect the presumption established by Section 6106.5 (funds of married persons who are parties to joint account presumed to be community property). See also Section 6112 (notice to financial institution from party able to request present payment that withdrawals should not be permitted).

UNIFORM PROBATE CODE COMMENT

It is to be noted that only a "party" may issue an order blocking the provisions of Section 6-104. "Party" is defined by Section 6-101 [(g)]. Thus if there is a trust account in the name of A or B in trust for C, C cannot change the right of survivorship because he has no present right of withdrawal and hence is not a party.

§ 6106. Accounts and transfers nontestamentary

6106. Any transfers resulting from the application of Section 6104 are effective by reason of the account contracts involved and this division and are not to be considered as testamentary or subject to probate administration, except that any such transfer is subject to the interests otherwise created by law in community property, and except as a consequence of, and to the extent directed by, Section 6107.

LAW REVISION COMMISSION COMMENT

Section 6106 is the same as Section 6-106 of the Uniform Probate Code, with two exceptions:

(1) The UPC provision that transfers resulting from the application of Section 6-104 are not "subject to Articles I through IV" has been revised to make them not "subject to probate administration"—a nonsubstantive change.

(2) The UPC provision that transfers resulting from the application of Section 6-104 are nontestamentary "except as provided in Sections 2-201 through 2-207" has been revised to make them "subject to the interests otherwise created by law in community property." See generally the discussion in the Comment to Sections 6104 and 6106.5. Sections 2-201 through 2-207 of the Uniform Probate Code relate to the elective share of a surviving spouse and were drafted with common law states in mind, not community property states. See "General Comment" to Part 2 of Article II of the Uniform Probate Code. See also Section 6106.5 (presumption of community property where two parties to an account are married to each other).

UNIFORM PROBATE CODE COMMENT

The purpose of classifying the transactions contemplated by Article VI as nontestamentary is to bolster the explicit statement

that their validity as effective modes of transfers at death is not to be determined by the requirements for wills. The section is consistent with Part 2 of Article VI.

The closing reference to Article II, Part 2, and to 6-107 was added in 1975 at the recommendation of the Joint Editorial Board to clarify the intention of the original text.

§ 6106.5. Presumption that sums on deposit are community property

6106.5. (a) Notwithstanding Sections 6103 to 6105, inclusive, if parties to an account are married to each other, whether or not they are so described in the deposit agreement, their net contribution to the account is presumed to be and remain their community property.

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

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

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

LAW REVISION COMMISSION COMMENT

Section 6106.5 is a new provision; there is no comparable provision in the Uniform Probate Code.

Section 6106.5 applies to all "accounts" (defined in subdivision (a) of Section 6101), not just "multiple-party accounts" (defined in subdivision (e) of Section 6101). Thus, the presumption of community property applies, for example, to a husband and wife who have funds on deposit in a partnership account.

Section 6106.5 applies only to controversies between the parties to the account and those who stand in their shoes, such as a creditor or a person who takes under a party's will. The section does not affect or limit the right of the financial institution to make payments pursuant to Sections 6108-6116 and the deposit agreement. See Section 6102. For this reason, Section

6106.5 does not affect the definiteness and certainty that the financial institution must have in order to be induced to make payments from the account and, at the same time, the section preserves the rights of the parties, creditors, and successors that arise out of the nature of the funds—community or separate—in the account.

With respect to the spouses and those claiming under them, Section 6106.5 reverses the presumption under former law that community funds deposited into a joint account with right of survivorship are presumed to be converted into true joint tenancy funds and to lose their character as community property. See *In re* McCoin, 9 Cal. App.2d 480, 50 P.2d 114 (1935). The former presumption was inconsistent with the general belief of married persons. Married persons generally believe that community funds deposited in a joint tenancy account remain community property. See Griffith, *Community Property in Joint Tenancy Form,* 14 Stan. L. Rev. 87, 90, 95, 106-109 (1961). The presumption created by Section 6106.5 is consistent with this general belief.

The presumption created by Section 6106.5 is one affecting the burden of proof. See also Evid. Code § 606 ("The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact"). This requires proof that the funds of married persons in a joint account are not community property. Subdivision (b) of Section 6106.5 specifies the proof that must be made to rebut the presumption that the property is community property.

Paragraph (1) of subdivision (b) specifies one of the two methods of rebutting the presumption—the source-of-funds or tracing rule. If the person having the burden of proof can trace separate funds into a joint account, the presumption of community property is overcome and the funds retain their separate character. If separate funds have been commingled with community funds but remain ascertainable or traceable into a proportionate share of the account, the funds retain their separate character. On the other hand, if separate and community funds are so commingled that the party having the burden of proving that the funds are separate cannot meet that burden, then the entire account is treated as community property. See generally 7 B. Witkin, Summary of California Law *Community Property* §§ 33-34, at 5126-28 (8th ed. 1974). Even though the separate funds can still be traced, nothing prevents

the married persons from making an agreement that expresses their clear intent that the funds be community property. If the person claiming that such an agreement was made proves that fact by a preponderance of the evidence, the agreement is given effect as provided in the last clause of paragraph (1).

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

The presumption created by Section 6106.5 does not affect the provisions of Sections 6102, 6109, and 6112 that permit prompt payment of the sums on deposit in a joint account to the surviving spouse. The prompt payment provisions are most useful where the estate is small and payment to the surviving spouse will avoid the expense and delay of probate. Yet, because the presumption created by Section 6106.5 governs the rights between the spouses and their successors, claimants who wish to show that the funds are community funds will find it easier to do so.

The deceased spouse may dispose of one-half of the community property in the joint account by will (Section 201), and this avoids the inflexible and harsh treatment of heirs under a true joint tenancy. Under a true joint tenancy, the property passes to the surviving joint tenant and may not be disposed of by the will of the deceased joint tenant. In the case of dissolution of the marriage, the community property sums on deposit in the joint account are subject to division by the court. Civil Code § 4800. By way of contrast, a true joint tenancy account is ordinarily not subject to division on dissolution of marriage because the sums on deposit are separate property of the spouses. *Cf.* Walker v.

Walker, 108 Cal. App.2d 605, 608, 239 P.2d 106 (1952) (real property). An attempted gift or other disposition of community sums on deposit without valuable consideration and without the consent of the other spouse may be set aside. Civil Code § 5125(b).

During the lifetime of the spouses, the rights of creditors to reach the community property (see Civil Code §§ 5116, 5122) are not affected by the deposit of the community funds in the joint account. However, after the death of one of the spouses, the survivor has the right to sums in a multiple-party account unless the assets of the probate estate are insufficient to pay the debts. See Section 6107.

§ 6107. Rights of creditors

6107. (a) No multiple-party account is effective against an estate of a deceased party to transfer to a survivor sums needed to pay debts, taxes, and expenses of administration, including allowances to the surviving spouse, minor children and dependent children under Article 2 (commencing with Section 680) of Chapter 11 of Division 3, if other assets of the estate are insufficient.

(b) A surviving party, P.O.D. payee, or beneficiary who receives payment from a multiple-party account after the death of a deceased party is liable to account to the personal representative of the deceased party for amounts the decedent owned beneficially immediately before his or her death to the extent necessary to discharge the claims and charges mentioned in subdivision (a) remaining unpaid after application of the decedent's estate. No proceeding to assert this liability shall be commenced unless the personal representative has received a written demand by a surviving spouse, a creditor or one acting for a minor or dependent child of the decedent, and no proceeding shall be commenced later than two years following the death of the decedent. Sums recovered by the personal representative shall be administered as part of the decedent's estate.

(c) This section does not affect the right of a financial institution to make payment on multiple-party accounts according to the terms thereof, or make it liable to the

estate of a deceased party, unless before payment the institution has been served with process in a proceeding by the personal representative.

(d) If parties to a multiple-party account are married to each other and the sums on deposit are transferred to one spouse upon the death of the other under a right of survivorship under Section 6104, subdivisions (a), (b), and (c) of this section apply notwithstanding that the funds in the account were community property.

LAW REVISION COMMISSION COMMENT

Section 6107 is the same in substance as Section 6-107 of the Uniform Probate Code, except for two changes:

(1) Subdivision (d) has been added.

(2) The general reference in the UPC to "statutory" allowances to the surviving spouse, minor children and dependent children has been revised to refer specifically to the family allowance provisions of Sections 680-684. See generally Pigott, *Family Allowance,* in 1 California Decedent Estate Administration §§ 11.1-11.34, at 394-413 (Cal. Cont. Ed. Bar 1971). See also Section 647 (multiple-party account funds generally not subject to small estate set-aside provisions).

When the personal representative of the deceased party obtains multiple-party account funds pursuant to this section, the funds are subject to the rules for priority of payment under Section 950 of the Probate Code and the various tax statutes relating to priorities. See DeMeo, *Creditors' Claims,* in 1 California Decedent Estate Administration § 13.40, at 485-86 (Cal. Cont. Ed. Bar 1971).

Section 6107 authorizes the invasion of multiple-party account funds needed by the estate to pay debts, taxes, and expenses of administration. This changes former law with respect to a true joint tenancy account. It was the former rule that the surviving joint tenant took the funds free of the claims of the deceased joint tenant's creditors. See Kilfoy v. Fritz, 125 Cal. App.2d 291, 294, 270 P.2d 579 (1954); *cf.* People v. Nogarr, 164 Cal. App.2d 591, 330 P.2d 858 (1958) (real property); Zeigler v. Bonnell, 52 Cal. App.2d 217, 126 P.2d 118 (1942) (real property).

When multiple-party account funds are community property (see Section 6106.5), subdivision (d) of Section 6107 requires that creditors of the deceased spouse look first to assets in the estate of the deceased spouse for satisfaction. If estate assets are

insufficient for this purpose, creditors of the deceased spouse may pursue community funds in a multiple-party account. Under former law, when community property funds were deposited into a joint account, the result depended upon whether or not the account was a true joint tenancy account. If the funds were transmuted into joint tenancy property (see *In re* McCoin, 9 Cal. App.2d 480, 50 P.2d 114 (1935)), on the death of one spouse, creditors of that spouse could no longer reach the funds. See Kilfoy v. Fritz, *supra; cf.* People v. Nogarr, *supra;* Zeigler v. Bonnell, *supra.* On the other hand, if the funds were shown to be community property, then the rights of creditors were the same as in the other community property of the spouses. See generally Prob. Code §§ 205 (personal liability of surviving spouse for debts of deceased spouse chargeable against community property); 704.2 and 704.4 (claim of surviving spouse against estate for payment of debts of deceased spouse, and debts of surviving spouse for which community property is liable); 980 (petition in estate proceeding for allocation of responsibility for debts). Nothing in subdivision (d) affects the right of a creditor to recover from the property of the surviving spouse if the surviving spouse is personally liable to the debtor.

It should be noted that inheritance taxes (as distinguished from estate taxes) are the responsibility of the recipient of the account funds and not of the estate. See King, *Death Tax Procedures,* in 1 California Decedent Estate Administration §§ 15.1-15.2, at 562 (Cal. Cont. Ed. Bar 1971). See also Estate of Yush, 8 Cal. App.3d 251, 87 Cal. Rptr. 222 (1970) (improper to delay estate distribution when estate owes no taxes, although a beneficiary outside probate owes taxes).

If the personal representative of a deceased party brings a proceeding to assert liability under Section 6107 and the financial institution is served before it makes payment from the multiple-party account, then under subdivision (c) the financial institution may not thereafter make payment according to the terms of the account. This specific provision controls over the general provisions of Financial Code Sections 952, 7612, and 11211.

UNIFORM PROBATE CODE COMMENT

The sections of this Article authorize transfers at death which reduce the estate to which the surviving spouse, creditors and minor children normally must look for protection against a decedent's gifts by will. Accordingly, it seemed desirable to

provide a remedy to these classes of persons which should assure them that multiple-party accounts cannot be used to reduce the essential protection they would be entitled to if such accounts were deemed a special form of specific devise. Under this Section a surviving spouse is automatically assured of some protection against a multiple-party account if the probate estate is insolvent; rights are limited, however, to sums needed for statutory allowances. The phrase "statutory allowances" includes the homestead allowance under Section 2-401, the family allowance under Section 2-403, and any allowance needed to make up the deficiency in exempt property under Section 2-402. In any case (including a solvent estate) the surviving spouse could proceed under Section 2-201 et seq. to claim an elective share in the account if the deposits by the decedent satisfy the requirements of Section 2-202 so that the account falls within the augmented net estate concept. In the latter situation the spouse is not proceeding as a creditor under this section.

CHAPTER 3. PROTECTION OF FINANCIAL INSTITUTION

§ 6108. Establishment of and payment from multiple-party accounts; inquiry not required to establish net contributions

6108. (a) Financial institutions may enter into multiple-party accounts to the same extent that they may enter into single-party accounts. Any multiple-party account may be paid, on request, to any one or more of the parties.

(b) By written instructions of all parties to a multiple-party account given to the financial institution, the parties may require the signatures of more than one of such parties during their lifetimes or of more than one of the survivors after the death of any one of them on any check, check endorsement, receipt, notice of withdrawal, request for withdrawal, or withdrawal order. In such case, the financial institution shall pay the sums on deposit only in accordance with such instructions, but no such instructions limit the right of the sole survivor or of all of the survivors to receive the sums on deposit.

(c) A financial institution shall not be required to inquire as to the source of funds received for deposit to a

multiple-party account, or to inquire as to the proposed application of any sum withdrawn from an account, for purposes of establishing net contributions.

LAW REVISION COMMISSION COMMENT

Section 6108 is the same in substance as Section 6-108 of the Uniform Probate Code except for subdivision (b) which is not contained in the Uniform Probate Code. Subdivision (b) continues provisions of former Financial Code Section 852 (third sentence) (banks), Section 7603 (second sentence) (savings and loan associations), Section 11204 (third sentence) (federal savings and loan associations), and Section 14854 (second sentence) (credit unions).

§ 6109. Payment of joint account

6109. Any sums in a joint account may be paid, on request, to any party without regard to whether any other party is incapacitated or deceased at the time the payment is demanded; but payment may not be made to the personal representative or heirs of a deceased party unless proof of death is presented to the financial institution showing that the decedent was the last surviving party or unless there is no right of survivorship under Section 6104.

LAW REVISION COMMISSION COMMENT

Section 6109 is the same in substance as Section 6-109 of the Uniform Probate Code. Payment pursuant to Section 6109 may in some cases be subject to Section 6115 (delay in payment after death). The requirements of Revenue and Taxation Code Section 14345 (inheritance tax) must also be satisfied if payment is to be made after the death of a party. See Section 6117.

§ 6110. Payment of P.O.D. account

6110. Any P.O.D. account may be paid, on request, to any original party to the account. Payment may be made, on request, to the P.O.D. payee or to the personal representative or heirs of a deceased P.O.D. payee upon presentation to the financial institution of proof of death showing that the P.O.D. payee survived all persons named as original payees. Payment may be made to the personal

representative or heirs of a deceased original party if proof of death is presented to the financial institution showing that his or her decedent was the survivor of all other persons named on the account either as an original party or as P.O.D. payee.

LAW REVISION COMMISSION COMMENT

Section 6110 is the same in substance as Section 6-110 of the Uniform Probate Code. Payment pursuant to Section 6110 is in some cases subject to Section 6115 (delay in payment after death). See also Section 6117 (inheritance tax law requirements must be satisfied if payment is to be made after death of a party).

§ 6111. Payment of trust account

6111. Any trust account may be paid, on request, to any trustee. Unless the financial institution has received written notice that the beneficiary has a vested interest not dependent upon his or her surviving the trustee, payment may be made to the personal representative or heirs of a deceased trustee if proof of death is presented to the financial institution showing that his or her decedent was the survivor of all other persons named on the account either as trustee or beneficiary. Payment may be made, on request, to the beneficiary upon presentation to the financial institution of proof of death showing that the beneficiary or beneficiaries survived all persons named as trustees.

LAW REVISION COMMISSION COMMENT

Section 6111 is the same as Section 6-111 of the Uniform Probate Code. Payment pursuant to Section 6111 is in some cases subject to Section 6115 (delay in payment after death). See also Section 6117 (inheritance tax law requirements must be satisfied if payment is to be made after death of a party).

§ 6112. Payment as discharge

6112. (a) Subject to Section 6115, payment made pursuant to Section 6108, 6109, 6110, or 6111 discharges the financial institution from all claims for amounts so paid whether or not the payment is consistent with the

beneficial ownership of the account as between parties, P.O.D. payees, or beneficiaries, or their successors.

(b) The protection provided by subdivision (a) does not extend to payments made after the particular office or branch office of the financial institution where the account is carried has received written notice from any party able to request present payment to the effect that withdrawals in accordance with the terms of the account should not be permitted. Unless the notice is withdrawn by the person giving it, the successor of any deceased party must concur in any demand for withdrawal if the financial institution is to be protected under this section. No other notice or any other information shown to have been available to a financial institution shall affect its right to the protection provided by subdivision (a).

(c) After receipt of the written notice referred to in subdivision (b), the financial institution may refuse, without liability, to pay any sums on deposit pending determination of the rights of the parties and their successors.

(d) The protection provided by this section has no bearing on the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of funds in, or withdrawn from, multiple-party accounts.

LAW REVISION COMMISSION COMMENT

Subdivisions (a), (b), and (d) of Section 6112 are the same in substance as Section 6-112 of the Uniform Probate Code with two additions: (1) A reference is added in subdivision (a) to Section 6115 (delay in payment in certain cases), and (2) the requirement is added in subdivision (b) that the notice be received by "the particular office or branch office of the financial institution where the account is carried." This requirement is drawn from former Financial Code Section 852 and is consistent with other provisions of the Financial Code.

Subdivision (c) continues the substance of the fifth sentence of former Section 852 of the Financial Code and the fourth sentence of former Section 7603 of the Financial Code.

Subdivision (d) makes clear that the section does not affect the rights under Chapter 2 (commencing with Section 6103). In

connection with those rights, see Section 6105 (altering account to change form of account or to stop or vary payment under terms of account).

§ 6113. Set-off

6113. Unless such right is restricted by the account contract, if a party to a multiple-party account is indebted to a financial institution, the financial institution has, to the extent otherwise permitted under applicable law, a right to set-off against the account in which the party has or had immediately before his or her death a present right of withdrawal. The amount of the account subject to set-off is that proportion to which the debtor is, or was immediately before his or her death, beneficially entitled, and in the absence of proof of net contributions, to an equal share with all parties having present rights of withdrawal.

LAW REVISION COMMISSION COMMENT

Section 6113 is drawn from Section 6-113 of the Uniform Probate Code. Unlike the Uniform Probate Code provision, Section 6113 does not give a financial institution a right of set-off it did not have under prior law. Rather Section 6113 incorporates existing law with respect to set-off. See Fin. Code §§ 864 (bank set-off), 7609.5 (savings and loan association set-off); Kruger v. Wells Fargo Bank, 11 Cal. 3d 352, 357, 521 P.2d 441, 113 Cal. Rptr. 449 (1974) (right of set-off is "based upon general principles of equity").

Although the financial institution may not have a right of set-off in some cases under existing law, Section 6107 changes existing law to give a creditor (including a financial institution which is a creditor of the deceased party) access to such funds if the estate of the deceased party is not sufficient to pay the debt. See the Comment to Section 6107.

§ 6114. Payment of account held in trust form where financial institution has no notice that account is not a "trust account"

6114. The provisions of this chapter that apply to the payment of a trust account apply to an account in the name of one or more parties as trustee for one or more other persons if the financial institution has no other or further

notice that the account is not a trust account as defined in Section 6101.

LAW REVISION COMMISSION COMMENT

Section 6114 continues the substance of former Section 853 of the Financial Code which applied to banks, but extends the former provision to apply to all financial institutions (defined in Section 6101), including banks, savings and loan associations, and credit unions, except that the provision of former Section 853 concerning payment to a minor is superseded by Section 6116.

Section 6114 permits a financial institution to treat an account in trust form as a trust account (defined in Section 6101) if it is unknown to the financial institution that the funds on deposit are subject to a trust created other than by the deposit of the funds in the account in trust form. If the financial institution does not have the additional information, the financial institution is protected from liability if it pays the account as provided in this chapter. See Section 6112. However, Section 6114 does not affect the rights as between the parties to the account, the beneficiary, or their successors. See Sections 6102, 6103(c), and 6104(c).

§ 6115. Delay in payment after death

6115. (a) Except as provided in subdivision (b), notwithstanding any other provision of this chapter, whenever payment is authorized to be made to a P.O.D. payee, the heirs of a deceased original party to a P.O.D. account, a beneficiary of a trust account, or the heirs of a deceased trustee, the payment shall not be made until 60 days has elapsed since the death of the original party to the P.O.D. account or the trustee.

(b) Subdivision (a) does not apply if the payment is made to a person who is a spouse, minor or dependent child, executor, administrator, guardian, conservator, or other court-appointed fiduciary of the deceased original party to the P.O.D. account or of the deceased trustee.

LAW REVISION COMMISSION COMMENT

Section 6115 is new and is to afford time for the personal representative of the decedent to assert any claim against the account funds arising pursuant to Section 6107. When payment is made to a minor, payment must be made as provided in Sections 3400-3413. Section 6116.

§ 6116. Payment to minor

6116. If a financial institution is required or permitted to make payment pursuant to this chapter to a person who is a minor:

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

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

LAW REVISION COMMISSION COMMENT

Section 6116 is new; there is no comparable provision in Article VI of the Uniform Probate Code. Subdivision (a) of Section 6116 is consistent with Section 850 of the Financial Code but applies to all financial institutions, not merely banks. Subdivision (b) supersedes the last portion of former Section 853 of the Financial Code (direct payment to minor beneficiary permitted on death of trustee), and substitutes the protective provisions of Sections 3400-3413 of the Probate Code.

§ 6117. Revenue and Taxation Code provisions not affected

6117. Nothing in this division affects or limits any provision of the Revenue and Taxation Code.

Comment. Section 6117 is included to make clear that payment of accounts under this division is subject to the provisions of the Revenue and Taxation Code.

PART 2. DISPOSITIVE PROVISIONS IN WRITTEN INSTRUMENTS

§ 6201. Dispositive provisions in written instruments

6201. (a) Any of the following provisions in an insurance policy, contract of employment, bond, mortgage,

promissory note, deposit agreement, pension or profit-sharing plan, trust agreement, conveyance or any other written instrument effective as a contract, gift, conveyance, or trust is not invalid because the instrument is not executed with the formalities of a will, and this code does not invalidate the instrument or any of the following provisions:

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

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

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

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

LAW REVISION COMMISSION COMMENT

Section 6201 is the same in substance as Section 6-201 of the Uniform Probate Code. The Uniform Probate Code language that the provisions referred to in this section are "deemed to be nontestamentary" has been replaced by the language making them "not invalid because the instrument is not executed with the formalities of a will." See generally 7 B. Witkin, Summary of California Law *Wills and Probate* § 113, at 5628 (8th ed. 1974). This change is nonsubstantive.

Paragraphs (1) and (3) of subdivision (a) may expand California law with respect to the kinds of transfers on death which are valid. For example, although the question has not been decided in California, most courts treat as testamentary and therefore invalid a provision in a promissory note that on the payee's death the note shall be paid to another person. Comment to Uniform Probate Code Section 6-201. However, a contractual

provision has been upheld that should the owner of a business predecease the manager, the manager would receive the business, on the theory that it was additional compensation to the manager and could not be severed from the remainder of the agreement. Estate of Howe, 31 Cal.2d 395, 189 P.2d 5 (1948). Also, the payment of employee death benefits to a designated beneficiary has long been statutorily recognized in California. See, *e.g.,* Gov't Code §§ 21332-21335 (public employees' death benefits). See also Civil Code § 704 (payable-on-death designations in United States bonds and obligations).

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

UNIFORM PROBATE CODE COMMENT

This section authorizes a variety of contractual arrangements which have in the past been treated as testamentary. For example most courts treat as testamentary a provision in a promissory note that if the payee dies before payment is made the note shall be paid to another named person, or a provision in a land contract that if the seller dies before payment is completed the balance shall be cancelled and the property shall belong to the vendee. These provisions often occur in family arrangements. The result of holding the provisions testamentary is usually to invalidate them because not executed in accordance with the statute of wills. On the other hand the same courts have for years upheld beneficiary designations in life insurance contracts. Similar kinds of problems are arising in regard to beneficiary designations in pension funds and under annuity contracts. The analogy of the power of appointment provides some historical base for solving some of these problems aside from a validating statute. However, there appear to be no policy reasons for continuing to treat these varied arrangements as testamentary. The revocable living trust and the multiple-party bank accounts, as well as the experience with United States government bonds payable on death to named beneficiaries, have demonstrated that the evils envisioned if the statute of wills is not rigidly enforced simply do not materialize. The fact that these provisions often are part of a business transaction and in any event are evidenced by a writing tends to eliminate the danger of "fraud."

Because the types of provisions described in the statute are characterized as nontestamentary, the instrument does not have to be executed in compliance with Section 2-502; nor does it have to be probated, nor does the personal representative have any power or duty with respect to the assets involved.

The sole purpose of this section is to eliminate the testamentary characterization from the arrangements falling within the terms of the section. It does not invalidate other arrangements by negative implication. Thus it is not intended by this section to embrace oral trusts to hold property at death for named persons; such arrangements are already generally enforceable under trust law.

Operative date

SEC. 17. This act shall become operative on January 1, 1983, and it shall apply to accounts in existence on that date and accounts thereafter established.

LAW REVISION COMMISSION COMMENT

Section 16 is drafted on the assumption that this act will become effective on January 1, 1982. The operative date is delayed until January 1, 1983, so that financial institutions will have time to take any necessary action to operate under the provisions of the act and so persons who have accounts in existence on the effective date (January 1, 1982) will have time to make any changes in the deposit agreement that they believe are desirable in view of the enactment of this act.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Revision of the Powers of Appointment Statute

December 1980

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

NOTE

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

Cite this recommendation as *Recommendation Relating to Revision of the Powers of Appointment Statute,* 15 CAL. L. REVISION COMM'N REPORTS 1667 (1980).

CALIFORNIA LAW REVISION COMMISSION

4000 Middlefield Road, Room D-2
Palo Alto, CA 94306
(415) 494-1335

December 1, 1980

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

The present California statute governing powers of appointment was enacted in 1969 upon recommendation of the Law Revision Commission. See *Recommendation and a Study Relating to Powers of Appointment,* 9 Cal. L. Revision Comm'n Reports 301 (1969). See also *Background Statement Concerning Reasons for Amending Statute Relating to Powers of Appointment,* 14 Cal. L. Revision Comm'n Reports 257 (1978).

The Commission has received a number of suggestions for revision of the powers of appointment statute. This recommendation is the result of a study of these suggestions and is submitted pursuant to Resolution Chapter 19 of the Statutes of 1979.

The Commission wishes to acknowledge the assistance of Professors James L. Blawie, Jesse Dukeminier, Susan F. French, Jerry A. Kasner, and Richard Powell. They submitted suggestions for revision of the statute and assisted the Commission in the preparation of this recommendation.

Respectfully submitted,

BEATRICE P. LAWSON
Chairperson

CONTENTS

RECOMMENDATION

relating to

REVISION OF THE POWERS OF APPOINTMENT STATUTE

BACKGROUND[1]

Powers of appointment have been aptly described as one of the most useful and versatile devices available in estate planning. A power of appointment is a power conferred by the owner of property (the "donor") upon another person (the "donee") to designate the persons ("appointees") who will receive the property at some time in the future. A power of appointment is frequently included in an inter vivos or testamentary trust. In the typical situation, the creator of the trust transfers property in trust for the benefit of a designated person during that person's lifetime with a provision that, upon the death of the life beneficiary, the remaining property shall be distributed in accordance with an "appointment" made by the life beneficiary or, occasionally, by the trustee or another person.

Use of a power of appointment makes possible a disposition reaching into the future but with a flexibility that can be achieved in no other way. When a husband leaves his property in trust for the benefit of his wife during her lifetime and, upon her death, to such of their children and in such proportions as his wife may appoint, he makes it possible for the ultimate distribution to be made in accordance with changes that occur between the time of his death and the time of his wife's death. He has limited the benefits of his property to the objects of his bounty, but he has also permitted future distributions of principal and income to take account of changes in the needs of beneficiaries which he could not possibly have foreseen. Births, deaths, financial successes and failures, varying capacities of individuals, and fluctuations in income and

[1] This portion of this recommendation is drawn from the prior Commission recommendation that led to the enactment of the present California statute on powers of appointment. See *Recommendation and a Study Relating to Powers of Appointment*, 9 Cal. L. Revision Comm'n Reports 301, 307-08 (1969).

property values can all be taken into account at the time of appointment. Moreover, the limitations imposed by the donor on the manner of exercising the power and the persons to whom appointments can be made give him substantial control of the property after he has transferred the power. He can make the power exercisable during the lifetime of the donee (a power that is "presently exercisable" or one that is "postponed" until a stated event during the lifetime of the donee), or he can make the power exercisable only by will ("testamentary power"). He may permit the donee to appoint only among a specified group of persons, such as their children ("special power"), or he may create a broad power permitting the donee to appoint without limitation as to permissible appointees or to a group that includes the donee, her estate, her creditors, or creditors of her estate ("general power").

The most common use of powers today is in connection with the so-called marital deduction trust. Under this arrangement, the husband, for example, leaves his wife a sufficient portion of his estate to obtain full benefit of the marital deduction. She is given a life interest in such portion together with an unrestricted power to appoint the remainder, with a further provision in case she does not exercise the power. The transfer takes advantage of the marital deduction[2] and yet, where the power of appointment may be exercised only by will, insures that the property will be kept intact during the wife's lifetime.

If, on the other hand, the husband does not want to permit the wife to appoint the property to herself or her estate, he may give her a life estate with a power to appoint among only a small group of persons such as their children. In this case, the transfer is not eligible for the marital deduction but the husband has been able to direct the future disposition of the property; it must be kept intact during the wife's lifetime and, at her death, her right to dispose of the property is restricted to the appointees designated by the husband. Ownership of the special power of appointment does not subject the appointive property to taxation in the donee's estate.[3] Prior to the enactment of

[2] A life estate coupled with a general power of appointment—testamentary or presently exercisable—will qualify for the marital deduction. I.R.C. § 2056(b)(5); Rusoff, *Powers of Appointment and Estate Planning*, 10 J. Fam. L. 443, 456-57 (1971).

[3] I.R.C. § 2041.

the Tax Reform Act of 1976,[4] a special power of appointment was frequently used in connection with generation-skipping to avoid the so-called "second tax."[5] The impact of the generation-skipping tax of the Tax Reform Act of 1976[6] on the use of special powers of appointment has not yet been determined.[7]

A power of appointment also may be used to accomplish other objectives. One common use of the power in modern times is to give the surviving spouse some degree of control over the conduct of the children after the death of the other spouse. For instance, the Commission is advised[8] that a common provision in wills drafted by neighborhood law offices gives the surviving spouse a life estate in the dwelling house and gives the children the remainder, subject to a general power in the surviving spouse to appoint or consume as the surviving spouse sees fit. This provides the surviving spouse with protection against unexpected illness and debts, permits the property to pass to the children if they give care and attention to the surviving spouse, and permits the surviving spouse to exercise the power to cut off some or all of the children if so inclined. Such a provision is included in a will on the belief that, with this provision, the children will be solicitous of the surviving spouse, and without it, the surviving spouse will be neglected by the children.

RECOMMENDATIONS

Exercise of Power of Appointment by Residuary Clause or Other General Disposition in Donee's Will

Under existing law,[9] a residuary clause or other general language of disposition in the donee's will exercises a

[4] Pub. L. No. 94-455, 90 Stat. 1520 (1976).

[5] See A. Casner, 3 Estate Planning 1261 (4th ed. 1980); Coleman, *The Special Power of Appointment in Estate Planning*, 109 Tr. & Est. 920 (1970).

[6] I.R.C. §§ 2601-2622.

[7] "Powers of appointment will continue to be used in marital deduction trusts; and it seems likely that they will increasingly be used in other kinds of trusts, as a result of the enactment of the generation-skipping tax in the Tax Reform Act of 1976." French, *Exercise of Powers of Appointment: Should Intent to Exercise be Inferred From a General Disposition of Property?* 1979 Duke L.J. 747, 802 n.276.

[8] Letter from Professor James L. Blawie to John H. DeMoully (Dec. 1, 1980) (on file in office of California Law Revision Commission).

[9] Civil Code § 1386.2.

general power of appointment unless a contrary intent appears. The Uniform Probate Code provides the opposite rule. Under the Uniform Probate Code, a general residuary clause or other general disposition in a will does not exercise a power of appointment unless there is an indication of intention to include the property subject to the power under the will.[10] The existing California rule has been criticized by legal scholars,[11] and a number of states that formerly followed the rule have abandoned it.[12]

The Commission recommends that the substance of the Uniform Probate Code provision be substituted for the existing California rule. Adopting the Uniform Probate Code rule—that a general disposition or residuary clause, without more, does not exercise a power—will make California law consistent with that of the majority of other states.[13] There is a need for uniformity among the various states.[14] But a more important reason for changing the

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[10] Uniform Probate Code § 2-610.

[11] See French, *Exercise of Powers of Appointment: Should Intent to Exercise be Inferred From a General Disposition of Property?* 1979 Duke L.J. 747. Professor Jesse Dukeminier of U.C.L.A. Law School has also suggested that the existing California rule should be changed. Letter from Jesse Dukeminier to John H. DeMoully (Feb. 19, 1980) (on file in office of California Law Revision Commission).

[12] French, *Exercise of Powers of Appointment: Should Intent to Exercise be Inferred From a General Disposition of Property?* 1979 Duke L.J. 747, 792. "Since 1965 nineteen states have enacted statutes that address the question whether a general disposition or residuary clause in the donee's will exercises a power of appointment. All of these statutes, except those of New York and California, adopt the basic premise of the common law, that a general disposition or residuary clause, without more, does not exercise a power." *Id.* (footnotes omitted.)

[13] See French, *Exercise of Powers of Appointment: Should Intent to Exercise be Inferred From a General Disposition of Property?* 1979 Duke L.J. 747, 753-54 (survey of law in the 50 states).

[14] "The variety and complexity of the rules applied by the various states, when combined with the likelihood that the donee's attorney will not correctly anticipate which state's law will be applied, have created a situation that inevitably breeds litigation, frustrates expectations of beneficiaries, and provides ample opportunity for legal malpractice. The costs imposed by the variety of state rules clearly outweigh any possible advantages derived from their diversity. Given the mobility of today's population, the increasing emphasis on reducing the transaction costs in transmitting property at death, and the increasing use of powers of appointment, a better approach must be found. The only satisfactory solution will be a single rule that gives maximum opportunity to carry out the actual intent of the donee, applied uniformly throughout the United States. A uniform act would be ideal." French, *Exercise of Powers of Appointment: Should Intent to Exercise be Inferred From a General Disposition of Property?* 1979 Duke L.J. 747, 802 (footnotes omitted). The drafters of the Uniform Probate Code generally avoided any provisions relating to powers of appointment. However, Section 2-610 of the Uniform Probate Code was included because "there is a great need for uniformity on the subject of exercise by a will purporting to dispose of all of the donee's property, whether by a standard residuary clause or a general recital of property passing under the will." See Comment to Section 2-610 of the Uniform Probate Code.

existing California rule is that it may operate to upset a carefully drafted estate plan. Professor French summarizes the problem created by the existing rule:[15]

> Since 1948, the year the marital deduction was enacted, estate plans of married people have commonly included a marital deduction trust. This kind of trust, designed to secure the marital deduction without transferring property outright to the surviving spouse, gives the surviving spouse a life estate and a general testamentary power of appointment over the remainder. The primary purpose of creating the power is to qualify the property for the marital deduction, not to provide the surviving spouse with the power to dispose of the property by her will. In such estate plans the donor intends that the clause in default of appointment control devolution of the property, and that the donee will refrain from exercising the power. Statutes providing that the residuary clause or other general disposition in the donee's will exercises a power can wreak havoc on these estate plans.[16]

Release of Power of Appointment

Release of power of appointment not presently exercisable. A donor may give the donee a testamentary or postponed power. For example, the creating instrument may permit the power to be exercised only by the will of the donee or may provide that the donee may appoint only after all of their living children reach 21 years of age. By giving the testamentary or postponed power to the donee, the donor expresses the desire that the donee's discretion be retained until the donee's death or such other time as is stipulated. To allow the donee to contract to appoint under a testamentary or postponed power would permit the donor's intent to be defeated. Accordingly, the existing statute includes an express provision that the donee of a power of appointment cannot contract to make an

[15] French, *Exercise of Powers of Appointment: Should Intent to Exercise be Inferred From a General Disposition of Property?* 1979 Duke L.J. 747, 791 (footnotes omitted).

[16] It should be noted, however, that the creating instrument can avoid this problem by an express requirement that the instrument of appointment make a specific reference to the power or to the instrument that created the power. See Civil Code § 1385.2.

appointment while the power of appointment is not presently exercisable and makes unenforceable a promise to make such an appointment.[17]

Consistent with the provision relating to contracts to appoint, the existing statute also provides that no release of a power is permissible "when the result of the release is the present exercise of a power that is not presently exercisable."[18] This rule preventing release of a testamentary or postponed power is designed to prevent the donor's intent from being nullified by the use of a release. "Otherwise, a release as to all persons except a designated person would permit the donee, in effect, to exercise by an inter vivos act a power which the creator of the power intended to remain unexercised until the donee's death"[19] or until the time specified in the creating instrument when the power becomes exercisable.

The absolute prohibition against release of a power of appointment not presently exercisable should be contrasted with the existing rule on disclaimer of a power of appointment. Existing Probate Code provisions permit the donee to make a disclaimer of a power of appointment, whether or not presently exercisable.[20] By exercising the right of disclaimer, the donee may be able to avoid undesired tax consequences.[21] But the right of disclaimer exists only for a limited time.[22] If the disclaimer is not made within the time prescribed, the donee may under some circumstances avoid undesired tax consequences if the donee is permitted to release the testamentary or postponed power. There are other circumstances where it may be necessary to release a testamentary or postponed power. For example, in connection with a marriage dissolution settlement agreement, a spouse may be willing to waive support for the children if the other spouse releases a testamentary or postponed power of

[17] Civil Code § 1388.1.

[18] Civil Code § 1388.2(b).

[19] Comment to Civil Code § 1388.2.

[20] See Prob. Code §§ 190(a)(8), 190.1.

[21] See Kasner, *Disclaimers as an Estate Planning Tool: Are the Proposed Regulations Contrary to Congressional Intent and the Expectations of Practitioners and Their Clients?* 1980 CEB Est. Plan. & Cal. Prob. L. Rep. 21.

[22] See Prob. Code § 190.3.

appointment to assure that the appointive property will vest in the children.

In recognition that there are circumstances when a release should be permitted, the Commission recommends that Civil Code Section 1388.2 be amended to eliminate the absolute prohibition on release of a power that is not presently exercisable and to substitute a provision—taken from the New York powers of appointment statute[23] —that no release of a power that is not presently exercisable is permissible "where the donor designated persons or a class to take in default of the donee's exercise of the power" unless the release serves to "benefit all those so designated as provided by the donor." This new provision prevents the donee under the guise of a release from benefiting certain of the takers in default at the expense of the others.

The effect of this change on the three basic kinds of testamentary powers can be summarized as follows:

(1) *The imperative power.* A power of appointment is "imperative" when the creating instrument manifests an intent that the permissible appointees be benefited even if the donee fails to exercise the power.[24] If the power is imperative, the donee must exercise it or the court will divide the appointive property among the potential appointees.[25] An imperative power may not be released.[26]

(2) *The special power.* A power is classified as a "special" power where the donor establishes specific persons or a class among whom the donee is to appoint.[27] Ordinarily, the donee is given discretion to appoint to one, all, or some of the class, and there is a gift over in case of default, the class commonly being those to whom the donee could have appointed. Under the amendment recommended by the Commission, this power could be

[23] N.Y. Est., Powers & Trusts Law § 10-5.3(b) (McKinney) (Supp. 1980-81). The New York statute permits a release of a power of appointment which is not presently exercisable, but a 1977 amendment (1977 N.Y. Laws ch. 341, § 1) added the provision to assure that the release will benefit all the takers in default as provided by the donor.

[24] Civil Code § 1381.4.

[25] See Civil Code §§ 1381.4, 1389.2.

[26] See Civil Code § 1388.2.

[27] See Civil Code § 1381.2. A power is general, not special, if the donee can appoint to the donee, creditors of the donee, the donee's estate, or creditors of the donee's estate. *Id.*

released even though not presently exercisable, but the release is permitted only if it serves to benefit all those designated as takers in default as provided by the donor.

(3) *The general power.* The donee of a "general" power ordinarily may appoint to anyone the donee chooses,[28] and a default class may be specified in case the power is not effectively exercised. Under the amendment recommended by the Commission, this power could be released even though not presently exercisable, but the release is permitted where a default class is specified only if the release serves to benefit all those designated as takers in default as provided by the donor.

This summary of the effect of the proposed amendment demonstrates that the amendment will give needed flexibility to the release provision of the existing statute and, at the same time, will prevent the abuses possible if there were no limit on a release of a power not presently exercisable. The proposed limit on release of a power not presently exercisable diminishes the donee's power to bargain for his own advantage and limits the donee's ability to use the power to place undue pressure on one or more of the takers in default.

Release of power of appointment of minor donee. Under existing law, a minor donee may not exercise a power of appointment during minority unless the creating instrument otherwise provides.[29] Yet, to avoid unfavorable tax consequences, it may be desirable to disclaim or release a power of appointment of a minor donee. Existing law permits the guardian of the estate of a minor donee to disclaim any interest (including a power of appointment) which would otherwise be succeeded to by a minor.[30] Since the right of disclaimer exists for only a limited time,[31] it may sometimes be necessary to release a power where the disclaimer was not made within the time allowed. But there is no provision in existing law for the release of the minor donee's power of appointment.

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[28] See Civil Code § 1381.2.

[29] Civil Code § 1384.1(b).

[30] Prob. Code §§ 190(a)(8), 190.2.

[31] See Prob. Code § 190.3.

The Commission recommends that a provision be added to the powers of appointment statute to authorize the guardian of the estate of a minor donee to release a power of appointment in whole or in part. The recommended procedure is comparable to that provided in the new guardianship-conservatorship statute for obtaining a court order authorizing or requiring the conservator of the estate to exercise or release a power of appointment for a conservatee donee.[32] The recommended provision authorizes the court to order that the power be released in whole or in part. It does not authorize the court to order that the power be exercised on behalf of the minor; the minor can exercise it when the minor reaches majority.

Ineffective Appointments: Capture Doctrine

Under the existing statute,[33] the general rule is that when the donee of a discretionary power of appointment fails to make an effective appointment, the appointive property not effectively appointed passes to the takers in default or, if there are none, reverts to the donor. This general rule is subject to two statutory exceptions that apply the doctrine of capture in favor of the donee or the donee's estate when the donee of a general power of appointment makes an ineffective appointment:

(1) If the donee appoints to a trustee upon a trust which fails, there is a resulting trust in favor of the donee or the donee's estate.[34]

(2) In other cases, the appointive property passes to the donee or the donee's estate "if the instrument of appointment manifests an intent to assume control of the appointive property for all purposes and not for the limited purpose of giving effect to the expressed appointment."[35]

There are two problems created by the provisions of the existing statute that state the "capture" doctrine. First, the appointment to a trustee calls for the application of the capture doctrine automatically while an appointment to anyone else does not. This distinction is based on a doubtful

[32] Prob. Code §§ 2580-2586.

[33] Civil Code § 1389.3.

[34] This rule does not apply if either the creating instrument or the instrument of appointment manifests a contrary intent. Civil Code § 1389.3(b).

[35] This rule does not apply if the creating instrument manifests a contrary intent. Civil Code § 1389.3(c).

assumption that the donee intends to have property pass to his or her estate when the appointment is on a trust that fails but does not when the appointment is outright and fails. The Commission recommends that the existing rules stating the capture doctrine be replaced by a uniform provision that "an implied alternative appointment to the donee's estate may be found if the donee has manifested an intent that the appointive property be disposed of as property of the donee rather than as in default of appointment." This standard would require a manifestation of intent to make an alternative appointment to the donee's estate and would apply whether the ineffective appointment is made to a trustee or another.[36]

The second problem with the existing statutory provision is that it limits the evidence of intent to "capture" the appointive assets to the instrument of appointment. This limitation is unduly restrictive and may operate to defeat an intent that can be clearly established by extrinsic evidence. Accordingly, the Commission recommends that the requirement that the evidence of intent be contained in the instrument of appointment be eliminated. This change is consistent with the rule that permits use of extrinsic evidence to find an intent to exercise a power of appointment.[37]

Antilapse Provisions

A provision of the existing powers of appointment statute prevents the lapse of an appointment to a "kindred" of the donee but does not prevent the lapse of an appointment to someone unrelated to the donee.[38] To apply the antilapse

[36] The proposed standard will eliminate a troublesome problem in determining the meaning of the phrase "intent to assume control . . . for *all* purposes" (emphasis added) in subdivision (c) of Civil Code Section 1389.3. The donee may not intend to make the property available to creditors, or for administration in his or her estate, but this lack of intent to assume control of the appointive property for "all" purposes should not necessarily prevent a determination that the donee would have preferred that the property pass under his or her residuary clause rather than passing in default of appointment.

[37] See Civil Code § 1386.1. See also discussion in text accompanying notes 9-16 *supra* concerning the exercise of a power of appointment by a residuary clause or other general disposition in the donee's will.

[38] See Civil Code § 1389.4. Civil Code Section 1389.4 requires the appointment to be effectuated, if possible, by applying the provisions of Section 92 of the Probate Code (the antilapse statute) "as though the appointive property were the property of the donee." Section 92 of the Probate Code provides that when the estate is devised or bequeathed to any "kindred" of the testator and the devisee or legatee dies before

statute to prevent the lapse of appointments to kindred of the donee while refusing to apply it to prevent the lapse of appointments to anyone else is more likely to defeat the donee's intent than to carry it out. For example, a spouse of the donee is not the donee's kindred within the meaning of the antilapse statute.[39] Hence, a testamentary appointment to the donee's spouse will lapse if the spouse dies before the donee. Thus, there is a likelihood that the donee's children will receive no share of the appointive property.[40] Similarly, a testamentary appointment to a brother, sister, nephew, or niece of the donee's spouse will lapse if any such appointee dies before the donee; the children of any such deceased appointee will likely receive no share of the appointive property. Such a result is probably inconsistent with the donee's intent, particularly where the donee has been married for a long time and has had an opportunity to develop close relationships with the spouse's relatives.

Accordingly, the Commission recommends that existing antilapse provisions relating to power of appointment be revised to provide that, when a testamentary appointment is made to a person who was alive at the time the creating instrument was executed but who dies before the donee, the appointive property passes to the appointee's issue (if any) who survive the donee. This rule would not apply if the creating instrument or the instrument of appointment manifests a contrary intent.

A related problem is whether the donee may appoint to the issue of a permissible appointee under a special power of appointment even though the permissible appointees as

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the testator, the estate goes to lineal descendants of the devisee or legatee who survive the testator. It has been said that the effect of this provision is to prevent lapse of a testamentary appointment to relatives of the donee of the power, but not to prevent lapse of a testamentary appointment to relatives of the donor. French, *Application of Antilapse Statutes to Appointments Made by Will,* 53 Wash. L. Rev. 405, 432 (1978).

[39] As used in Section 92 of the Probate Code, the term "kindred" means a blood relative. 7 B. Witkin, Summary of California Law *Wills and Probate* § 226, at 5737 (8th ed. 1974); *cf. In re* Estate of Sowash, 62 Cal. App. 512, 217 P. 123 (1923) (construing term "relation" in earlier antilapse statute to exclude testator's spouse); Estate of Goulart, 222 Cal. App.2d 808, 819-24, 35 Cal. Rptr. 465 (1963) ("kindred" normally means biological relative).

[40] If an appointment lapses, the appointive property will pass under an express or implied provision in the creating instrument which is to be effective in default of appointment, by the residuary clause of the donor's will, or by intestacy from the donor. French, *Application of Antilapse Statutes to Appointments Made by Will,* 53 Wash. L. Rev. 405, 407 n.9 (1978).

designated in the creating instrument do not include such issue.[41] Suppose the donor creates a special power of appointment that permits the donee to appoint to John, Mary, and George, the three children of the donor. After the creating instrument is executed but before the power of appointment is exercised, George dies leaving a child. George having died, can the donee appoint any of the appointive property to the child of George? The Commission recommends that a new provision be added to the powers of appointment statute to make clear that where a permissible appointee under a special power of appointment dies before the power is exercised, the class of permissible appointees is expanded to include the issue of the deceased permissible appointee. This rule is likely to be what the donor would have wanted had the donor considered the possibility that one of the permissible appointees would die (leaving issue) before the power was exercised. The rule would not apply if the creating instrument provides otherwise.

Recordation

Under existing law, provision is made for the recording of a disclaimer of a power of appointment that affects real property. The disclaimer shall be acknowledged and proved, and may be certified and recorded, in like manner and with like effect as grants of real property, and all statutory provisions relating to the recordation or nonrecordation of conveyances of real property and to the effect thereof apply to the disclaimer with like effect. The validity of the recorded disclaimer is not affected by the failure to file the disclaimer as otherwise required by statute with the superior court in which the estate is being administered or with the trustee or with the person creating the interest; and, if the disclaimer is so filed, the effect of recording is not affected by the date of the filing.[42]

The provision governing the recording of a release of a power of appointment affecting real property is inconsistent with the provision governing disclaimers.

[41] For a discussion of this problem, see French, *Application of Antilapse Statutes to Appointments Made by Will*, 53 Wash. L. Rev. 405, 428-31 (1978).

[42] Prob. Code § 190.4.

Where the creating instrument has been previously recorded or where the creating instrument is a will and the order or decree of distribution has been previously recorded, the existing statute provides that no power of appointment affecting real property shall be terminated as to the appointive property until the release has been recorded.[43] This provision appears to require recording of the release in order to make an effective release.

The Commission recommends that the provision governing releases be revised to make it consistent with the provision governing recording of disclaimers.

Technical and Clarifying Changes

The Commission also recommends that revisions be made in the existing statute to make clear that, where a creditor of the donee has a right to reach property subject to a power of appointment, this right extends to a person to whom the donee owes an obligation to support to the extent of that obligation. A few other technical revisions are made in the recommended legislation. These revisions are explained in more detail in the Comments that accompany the relevant sections of the recommended legislation.

RECOMMENDED LEGISLATION

An act to amend Sections 1388.2, 1389.3, 1389.4, and 1390.1 of, to add Sections 1386.2, 1388.3, 1389.5, and 1390.5 to, and to repeal Section 1386.2 of, the Civil Code, relating to powers of appointment.

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

§ 1386.2 (repealed). Exercise by residuary clause or general disposition in donee's will

SECTION 1. Section 1386.2 of the Civil Code is repealed.

~~1386.2. A general power of appointment exercisable at the death of the donee is exercised by a residuary clause or other general language in the donee's will purporting to~~

[43] Civil Code § 1388.2(d).

~~dispose of the property of the kind covered by the power unless:~~

~~(a) The creating instrument requires that the donee make a specific reference to the power or to the instrument that created the power; or~~

~~(b) The donee manifests an intent, either expressly or by necessary inference, not to so exercise the power.~~

Comment. Section 1386.2 is superseded by new Section 1386.2.

§ 1386.2 (added). Exercise by residuary clause or general disposition in donee's will

SEC. 2. Section 1386.2 is added to the Civil Code, to read:

1386.2. A general residuary clause in a will, or a will making general disposition of all of the testator's property, does not exercise a power of appointment held by the testator unless specific reference is made to the power or there is some other indication of intention to exercise the power.

Comment. Section 1386.2, which adopts the substance of Section 2-610 of the Uniform Probate Code, supersedes former Section 1386.2. Former Section 1386.2 provided that a general power of appointment was exercised by a residuary clause or other general language of the donee's will purporting to dispose of property of the kind covered by the power unless the creating instrument otherwise required or the donee manifested an intent not to exercise the power. Under new Section 1386.2, a power of appointment is not exercised unless there is some manifestation of intent to exercise the power. A general residuary clause or disposition of all of the testator's property, alone, is not such a manifestation of intent.

The change made by the repeal of the former section and enactment of the new section recognizes the need for a uniform rule on the question and the fact that donees today may frequently intend that assets subject to a power pass to the takers in default, particularly assets held in a marital deduction trust. See Comment to Section 2-610 of the Uniform Probate Code; French, *Exercise of Powers of Appointment: Should Intent to Exercise Be Inferred From A General Disposition of Property?* 1979 Duke L.J. 747.

Under Section 1386.2, a general disposition of property in the donee's will may exercise a power of appointment if there is

some other indication of intent to include the appointive assets in the disposition made. Such other indication of intent to exercise the power may be found in the will or in other evidence apart from the will. Section 1386.1 sets forth a nonexclusive listing of types of evidence that indicate an intent to exercise a power of appointment. See also Prob. Code § 105. An exercise of a power of appointment may be found if a preponderance of the evidence indicates that the donee intended to exercise the power. See Bank of New York v. Black, 26 N.J. 276, 286-87, 139 A.2d 393, 398 (1958). Section 1386.2 does not apply where the donor has conditioned the exercise of the power on a specific reference to the power or to the instrument that created the power or has specified a specific method of exercise of the power. See Sections 1385.1, 1385.2.

§ 1388.2 (amended). Release of discretionary power

SEC. 3. Section 1388.2 of the Civil Code is amended to read:

1388.2. (a) Unless the creating instrument otherwise provides, any general or special power of appointment that is a discretionary power, whether testamentary or otherwise, may be released, either with or without consideration, by written instrument signed by the donee and delivered as provided in subdivision (c).

(b) Any releasable power may be released with respect to the whole or any part of the appointive property and may also be released in such manner as to reduce or limit the permissible appointees. No partial release of a power shall be deemed to make imperative the remaining power that was not imperative before such release unless the instrument of release expressly so provides. No release of a power *that is not presently exercisable* is permissible ~~when the result of the release is the present exercise of a power that is not presently exercisable~~ *where the donor designated persons or a class to take in default of the donee's exercise of the power unless the release serves to benefit all those so designated as provided by the donor*.

(c) A release shall be delivered as provided in this subdivision:

(1) If the creating instrument specifies a person to whom a release is to be delivered, the release shall be

delivered to that person but delivery need not be made as provided in this paragraph if such person cannot with due diligence be found.

(2) In any case where the property to which the power relates is held by a trustee, the release shall be delivered to such trustee.

(3) In a case not covered by paragraph (1) or (2), the release may be delivered to any of the following:

(i) Any person, other than the donee, who could be adversely affected by the exercise of the power.

(ii) The county recorder of the county in which the donee resides or in which the deed, will, or other instrument creating the power is filed.

~~(d) No power of appointment affecting real property, where the creating instrument has been previously recorded or where the creating instrument was a will and the order or decree of distribution has been previously recorded, shall be terminated, in whole or in part, as to such appointive real property by the execution of a release of such power until such release is recorded in the office of the county recorder of the county in which such appointive real property is located.~~

(d) A release of a power of appointment which affects real property or obligations secured by real property shall be acknowledged and proved, and may be certified and recorded, in like manner and with like effect as grants of real property, and all statutory provisions relating to the recordation or nonrecordation of conveyances of real property and to the effect thereof shall apply to such release with like effect, without regard to the date when the release was delivered, if at all, pursuant to subdivision (c). Failure to deliver pursuant to subdivision (c) a release which is recorded pursuant to this subdivision shall not affect the validity of any transaction with respect to such real property or obligation secured thereby, and the general laws of this state on recording and its effect shall govern any such transaction.

(e) This section does not impair the validity of any release made prior to July 1, 1970.

Comment. Subdivision (b) of Section 1388.2 is amended to impose the requirement that, where the donor designated persons or a class to take in default of the donee's exercise of the power, a release of a power that is not presently exercisable must serve to benefit all those so designated as provided by the donor. This new requirement is substituted for the deleted portion of the last sentence of subdivision (b) which provided that no release of a power was permissible when the result of the release was the present exercise of a power that was not presently exercisable. The deleted language might have been interpreted to prevent the release of a testamentary power and served as a trap that might upset a release made for tax reasons or in a marriage dissolution settlement. The substituted language is taken from New York Estate, Powers & Trusts Law § 10-5.3(b), added in 1977, and is necessary to ensure that the release of a power not presently exercisable does not defeat the donor's intent by benefiting some but not all of the takers in default.

Subdivision (d) of Section 1388.2 is amended to substitute language drawn from Probate Code Section 190.4 (disclaimer of power of appointment affecting real property) for the former language. This substitution avoids the possible construction of the former language that the release was not effective to terminate the power of appointment unless recorded. At the same time, the new language makes clear that a subsequent purchaser or encumbrancer, in good faith and for a valuable consideration, who first records is protected. See Civil Code § 1214. The unrecorded instrument is valid as between the parties thereto and those who have notice thereof if the instrument is otherwise effective. See Civil Code § 1217.

§ 1388.3 (added). Release by guardian on behalf of minor donee

SEC. 4. Section 1388.3 is added to the Civil Code, to read:

1388.3. (a) A release on behalf of a minor donee shall be made by the guardian of the estate of the minor pursuant to an order of court obtained under this section.

(b) The guardian or other interested person may file a petition with the court in which the guardianship of the estate proceeding is pending for an order of the court authorizing or requiring the guardian to release the ward's powers as a donee of a power of appointment in whole or in part.

(c) Notice of the hearing on the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1 of Division 4 of the Probate Code to all of the following (other than the petitioner or persons joining in the petition):

(1) The persons required to be given notice under Chapter 3 (commencing with Section 1460) of Part 1 of Division 4 of the Probate Code.

(2) The donor of the power if alive.

(3) The trustee if the property to which the power relates is held by a trustee.

(4) Such other persons as the court may order.

(d) After hearing, the court in its discretion may make an order authorizing or requiring the guardian to release on behalf of the ward any general or special power of appointment as permitted under Section 1388.2 if the court determines, taking into consideration all the relevant circumstances, that the ward as a prudent person would make the release of the power of appointment if the ward had the capacity to do so.

(e) Nothing in this section imposes any duty on the guardian to file any petition under this section, and the guardian is not liable for failure to file a petition under this section.

Comment. Section 1388.3 is a new provision that provides a procedure for the release of a general or special power of a minor donee. The extent to which a general or special power of a minor donee may be released is determined by Section 1388.2. Although former law contained no provision for release of the power of a minor donee, the guardian of the estate of a minor donee could make a disclaimer of an interest (including a power of appointment) which would otherwise be succeeded to by a minor. Prob. Code § 190.2. The court in which a conservatorship proceeding is pending has authority to make an order authorizing or requiring the conservator on behalf of the conservatee to exercise or release the conservatee's powers as donee of a power of appointment. See Prob. Code §§ 2580-2586. Section 1388.3 gives the court in which the guardianship proceeding is pending authority to make an order authorizing or requiring the guardian to release the ward's powers as donee of

a power of appointment, but the court is not authorized to order an exercise of the power of appointment. Section 1384.1 provides that a minor donee may not exercise a power of appointment during minority unless the creating instrument otherwise provides. The court may make an order authorizing or requiring the guardian to release the power of appointment only if the court determines, taking into consideration all the relevant circumstances, that the ward as a prudent person would release the power if the ward had the capacity to do so. For example, to avoid unfavorable tax consequences, it may be desirable that the power of appointment be disclaimed or released in whole or in part.

§ 1389.3 (amended). Discretionary powers

SEC. 5. Section 1389.3 is amended to read:

1389.3. (a) Except as provided in ~~subdivisions (b) and (c)~~ *subdivision (b)*, when the donee of a discretionary power of appointment fails to appoint the property, releases the entire power, or makes an ineffective appointment, in whole or in part, the appointive property not effectively appointed passes to the person or persons named by the donor as takers in default or, if there are none, reverts to the donor.

~~(b) Unless either the creating instrument or the instrument of appointment manifests a contrary intent, when the donee of a general power of appointment appoints to a trustee upon a trust which fails, there is a resulting trust in favor of the donee or his estate.~~

~~(c) Unless the creating instrument manifests a contrary intent, when the donee of a general power of appointment makes an ineffective appointment other than to a trustee upon a trust which fails, the appointive property passes to the donee or his estate if the instrument of appointment manifests an intent to assume control of the appointive property for all purposes and not only for the limited purpose of giving effect to the expressed appointment.~~

(b) When the donee of a general power of appointment makes an ineffective appointment, an implied alternative appointment to the donee's estate may be found if the donee has manifested an intent that the appointive

property be disposed of as property of the donee rather than as in default of appointment.

Comment. Section 1389.3 is amended to substitute a new subdivision (b) for former subdivisions (b) and (c). The new subdivision provides a uniform rule as to the application of the doctrine of capture in cases where the donee of a general power of appointment makes an ineffective appointment. The distinction formerly made between appointments upon a trust which fails and other ineffective appointments has not been continued. The amendment to Section 1389.3 also eliminates the requirement that evidence of intent to "capture" the appointive assets be contained in the instrument of appointment. This change is consistent with the rules found in other sections on admissibility of evidence extrinsic to the instrument of appointment. See Sections 1386.1-1386.3. Otherwise, Section 1389.3 is intended to adopt the substance of the common law doctrine of capture or implied alternative appointment to the donee's estate. See L. Simes, Law of Future Interests § 69 (2d ed. 1966).

§ 1389.4 (amended). Appointment to previously deceased appointee by will or instrument effective at death of donee

SEC. 6. Section 1389.4 of the Civil Code is amended to read:

1389.4. *(a)* ~~If~~ *Except as provided in subdivision (b), if* an appointment by will or by instrument effective only at the death of the donee is ineffective because of the death of an appointee before the appointment becomes effective ; ~~the appointment is to be effectuated, if possible, by applying the provisions of Section 92 of the Probate Code as though the appointive property were the property of the donee~~ *and the appointee leaves issue surviving the donee, the surviving issue of such appointee shall take the appointed property, per stirpes and not per capita, in the same manner as the appointee would have taken had the appointee survived the donee* except that the property shall pass only to persons who are permissible appointees , *including those permitted under Section 1389.5* .

(b) This section does not apply if either the donor or donee manifests an intent that some other disposition of the appointive property shall be made.

Comment. Section 1389.4 is amended to permit issue of an appointee to take the appointed property where an appointee dies before the appointment becomes effective and leaves issue surviving the donee, whether or not the issue is related to the donee. Prior to this amendment, the section apparently permitted only issue of an appointee related to the donee to take the appointed property where the appointee died before the appointment becomes effective. See French, *Application of Antilapse Statutes to Appointments Made by Will,* 53 Wash. L. Rev. 405, 432 (1978).

Section 1389.4 provides a more liberal antilapse provision than the general antilapse provision of Section 92 of the Probate Code, because Section 1389.4 does not require that the issue of the predeceased appointee be related either to the donor or donee. Section 1389.4 permits the children of the spouse of the donee to take if the spouse of the donee is the appointee and dies before the appointment becomes effective. Likewise, an appointment to a brother or sister or nephew or niece of the donee's spouse will not lapse. A person may not take under Section 1389.4 unless the person is a permissible appointee.

This section applies only in the absence of a manifestation of a contrary intent by the donor or donee. It is designed to fill the gap if there is no discernible intent of the donor or donee as to the desired disposition of the property when an intended taker dies before the effective date of the disposition.

§ 1389.5 (added). Appointment to issue of permissible appointee under special power

SEC. 7. Section 1389.5 is added to the Civil Code, to read:

1389.5. Unless the creating instrument expressly otherwise provides, if a permissible appointee dies before the exercise of a special power of appointment, the donee has the power to appoint to the issue of the deceased permissible appointee, whether or not such issue was included within the description of the permissible appointees, if the deceased permissible appointee was alive at the time of the execution of the creating instrument or was born thereafter. This section applies whether the special power of appointment is exercisable by inter vivos instrument, by will, or otherwise.

Comment. Section 1389.5 permits an appointment under a special power to the issue of a predeceased object of the power. A special power of appointment is usually designed to permit flexibility in the ultimate disposition of the property by permitting the donee to take into account changing family circumstances. Permitting the donee to select not only among the primary class members but also among the issue of those who are deceased is necessary to permit effectuation of the donor's purpose. Section 1389.5 applies the principle of the antilapse statute to this situation without regard to whether the substitute takers are included within the permissible appointees. See generally French, *Application of Antilapse Statutes to Appointments Made by Will,* 53 Wash. L. Rev. 405 (1978).

This section applies in the absence of an express contrary provision in the creating instrument. The section is designed to fill the gap if the creating instrument is silent as to the desired disposition of the property when an object of the power dies before the time of the exercise of the power.

§ 1390.1 (amended). Authority of donor to alter rights of creditors of the donee

SEC. 8. Section 1390.1 of the Civil Code is amended to read:

1390.1. The donor of a power of appointment cannot nullify or alter the rights given creditors of the donee by Sections 1390.3, ~~and~~ 1390.4, *and 1390.5* by any language in the instrument creating the power.

Comment. Section 1390.1 is amended to reflect the addition of Section 1390.5. The addition of the reference to Section 1390.5 will protect the rights of support of dependents from being avoided by language in the creating instrument.

§ 1390.5 (added). Persons entitled to support considered creditors of donor

SEC. 9. Section 1390.5 is added to the Civil Code, to read:

1390.5. For the purposes of Sections 1390.3 and 1390.4, a person to whom the donee owes an obligation of support shall be considered a creditor of the donee to the extent that a legal obligation exists for the donee to provide such support.

Comment. Section 1390.5 is added to make clear that the obligation of the donee to support persons to whom the donee owes an obligation of support can be enforced against (1) property subject to a general power of appointment that is presently exercisable (Section 1390.3), and (2) property subject to an unexercised general power of appointment created by the donor in favor of himself, whether or not presently exercisable (Section 1390.4).

Transitional provision

SEC. 10. (a) Sections 1389.3 and 1389.4 of the Civil Code as amended by this act apply to any case where the donee dies on or after the operative date of this act.

(b) The amendment of Section 1388.2 of the Civil Code made by this act applies to any release made on or after the operative date of this act, but does not impair the validity of any release made prior to that date.

(c) Section 1389.5 which is added to the Civil Code by this act applies to any case where the power of appointment is exercised on or after the operative date of this act, but does not affect the validity of any exercise of a power of appointment made prior to that date.

(d) The repeal and addition of Section 1386.2 of the Civil Code as made by this act applies to any case where the donee dies on or after the operative date of this act.

Operative date

SEC. 11. This act shall become operative on July 1, 1982.

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