

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATIONS

relating to

Probate Law

Independent Administration of Decedent's Estate

Distribution of Estates Without Administration

Simultaneous Deaths

Notice of Will

Garnishment of Amounts Payable to Trust Beneficiary

Bonds for Personal Representatives

Recording Affidavit of Death

Execution of Witnessed Wills

Revision of Wills and Intestate Succession Law

November 1983

CALIFORNIA LAW REVISION COMMISSION

4000 Middlefield Road, Suite D-2

Palo Alto, California 94306

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The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 17 of the Commission's *Reports, Recommendations, and Studies* which is scheduled to be published late in 1984.

Cite this pamphlet as *Recommendations Relating to Probate Law*, 17 CAL. L. REVISION COMM'N REPORTS 401 (1984).

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STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

**Independent Administration
of Decedent's Estate**

September 1983

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

NOTE

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

Cite this recommendation as *Recommendation Relating to Independent Administration of Decedent's Estate*, 17 Cal. L. Revision Comm'n Reports 405 (1984).

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BEATRICE P. LAWSON

September 23, 1983

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

This recommendation proposes various changes in the Independent Administration of Estates Act. These changes are designed to make that statute a more useful alternative to administration of an estate under court supervision.

The Commission recommends that the independent administration procedures be extended to sales and exchanges of real property and to grants of options to purchase real property.

The Commission also recommends several changes to improve the advice of proposed action procedure:

(1) A new method of objecting to a proposed action should be provided: An objection could be made by merely delivering or mailing a written objection to the executor or administrator. This new method would be an alternative to the existing procedure which requires that the person objecting obtain a court order restraining the executor or administrator from taking the proposed action without court supervision.

(2) A person receiving advice of proposed action should be required to object to the proposed action within a specified time

and failure to object would waive the right of that person to later seek court review of the action taken.

This recommendation is made pursuant to 1980 Cal. Stats. res. ch. 37.

Respectfully submitted,

DAVID ROSENBERG
Chairperson

RECOMMENDATION

relating to

INDEPENDENT ADMINISTRATION OF DECEDENT'S ESTATE

Background

The Independent Administration of Estates Act,¹ enacted in 1974,² permits the court to authorize the executor or administrator to administer a decedent's estate with a minimum of supervision.³ The executor or administrator may petition the court for authority to administer the estate under the Act.⁴ The court must grant the authority unless good cause is shown why it should not be granted.⁵ If the authority is granted, many actions that otherwise would be under court supervision may be taken without court supervision.⁶ However, the executor or administrator must give prior advice of many proposed actions to affected persons;⁷ and, upon request of an affected person, the court must grant without a hearing an order restraining the

¹ Prob. Code §§ 591-591.7.

² 1974 Cal. Stats. ch. 961.

³ The enactment was a response to public criticism of the probate process as requiring too much court involvement, too much attorneys' time, and being too complex and costly. See Note, *Probate Reform: California's Declaration of Independent Administration*, 50 S. Cal. L. Rev. 155 (1976).

⁴ Prob. Code § 591.1.

⁵ Prob. Code § 591.1. See also Prob. Code § 591.7 (revocation of authority where good cause shown). Independent administration authority may not be granted if the decedent's will provides that the decedent's estate shall not be administered under the Act. Prob. Code § 591.1.

⁶ Prob. Code § 591.6.

⁷ Prob. Code §§ 591.3-591.4. Advice of the proposed action is required to be given to the devisees and legatees whose interest in the estate is affected by the proposed action; to the heirs of the decedent in intestate estates; to the State of California if any portion of the estate is to escheat to it; and to any persons who have filed a request for special notice pursuant to Probate Code Section 1202 (the persons who may request special notice include a creditor, a beneficiary under a trust, or other person interested in the estate, and the State Controller).

Advice of proposed action is required for the following actions: selling or exchanging personal property (with certain exceptions), leasing real property for more than a year, entering into any contract (other than a lease of real property) not to be performed within two years, selling, incorporating, or operating for longer

executor or administrator from taking the proposed action without court supervision.⁸

The Independent Administration of Estates Act is highly regarded by probate judges, referees, and practitioners. It has significantly streamlined the probate process. Most petitions for commencement of probate request authority to administer the estate under the Act. Nevertheless, the experience under the Act indicates that the Act can be improved. The needed improvements are discussed below.

Procedure for Objecting to Proposed Action

When the executor or administrator gives an advice of proposed action, the advice must state a date—not earlier than 15 days after delivery or mailing of the advice—on or after which the proposed action is to be taken.⁹ This does not allow adequate time for the recipient of the advice to consult an attorney and for the attorney to obtain an order restraining the executor or administrator from taking the proposed action without court supervision. Moreover, the requirement that a restraining order be obtained places a significant financial burden on the recipient of the advice who ordinarily must retain an attorney to secure the order.

The Commission recommends that a less expensive and more expeditious method be provided for objecting to a proposed action. The recipient of the advice of proposed action should be permitted to object by merely delivering or mailing a written objection to the executor or administrator. If an objection is received, the executor or administrator who desires to proceed with the proposed action would be required to submit the proposed action to the court for approval following the Probate Code provisions dealing with court supervision of that particular type of action. This procedure would be an alternative to

than six months an unincorporated business of the decedent, commencing payment of or increasing a family allowance or paying a family allowance for more than 12 months after the death of the decedent, investing funds of the estate (with certain exceptions), completing a contract of the decedent to convey real or personal property, borrowing money, executing a mortgage or deed of trust or giving other security, and determining specified claims to real or personal property. Prob. Code § 591.3.

⁸ Prob. Code § 591.5.

⁹ Prob. Code § 591.4. The recommended legislation extends the 15-day period to 20 days when the advice of proposed action is mailed.

the existing procedure which requires that the person objecting obtain a court order restraining the executor or administrator from taking the proposed action without court supervision.

Effect of Failure to Object to Proposed Action

A person who receives an advice of proposed action has no duty to object to the proposed action. A recipient who fails to object before the action is taken may still have a court later review the action.¹⁰ This is a serious defect in the Independent Administration of Estates Act. The executor or administrator who takes an action under the Act after advice of proposed action to the affected persons runs the risk that one of those persons may later challenge the action even though the person did not object before the action was taken.

The Commission recommends that persons given an advice of proposed action be required to object to the proposed action within the time allowed and that failure to object constitute a waiver of the right to have the court later review the action taken unless the person who failed to object establishes that he or she did not actually receive advice of the proposed action before the time to object expired. This change would not, however, limit the power of the court to review actions of the executor or administrator on its own motion or on the motion of any interested person who was not given an advice of proposed action. The recommended provision will protect the executor or administrator where a person who receives the advice of proposed action does nothing before the action is taken and then seeks to have the court review the action after it is taken. In addition, it will encourage those given an advice of proposed action to object promptly so that the executor or administrator may abandon the proposed action in view of the objection or may obtain court approval before the action is taken.

¹⁰ Prob. Code § 591.4; 7 B. Witkin, *Summary of California Law Wills and Probate* § 443C, at 227 (Supp. 1982).

Real Property Transactions

The court is not authorized to grant independent administration with respect to the sale or exchange of real property or the granting of options to purchase real property.¹¹ The lack of this authority means that the persons interested in the estate have no alternative but to follow the cumbersome, expensive, and time-consuming court-supervised procedures required by the Probate Code.¹² The Commission recommends that the independent administration procedures be extended to sales and exchanges of real property and to grants of options to purchase real property. This will give the persons interested in the estate the opportunity to handle these matters in an economical and efficient way. Instead of following the complex and expensive court-supervised procedures, the executor or administrator would give an advice of proposed action to the affected persons. Any of these persons could object and require that the transaction proceed only under court supervision. This scheme will maintain the protective features of court supervision in those cases where any affected person desires such protection but will not impose court supervision in cases where all the affected persons are in agreement on the proposed method of handling the matter.

Recommended Legislation

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

An act to amend Sections 591.2, 591.3, 591.4, and 591.5 of the Probate Code, relating to administration of estates.

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

¹¹ See Prob. Code § 591.2.

¹² Prob. Code §§ 750-764, 780-793. See Shepherd, *Real Estate Sales in Probate—Suggested Reform in Procedure*, 15 Cal. St. B.J. 65 (1940). A court appearance with respect to estate property is an "extraordinary" service. See Prob. Code § 902. Attorneys for executors and administrators are allowed extra compensation for extraordinary services. Prob. Code § 910.

Probate Code § 591.2 (amended). When court supervision required

SECTION 1. Section 591.2 of the Probate Code is amended to read:

591.2. (a) Upon obtaining authority to administer the estate under this article, the executor or administrator shall proceed to administer the estate in the same manner as provided in this code with respect to executors or administrators who have not been granted such authority. However, ~~he shall~~ *the executor or administrator is not* ~~be~~ required to obtain judicial authorization, approval, confirmation, or instructions, which shall be known and referred to in this article as “court supervision”, with respect to any actions during the course of the administration of the estate, except that ~~he shall be the executor or administrator is~~ required to obtain court supervision, in the manner provided in this code, for any of the following actions:

~~(a) Sale or exchange of real property whether sold individually or as a unit with personal property.~~

~~(b) (1) Allowance of executor's and administrator's commissions and attorney's fees.~~

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

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

~~(e) Granting options to purchase real property.~~

(b) ~~Nevertheless~~ *Notwithstanding subdivision (a)*, the executor or administrator may obtain court supervision as provided in this code of any action taken by him or her during the administration of the estate. All publications of notice required by this code shall continue to be given except, when no hearing is required because the executor or administrator does not seek court supervision of an action or proposed action, no publication of the notice of hearing ~~shall be~~ *is* required.

Comment. Section 591.2 is amended to permit the independent administration procedures to be used for sales or exchanges of real property and granting options to purchase real property. See Sections 591.3 and 591.5.

Probate Code § 591.3 (amended). Advice of proposed action

SEC. 2. Section 591.3 of the Probate Code is amended to read:

591.3. (a) Prior to the consummation of any of the actions described in ~~this section~~ *subdivision (b)* without court supervision, the executor or administrator to whom authority has been granted to act without court supervision shall advise the persons affected by the proposed action of his *or her* intention to take such action. The advice, known and referred to in this article as "advice of proposed action," shall be given to the devisees and legatees whose interest in the estate is affected by the proposed action; to the heirs of the decedent in intestate estates; to the State of California if any portion of the estate is to escheat to it; and to persons who have filed a request for special notice pursuant to Section 1202.

(b) The actions requiring such advice are all of the following:

(1) *Selling or exchanging real property.*

(2) *Granting options to purchase real property.*

~~(a)~~ (3) Selling or exchanging personal property, except for securities sold upon an established stock or bond exchange and other assets referred to in Sections 770 and 771.5 when sold for cash.

~~(b)~~ (4) Leasing real property for a term in excess of one year.

~~(c)~~ (5) Entering into any contract, other than a lease of real property, not to be performed within two years.

~~(d)~~ (6) Continuing for a period of more than six months from the date of appointment of the executor or administrator of an unincorporated business or venture in which the decedent was engaged or which was wholly or partly owned by the decedent at the time of his or her death, or the sale or incorporation of such business.

~~(e)~~ (7) The first payment, the first payment for a period commencing 12 months after the death of the decedent, and any increase in the payments of, a family allowance.

~~(f)~~ (8) Investing funds of the estate, except depositing funds in banks and investing in insured savings and loan

association accounts, in units of a common trust fund described in Section 585.1, in direct obligations of the United States maturing not later than one year from the date of investment or reinvestment, and in mutual funds which are comprised of ~~(1)~~ (i) those obligations, or ~~(2)~~ (ii) repurchase agreements with respect to any obligation, regardless of maturity, in which the fund is authorized to invest.

~~(g)~~ (9) Completing a contract entered into by the decedent to convey real or personal property.

~~(h)~~ (10) Borrowing money or executing a mortgage or deed of trust or giving other security.

~~(i)~~ (11) Determining third-party claims to real and personal property if the decedent died in possession of, or holding title to, such property, or determining decedent's claim to real or personal property title to or possession of which is held by another.

Comment. Section 591.3 is amended to require advice of proposed action in the case of sales or exchanges of real property and granting options to purchase real property in view of the amendment to Section 591.2 deleting the former mandatory court authorization or approval of those actions. A person given the advice of proposed action may object and thus require that the action proceed only with court supervision. See Section 591.5.

Probate Code § 591.4 (amended). Notice of advice of proposed action

SEC. 3. Section 591.4 of the Probate Code is amended to read:

591.4. The advice of proposed action shall be delivered personally or sent by first-class mail, or sent by airmail to any person residing outside the jurisdiction of the United States, to each person described in Section 591.3 at his *or her* last known address. The advice of proposed action shall state the name and mailing address of the executor or administrator, *the person and telephone number to call to get additional information*, and the action proposed to be taken, with a ~~reasonable~~ *reasonably* specific description of such action, and the date on or after which the proposed action is to be taken. Such date shall not be less than 15 days after the personal delivery, *or not less than 20 days after the*

mailing, of the advice. *When the proposed action involves the sale or exchange of real property, or the granting of an option to purchase real property, the advice of proposed action shall state the material terms of the transaction, including, if applicable, the sale price.* The failure of the executor or administrator to comply with the provisions of this section shall not affect the validity of the action so taken or the title to any property conveyed or transferred to bona fide purchasers and to third persons dealing in good faith with ~~him~~ *the executor or administrator* who changed their position in reliance on the action, conveyance, or transfer without *actual* notice of the failure of the executor or administrator to comply with such provisions. ~~The receipt of such advice shall not prejudice the right of any person interested in the estate to have the court later review the action taken.~~ *No person dealing with the executor or administrator shall have any duty to inquire or investigate whether or not the executor or administrator has complied with the provisions of this section.*

Comment. Section 591.4 is amended to make the following changes:

(1) The requirement that the advice of proposed action include the person and telephone number to call to get additional information and the material terms of real property transactions is added. Furnishing the name and telephone number should facilitate informal negotiations. Inclusion of the terms of real property transactions reflects the deletion from Section 591.2 of the former mandatory court supervision of real property transactions and the inclusion of such transactions with those of which advice of proposed action must be given under Section 591.3.

(2) The minimum period between the giving of the advice of proposed action and the taking of the action is extended to 20 days when the advice is mailed, recognizing the delay inherent in giving the advice by mail.

(3) The requirement of "actual" notice to transferees and others is added to the fifth sentence to conform to Section 591.5.

(4) The provision which permitted persons given an advice of proposed action to have later court review of the action is deleted. Section 591.5 is amended to require objections to be made as provided in that section and to preclude a person who receives an advice of proposed action from obtaining later court review.

(5) The last sentence (no duty to inquire or investigate) is added for consistency with the last sentence of Section 591.5(c).

Probate Code § 591.5 (amended). Objection to proposed action

SEC. 4. Section 591.5 of the Probate Code is amended to read:

591.5. (a) Any person described in Section 591.3 who objects to the taking of any proposed action described in Section 591.3 without court supervision, may *do either or both of the following*:

(1) *The person may apply to the court having jurisdiction over the proceeding for an order restraining the executor or administrator from taking the proposed action without court supervision under the provisions of this code dealing with the court supervision of such action, which order the court shall grant without requiring notice to the executor or administrator and without cause being shown therefor. Such order may be served by the person so objecting upon the executor or administrator in the same manner provided for in Section 415.10 or 415.30 of the Code of Civil Procedure or in such manner as may be authorized by the court.*

(2) *The person may deliver or mail a written objection to the executor or administrator at the address stated in the advice of proposed action, so that the objection is received before the date specified on or after which the proposed action is to be taken, or before the proposed action is actually taken, whichever is later.*

(b) If the executor or administrator has notice of the issuance of the restraining order ~~he~~ or of the written objection of a person described in Section 591.3, the executor or administrator shall, if he or she desires to consummate such action, submit it to the court for approval following the provisions of this code dealing with the court supervision of such action and may consummate such action under such order as may be entered by the court.

(c) The failure of the executor or administrator to comply with ~~such restraining order subdivision (b)~~ and the consummation of the action by the executor or administrator ~~in violation of such order~~ without complying

with subdivision (b) shall not affect the validity of the action so taken; or the title to any property conveyed or transferred to bona fide purchasers and to third persons dealing in good faith with ~~him~~ the executor or administrator who changed their position in reliance on the action, conveyance, or transfer without actual notice of the failure of the executor or administrator to comply with ~~such order~~ subdivision (b). No person dealing with the executor or administrator shall have any duty to inquire or investigate whether or not ~~a restraining order has been issued~~ the executor or administrator has complied with subdivision (b).

(d) All persons described in Section 591.3 who have been given an advice of proposed action as provided in Section 591.4 may object only in the manner provided in this section. The failure to object is a waiver of any right to have the court later review the action taken unless the person who fails to object establishes that he or she did not actually receive advice of the proposed action before the time to object expired. The court may, however, review actions of the executor or administrator on its own motion or on motion of an interested person who did not receive an advice of proposed action before the time to object expired.

Comment. Section 591.5 is amended to provide an alternative to the obtaining of a restraining order by one who objects to the proposed action. The amendment permits a person given advice of the proposed action to object directly to the executor or administrator. Section 591.5 is also amended to add subdivision (d) to make the advice of proposed action binding on those who receive it and fail to make a timely objection. If a timely objection is made, the proposed action may be taken only under the provisions dealing with court supervision of the action. For example, if the proposed action is a sale of real property and there is a timely objection to the proposed action, the real property sale is to be taken in the same manner as if independent administration authority had not been granted.

Transitional provision

SEC. 5. (a) Except as provided in subdivision (b), the amendments made by this act to Sections 591.2, 591.3, 591.4, and 591.5 of the Probate Code do not apply if the executor

or administrator was granted authority prior to January 1, 1985, to administer the estate under the Independent Administration of Estates Act.

(b) An executor or administrator who was granted authority prior to January 1, 1985, to administer the estate under the Independent Administration of Estates Act may file a petition under Section 591.1 of the Probate Code after January 1, 1985. If the petition is granted, the provisions of the Independent Administration of Estates Act as amended by this act apply.

Comment. Section 5 makes clear that the amendments made by this act do not automatically apply where independent administration authority was granted prior to the operative date of this act. This is to protect an affected person who would have objected to the granting of independent administration authority if it had been petitioned for under the Independent Administration Estates Act as amended by this act. Subdivision (b) permits the executor or administrator to petition for independent administration authority after the operative date of this act, even though independent administration authority was granted prior to the operative date. If the petition is granted, the amendments made by this act apply, including but not limited to the new provisions giving expanded independent administration authority and providing that an objection to a proposed action is waived if not timely made.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

**Distribution of Estates
Without Administration**

September 1983

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

NOTE

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

Cite this recommendation as *Recommendation Relating to Distribution of Estates Without Administration*, 17 Cal. L. Revision Comm'n Reports 421 (1984).

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September 23, 1983

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Commission recommends that the procedure for passage of community and quasi-community property to a surviving spouse without administration be expanded to cover separate property passing to the surviving spouse by will or intestate succession.

The Commission also recommends that the affidavit procedure under Probate Code Section 630 for collection of a small estate without probate be expanded to increase its usefulness. Specifically, the Commission recommends the following:

(1) The maximum estate value for use of the affidavit procedure should be increased from \$30,000 to \$100,000.

(2) The affidavit procedure should be allowed to be used even if the estate includes a real property interest of a gross value of \$10,000 or less.

(3) The relatives of the decedent who may use the procedure should be expanded to include a grandparent of the decedent.

This recommendation is authorized by 1980 Cal. Stats. res. ch. 37.

Respectfully submitted,

DAVID ROSENBERG
Chairperson

RECOMMENDATION

relating to

DISTRIBUTION OF ESTATES WITHOUT ADMINISTRATION

Introduction

California law includes provisions to expedite transfer of property of a decedent to the persons entitled to the property without the need for probate administration.¹ The Commission has reviewed these provisions and recommends that their scope be expanded to reduce the need for probate administration.

Passage of Property to Surviving Spouse Without Administration

When a married person dies the community and quasi-community property which passes to the surviving spouse² is not subject to probate administration unless the surviving spouse elects to have it administered.³ If all of the estate property is community or quasi-community property

¹ See Prob. Code §§ 649.1 (formerly Section 202), 630-632, 650-655. 1983 Cal. Stats. ch. 842, operative January 1, 1985, added, amended, or repealed many sections of the Probate Code. References in this recommendation are to the Probate Code as revised by 1983 Cal. Stats. ch. 842. The comparable provisions of the Probate Code that were superseded by that chapter also are indicated.

² In the usual case, all of the decedent's share of the community and quasi-community property does pass to the surviving spouse. If the decedent dies intestate, all of the decedent's share of the community and quasi-community property passes to the surviving spouse. Prob. Code §§ 100 (formerly Section 201), 101 (formerly Section 201.5). If the decedent dies testate, it is likely that the surviving spouse will take the decedent's share of the community and quasi-community property under the decedent's will, since empirical studies show that most decedents who die testate leave their estate to the surviving spouse. See Fellows, Simon & Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 Am. B. Found. Research J. 321, 356. The decedent may, however, leave up to half of the community and quasi-community property to someone other than the surviving spouse. See Prob. Code § 6101 (formerly Sections 201, 201.5). To that extent, the community and quasi-community property must be administered in the decedent's estate. See Prob. Code § 649.3 (formerly Section 204). Also, if the decedent's will leaves community or quasi-community property in trust or limits the surviving spouse to a qualified ownership in the property, it is to that extent subject to administration in the decedent's estate. Prob. Code § 649.3 (formerly Section 204).

³ Prob. Code § 649.1 (formerly Section 202). It may be advisable for the surviving spouse to elect to have the community and quasi-community property administered when

which passes to the surviving spouse under the decedent's will or by intestate succession, there need be no administration at all. If some of the estate is the decedent's separate property, only that property must be administered.

The surviving spouse may obtain a court order confirming that all or part of the deceased spouse's share of the community or quasi-community property belongs by will or intestate succession to the surviving spouse.⁴ The order may be obtained without the need for probate administration.⁵ Although the surviving spouse is not required to petition for the order, such an order is sometimes required by a title insurance company or a stock transfer agent.⁶

This system has worked well in California to pass sizable amounts of wealth to the surviving spouse without the need for costly and time-consuming estate proceedings. Where all the property passes to the surviving spouse, there are usually no contending claimants requiring the interposition of a court. Creditors are protected by imposing on the surviving spouse personal liability for the debts of the decedent chargeable against the community and quasi-community property.⁷

The Commission recommends that the procedure for passage of community and quasi-community property to the surviving spouse without administration be extended to cover separate property passing to the surviving spouse by

there are complex investments or a family business that the surviving spouse may not be able to manage properly, complex creditors' situations or liabilities in excess of the value of the estate, strained family relations, when the surviving spouse is incompetent, or for certain tax purposes. See O. McCarroll, 1 California Decedent Estate Administration Supplement § 3.38, at 88 (Cal. Cont. Ed. Bar 1983).

⁴ Prob. Code §§ 650-657.

⁵ Prob. Code § 650(a).

⁶ See A. Watenmaker, 2 California Decedent Estate Administration Supplement § 30.30, at 64 (Cal. Cont. Ed. Bar 1983).

⁷ Prob. Code § 649.4 (formerly Section 205). The personal liability of the surviving spouse does not exceed the value at the date of death, less the amount of any liens and encumbrances, of (1) the interest of the surviving spouse (i) in the community property immediately prior to the death and (ii) in quasi-community property arising by virtue of the death which is not exempt from enforcement of a money judgment plus (2) the interest of the deceased spouse in such property passing to the surviving spouse without administration. *Id.*

will or intestate succession.⁸ This will avoid the need for administration of the separate property which passes to the surviving spouse and will avoid the need for any administration at all where the surviving spouse takes the entire estate.⁹ In addition, it will avoid unnecessary time and resources being spent to classify as separate or as community or quasi-community the property that passes to the surviving spouse.

Collection of Personal Property by Affidavit

California law provides a simple procedure for the collection of the decedent's personal property from the person holding the property without the need for administration of the decedent's estate.¹⁰ The person entitled to the property presents an affidavit to the third-party holder of the property showing that the person is entitled to the property under the decedent's will or by intestate succession.¹¹ Payment or delivery of the property in accord with the affidavit discharges the holder from any further liability with respect to the property.¹² The payment or transfer does not preclude the administration of the estate when necessary to enforce payment of the decedent's debts.¹³ The person who received the property may then be required to turn it over to the estate's personal

⁸ The decedent's creditors would be protected by making the surviving spouse personally liable also for debts of the decedent chargeable against the separate property of the decedent. The surviving spouse's liability would not exceed the value of the surviving spouse's interest in community and quasi-community property plus the value of the property of the deceased spouse passing to the surviving spouse.

⁹ Under Probate Code Sections 640-647, the surviving spouse may have the estate summarily set aside if the net value of the estate does not exceed \$20,000. However, these provisions would not be usable if there are large amounts of community or quasi-community property, since half the value of such property is includable for the purpose of determining whether the estate value is less than \$20,000. Estate of Pezzola, 112 Cal. App.3d 752, 169 Cal. Rptr. 464 (1980).

¹⁰ Prob. Code §§ 630-632. See also note 22, *infra*, for a listing of relatives of the decedent and others who may use the affidavit procedure. A separate provision permits the surviving spouse (but not other relatives of the decedent) to collect not more than \$500 on deposit in a bank if the surviving spouse is otherwise entitled to the money and the estate value does not exceed \$5,000, without regard to whether the decedent owns real property in California. Prob. Code § 630.5.

¹¹ Prob. Code § 630. As to the persons entitled to use the procedure, see note 22, *infra*.

¹² Prob. Code § 631.

¹³ Prob. Code § 631.

representative.¹⁴ The affidavit procedure is merely a collection mechanism and does not give title to the person collecting the property as against other claimants to the property.¹⁵ This affidavit procedure can be used only where the decedent leaves no interest in California real property (excluding property passing to the surviving spouse)¹⁶ and the value of the estate (excluding certain property) does not exceed \$30,000.¹⁷

The Commission recommends the following modifications in the affidavit procedure to increase its usefulness:

(1) The maximum estate value for use of the affidavit procedure should be increased from the present \$30,000 to \$100,000.¹⁸ Estates of less than \$100,000 are too small to justify the expense and delay of the probate process where there are no unpaid creditors and no disagreement among the persons who take the decedent's property.¹⁹

¹⁴ Broll, *Summary Administration*, in 1 California Decedent Estate Administration § 3.14, at 124 (Cal. Cont. Ed. Bar 1971); cf. Estate of Kevil, 98 Cal. App.2d 388, 392, 220 P.2d 555 (1950).

¹⁵ See *Brezzo v. Brangero*, 51 Cal. App. 79, 81, 196 P. 87 (1921).

¹⁶ The procedure is not available if the decedent leaves real property, or an interest in or lien on real property, in this state. Prob. Code § 630. However, certain property is excluded in determining the property of the decedent: property held by the decedent as a joint tenant, or in which the decedent had a life or other estate terminable upon the decedent's death, or which was held by the decedent as community or quasi-community property and passed to the decedent's surviving spouse pursuant to Probate Code Section 649.1 (formerly Section 202). Prob. Code § 632. This exclusion would be expanded by the recommended legislation to include separate property passing to the decedent's surviving spouse to conform the exclusion to the recommended expansion of the scope of Section 649.1.

¹⁷ The following are excluded in determining whether the estate exceeds \$30,000 in value: property not in this state, motor vehicles, mobilehomes, commercial coaches, amounts due the decedent for services in the armed forces of the United States, compensation not exceeding \$5,000 owing to decedent for services from any employment, and the property described in note 16, *supra*. Prob. Code §§ 630, 632. For a special provision permitting a surviving spouse to collect not to exceed \$500 from a bank deposit when the value of the estate does not exceed \$5,000, irrespective of the character of the decedent's property, see Prob. Code § 630.5.

¹⁸ The Commission is informed that the affidavit procedure is presently used in about 20 percent of the estates in California. The maximum dollar amount has been repeatedly increased by the Legislature in recent years, being increased from \$1,000 to \$2,000 in 1961, to \$3,000 in 1967, to \$5,000 in 1972, to \$10,000 in 1974, to \$20,000 in 1976, and to the present \$30,000 in 1979.

The Commission also recommends that existing law be clarified by providing that the maximum estate value for use of the affidavit procedure means *gross* value, less the specific exclusions now found in Probate Code Section 630 (motor vehicle, mobilehome, commercial coach, pay for service in armed forces of the United States, salary not exceeding \$5,000).

¹⁹ An unpaid creditor or a dissatisfied person who would take a portion of the decedent's property by testate or intestate succession can institute a probate proceeding. See

(2) The existing statute that prevents use of the affidavit procedure where the decedent owns an interest in California real property,²⁰ no matter how small in value, should be relaxed to permit use of the procedure to collect the decedent's personal property where the gross value of the real property in the estate does not exceed \$10,000. This change will permit use of the affidavit procedure where the estate includes a real property interest of nominal or very small value, such as a desert lot of little value or an oil lease producing little or no income.²¹

(3) The persons allowed to use the affidavit procedure should be expanded to include a grandparent of the decedent who is entitled to the property under the decedent's will or by intestate succession. This slight expansion of existing law²² may avoid the need for probate where a grandparent takes a portion of a small estate.

Recommended Legislation

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

An act to amend the headings for Article 1 (commencing with Section 630) and Article 2.5 (commencing with Section 649.1) of Chapter 10 of Division 3 of, to amend Sections 630, 632, 649.1, 649.3, 649.4, 650, 653, 655, and 656 of, and to repeal Section 630.5 of, the Probate Code, relating to probate law and procedure.

Prob. Code §§ 323 (persons entitled to have will probated), 422 (persons entitled to obtain letters of administration of the estate of person dying intestate). See also *In re Edwards' Estate*, 154 Cal. 91, 97 P. 23 (1908) (right of creditor to petition for probate of will).

²⁰ Real property that passes to the surviving spouse and certain other real property is excluded in determining whether there is real property in the decedent's estate. See note 16, *supra*.

²¹ In some cases, the value of real property interest may not justify the expense of a probate proceeding. The Commission is informed that many title insurers and oil companies are willing to recognize an effective transfer of an interest in real property that is of small value without the probate proceedings. Letter from Valerie J. Merritt, Secretary-Treasurer, Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association, to Law Revision Commission (Sept. 6, 1983) (on file in office of Commission).

²² Under existing law, the affidavit procedure may be used (1) by the decedent's surviving spouse, children, lawful issue of deceased children, parents, brothers, or sisters of the decedent, lawful issue of a deceased brother or sister, if they are otherwise entitled to the property under the decedent's will or by intestate succession, or (2) by the sole beneficiary or all the beneficiaries under the decedent's will (whether or not related to the decedent). Prob. Code § 630.

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

Heading for Article 1 (commencing with Section 630) of Chapter 10 of Division 3 of the Probate Code (amended)

SECTION 1. The heading for Article 1 (commencing with Section 630) of Chapter 10 of Division 3 of the Probate Code is amended to read:

Article 1. ~~Transfer~~ *Collection of Personal Property Not Exceeding One Thousand Dollars (\$1,000) in Value by Affidavit*

Probate Code § 630 (amended). Collection of decedent's personal property by affidavit

SEC. 2. Section 630 of the Probate Code is amended to read:

630. (a) ~~When a decedent leaves no real property, nor interest therein nor lien thereon, in this state, Subject to Section 632, subdivision (b) applies only where the gross value of the decedent's real property in this state, if any, does not exceed ten thousand dollars (\$10,000) and the total gross value of the decedent's real and personal property in this state; (excluding any motor vehicle, or mobilehome or commercial coach registered under the provisions of Part 2 (commencing with Section 18000) of Division 13 of the Health and Safety Code, of which the decedent is the owner or legal owner;) over and above any amounts due to the decedent for services in the armed forces of the United States, and over and above the amount of salary not exceeding five thousand dollars (\$5,000), including compensation for unused vacation, owing to decedent for services from any employment, does not exceed thirty thousand dollars (\$30,000); one hundred thousand dollars (\$100,000).~~

(b) ~~the~~ *The* surviving spouse, the children, ~~lawful~~ *the* issue of deceased children, a *grandparent*, parent, brothers or sisters of the decedent, the ~~lawful~~ issue of a deceased brother or sister, or the guardian or conservator of the estate of any person bearing such relationship to the

decedent, or the trustee named under a trust agreement executed by the decedent during his *or her* lifetime, the primary beneficiaries of which bear such relationship to the decedent, if such person or persons has or have a right to succeed to the property of the decedent, or the sole beneficiary, or all of the beneficiaries under the last will ~~and testament~~ of the decedent, regardless of whether or not any beneficiary is related to the decedent, may, without procuring letters of administration, or awaiting the probate of the will, collect any money due the decedent (*including money of the decedent on deposit in a financial institution as defined in Section 40*), receive the *tangible personal* property of the decedent, and have any evidences of a *debt, obligation, interest, indebtedness or right, stock, or chose in action* transferred to such person or persons upon furnishing the person, representative, corporation, officer or body owing the money, having custody of such property or acting as registrar or transfer agent of such evidences of *debt, obligation, interest, indebtedness or right, stock, or chose in action*, with an affidavit or declaration under penalty of perjury showing the right of the person or persons to receive such money or property, or to have such evidences transferred.

(c) A transfer agent of any security shall change the registered ownership on the books of a corporation from the decedent to the successor or successors upon the presentation of an affidavit as provided in subdivision (b) and is discharged from liability in so doing as provided in Section 631.

Comment. Section 630 is amended to do the following:

(1) To increase the maximum estate value for use of the affidavit procedure from \$30,000 to \$100,000.

(2) To make clear that the \$100,000 maximum estate value refers to gross value (not gross value less liens and encumbrances on the property), less the specific exclusions set forth in Section 630. Prior law was not clear.

(3) To permit use of the affidavit procedure notwithstanding the presence in the estate of a real property interest of a gross value of \$10,000 or less.

(4) To add a grandparent of the decedent to the list of the decedent's relatives who may use the affidavit procedure.

(5) To add subdivision (c), which is drawn from Uniform Probate Code Section 3-1201. The provision in subdivision (c) protecting the transfer agent from liability is consistent with Section 631.

The reference to “tangible” personal property and evidences of an “obligation”, “stock”, or “choses in action” in subdivision (b) is drawn from Section 3-1201 of the Uniform Probate Code and is clarifying. The word “issue” has been substituted for “lawful issue” in subdivision (b) to conform to the provisions relating to intestate succession. See Sections 6408 and 6408.5.

Probate Code § 630.5 (repealed). Collection of \$500 or less from bank account

SEC. 3. Section 630.5 of the Probate Code is repealed.

~~630.5. Whether a person dies testate or intestate, and irrespective of the character of his or her property, if the value of the estate does not exceed five thousand dollars, the spouse of the decedent, if entitled by succession or by the last will and testament of the decedent to any money of the decedent on deposit in bank, may collect such money, not to exceed the total sum of five hundred dollars, without procuring letters testamentary or of administration, upon furnishing the bank with an affidavit showing the right of the affiant to receive such money.~~

Comment. Former Section 630.5 is superseded by Sections 630 and 632 which permit the surviving spouse to collect the decedent’s personal property (including funds on deposit in a financial institution) in a small estate and Sections 649.1-649.4 and 650-656 which permit the surviving spouse to obtain an order confirming title to property without the need for a probate proceeding.

Probate Code § 632 (amended). Exclusion of certain property for purposes of article

SEC. 4. Section 632 of the Probate Code is amended to read:

632. For the purpose of this article, any property or interest therein or lien thereon which, at the time of the decedent’s death, was held by the decedent as joint tenant, or in which the decedent had a life or other estate terminable upon the decedent’s death, or which was held by the decedent as community property or

~~quasi/community property~~ and passed to the decedent's surviving spouse pursuant to Section 649.1, shall be excluded in determining the property or estate of the decedent or its value.

Comment. Section 632 is amended to reflect the inclusion of separate property in the property that may pass to the decedent's spouse pursuant to Section 649.1. See Section 649.1.

Heading for Article 2.5 (commencing with Section 649.1) of Chapter 10 of Division 3 (amended)

SEC. 5. The heading for Article 2.5 (commencing with Section 649.1) of Chapter 10 of Division 3 of the Probate Code is amended to read:

Article 2.5. ~~Administration of Community and Quasi/Community Property~~ Passage of Property to Surviving Spouse Without Administration

Probate Code § 649.1 (amended). Passage of property to surviving spouse

SEC. 6. Section 649.1 of the Probate Code is amended to read:

649.1. (a) Except as provided in Section 649.3, when a husband or wife dies intestate, or dies testate and by his or her will bequeaths or devises all or a part of his or her ~~interest in the community property or quasi/community property~~ to the surviving spouse, it passes to the survivor subject to the provisions of Sections 649.2 and 649.4, and no administration is necessary.

(b) Notwithstanding subdivision (a), upon the election of the surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse, the ~~interest of the deceased spouse in the community property or quasi/community property or both the interest of the deceased spouse and the surviving spouse in the community property or quasi/community property, or both,~~ *following property* may be administered under this division::

(1) The one-half of the community property that belongs to the decedent under Section 100, the one-half of the quasi-community property that belongs to the decedent

under Section 101, and the separate property of the decedent.

(2) Both the property described in paragraph (1) and the one-half of the community property that belongs to the surviving spouse under Section 100, and the one-half of the quasi-community property that belongs to the surviving spouse under Section 101.

(c) The election must be made within four months after the issuance of letters testamentary or of administration, or within such further time as the court may allow upon a showing of good cause, by a writing specifically evidencing the election filed in the proceedings for the administration of the estate of the deceased spouse and prior to the entry of an order under Section 655.

~~(e)~~ (d) Notwithstanding subdivision (a) or (b), the surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse may file an election and agreement in the proceedings for the administration of the estate of the deceased spouse to have all or part of the ~~interest of the surviving spouse in one-half of the community property or~~ *that belongs to the surviving spouse under Section 100 and the one-half of the quasi-community property that belongs to the surviving spouse under Section 101* transferred by the surviving spouse or the surviving spouse's personal representative, guardian, or conservator to the trustee under the will of the deceased spouse or the trustee of an existing trust identified by the will of the deceased spouse, to be administered and distributed by the trustee. The election and agreement must be filed before the entry of the decree of final distribution in the proceedings.

Comment. Section 649.1 is amended to expand the property of the decedent which may pass to the surviving spouse without administration to include the decedent's separate property.

Probate Code § 649.3 (amended). Property subject to administration

SEC. 7. Section 649.3 of the Probate Code is amended to read:

649.3. ~~When a deceased spouse disposes by will of all or part of his or her interest in the community property or~~

~~quasi/community property to someone other than the surviving spouse or when the will of a deceased spouse contains a trust or limits the surviving spouse to a qualified ownership in the property, that part of the interest of the deceased spouse in the community property or quasi/community property disposed of to someone other than the surviving spouse, disposed of in trust, or limiting the surviving spouse to a qualified ownership in the property shall be subject to administration under this division. A will that provides for~~ *The following property of the decedent is subject to administration under this division:*

(a) Property passing to someone other than the surviving spouse under the decedent's will or by intestate succession.

(b) Property disposed of in trust under the decedent's will.

(c) Property in which the decedent's will limits the surviving spouse to a qualified ownership. For the purpose of this subdivision, a devise or bequest of ~~community property or quasi/community property~~ to the surviving spouse if ~~such spouse survives the deceased spouse that is conditioned on the spouse surviving the decedent~~ by a specified period of time ~~shall not be considered to create such is not a qualified ownership~~ "qualified ownership" interest as to fall within the provision of this section, if the specified period of time has expired.

Comment. Section 649.3 is amended to make clear that the decedent's separate property which does not pass to the surviving spouse under Section 649.1 is subject to administration.

Probate Code § 649.4 (amended). Surviving spouse's liability for decedent's debts

SEC. 8. Section 649.4 of the Probate Code is amended to read:

649.4. (a) Except as provided ~~by in this section and~~ Section 951.1, upon the death of a married person, the surviving spouse is personally liable for the debts of the deceased spouse chargeable against the ~~community property and the debts of the deceased spouse chargeable against the separate property of the deceased spouse to the~~

extent such separate property is characterized as quasi/community property under Section 66, unless the interests of both spouses in the community property or quasi/community property, or both, are administered under this division *property described in subdivision (b).*

(b) The ~~personal~~ liability *imposed by subdivision (a)* shall not exceed the value at the date of death, less the amount of any liens and encumbrances, of the total of the following:

(1) ~~The interest of the surviving spouse (A) in the community property immediately prior to the death and (B) in quasi/community property arising by virtue of the death which one-half of the community and quasi-community property that belongs to the surviving spouse under Sections 100 and 101 that is not exempt from the enforcement of a money judgment.~~

(2) ~~The interest of the deceased spouse in such property passing one-half of the community and quasi-community property that belongs to the decedent under Sections 100 and 101 that passes to the surviving spouse without administration.~~

(3) ~~The separate property of the decedent that passes to the surviving spouse without administration.~~

(c) ~~The surviving spouse is not liable under subdivision (a) if all of the property described in subdivision (b) is administered under this division.~~

~~(b)~~ (d) If proceedings are commenced in this state for the administration of the estate of the deceased spouse and the time for filing or presenting claims has commenced, any action upon the liability of the surviving spouse pursuant to subdivision (a) ~~shall be~~ *is* barred to the same extent as provided for claims under Article 1 (commencing with Section 700) of Chapter 12, except as to the following:

(1) Creditors who had commenced judicial proceedings for the enforcement of the debts and had served the surviving spouse with process prior to the expiration of the time for filing or presenting claims.

(2) Creditors who secure the acknowledgment in writing of the liability of the surviving spouse for the debts.

(3) Creditors who file a timely claim in the proceedings.

~~(e)~~ (e) Except as provided ~~by~~ *in* subdivision ~~(b)~~, (d), any debt described in subdivision (a) may be enforced against the surviving spouse in the same manner as it could have been enforced against the deceased spouse if the deceased spouse had not died. In any action based upon the debt, the surviving spouse may assert any defenses, cross-complaints, or setoffs which would have been available to the deceased spouse if the deceased spouse had not died.

Comment. Section 649.4 is amended to include separate property of the decedent passing to the surviving spouse without administration in the calculation of the maximum limit on the personal liability of the surviving spouse.

Probate Code § 650 (amended). Petition to have property not administered in the estate

SEC. 9. Section 650 of the Probate Code is amended to read:

650. (a) A surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse may file a petition in the superior court in the county in which the estate of the deceased spouse may be administered alleging that administration of all or a part of the estate is not necessary for the reason that all or a part of the estate is ~~community property or quasi-community~~ property passing or belonging to the surviving spouse. The petition shall be verified and shall set forth the following information:

(1) The facts necessary to determine the county in which the estate of the deceased spouse may be administered if proceedings for the administration of the estate are not pending.

(2) The names, ages, and addresses of the heirs, devisees, and legatees of the deceased spouse, the names and addresses of all persons named as executors of the will of the deceased spouse, and the names and addresses of all persons appointed as executors of the will or administrators of the estate of the deceased spouse, which are known to the petitioner.

(3) A description of the property of the deceased spouse which the petitioner alleges is ~~community property or~~

~~quasi/community~~ property passing to the surviving spouse, including the trade or business name of any *property passing to the surviving spouse that consists of a business or an interest in a community property or quasi/community property* business which the deceased spouse was operating or managing at the time of death.

(4) The facts upon which the petitioner bases the allegation that all or a part of the estate of the deceased spouse is ~~community property or quasi/community~~ property passing to the surviving spouse.

(5) A description of any interest in the community property or quasi-community property, or both, which the petitioner requests the court to confirm to the surviving spouse as belonging to the surviving spouse pursuant to Section 100 or 101.

(b) If the petitioner bases the allegation that all or part of the estate of the deceased spouse is ~~community property or quasi/community~~ property passing to the surviving spouse upon the will of the deceased spouse, a copy of the will shall be attached to the petition.

(c) To the extent of the election, this section does not apply *if to property that the petitioner has elected to have administered under this division as provided in pursuant to* subdivision (b) of Section 649.1. ~~either to have:~~

~~(1) The interest of the deceased spouse in the community property or quasi/community property; or both, administered under this division.~~

~~(2) Both the interest of the deceased spouse and the surviving spouse in the community property or quasi/community property; or both, administered under this division.~~

(d) The action authorized by this section may be taken by a guardian or conservator without authorization or approval of the court in which the guardianship or conservatorship proceeding is pending.

Comment. Section 650 is amended to reflect the inclusion of separate property passing to the surviving spouse in the property of the decedent which need not be administered. See Section 649.1.

Probate Code § 653 (amended). Clerk to set petition for hearing; notice of hearing

SEC. 10. Section 653 of the Probate Code is amended to read:

653. (a) If proceedings for the administration of the estate of a deceased spouse are pending at the time a petition described in Section 650 is filed or, if the proceedings are not pending and if the petition is not joined with a petition for probate of the will or administration of the estate of the deceased spouse, the clerk shall set the petition for hearing. At least 20 days prior to the date of the hearing on the petition, a notice of the hearing and a copy of the petition shall be personally served upon the following persons by the petitioner or mailed, postage prepaid, by the petitioner to the following persons, addressed to the addresses given in their request for special notice or notice of appearance, the addresses of their offices or places of residence, or, if neither of these addresses are known to the petitioner, the county seat of the county in which the proceedings are pending:

(1) Any personal representative who is not the petitioner.

(2) All legatees, devisees, and known heirs of the deceased spouse.

(3) All persons or their attorneys who have requested special notice pursuant to Section 1202.

(4) All persons or their attorneys who have given notice of appearance.

(5) The Attorney General, addressed to the office of the Attorney General at Sacramento, California, if the petitioner bases the allegation that all or part of the estate of the deceased spouse is ~~community property or quasi-community~~ property passing to the surviving spouse upon the will of the deceased spouse and the will involves or may involve (i) a testamentary trust of property for charitable purposes other than a charitable trust with a designated trustee, resident in this state, or (ii) a bequest or devise for a charitable purpose without an identified legatee, devisee, or beneficiary.

(6) All other persons who are named in the will of the deceased spouse, if the petitioner bases the allegation that

all or part of the estate of the deceased spouse is ~~community property or quasi/community~~ property passing to the surviving spouse upon the will.

(b) Notwithstanding the provisions of subdivision (a), a copy of the petition is not required to be personally served upon or mailed to any of the persons specified therein if both of the following conditions are met:

(1) All of the decedent's property passes to the surviving spouse under the decedent's will.

(2) No contingencies in the decedent's will remain to be satisfied at the time of the filing of the petition.

The notice shall specify that paragraphs (1) and (2) are applicable to the estate that is the subject of the petition.

Comment. Section 653 is amended to reflect the inclusion of separate property passing to the surviving spouse in the property of the decedent which need not be administered. See Section 649.1.

Probate Code § 655 (amended). Court order

SEC. 11. Section 655 of the Probate Code is amended to read:

655. (a) If the court finds that all of the property is ~~community property or quasi/community~~ property; ~~or both~~, passing to the surviving spouse, it shall issue an order describing the property, determining that the property is ~~community property or quasi/community~~ property; ~~or both~~, passing to the surviving spouse, and determining that no administration is necessary. If the petition filed under Section 650 includes a description of the interest of the surviving spouse in the community property or quasi-community property, or both, which belongs to the surviving spouse pursuant to Section 100 or 101 and the court finds that the interest belongs to the surviving spouse, it shall issue an order describing the property and confirming the ownership of the surviving spouse.

(b) If the court finds that all or a part of the property is not ~~community property or quasi/community~~ property passing to the surviving spouse, it shall do all of the following:

(1) Issue an order describing any property which is ~~community property or quasi/community~~ property passing

to the surviving spouse, determining that the property passes to the surviving spouse, and determining that no administration of the property is necessary; and issue any further orders which may be necessary to cause delivery of the property or its proceeds to the surviving spouse.

(2) If the petition filed under Section 650 includes a description of the interest of the surviving spouse in the community property or quasi-community property, or both, which belongs to the surviving spouse pursuant to Section 100 or 101 and the court finds that the interest belongs to the surviving spouse, issue an order describing the property and confirming the ownership of the surviving spouse and any further orders which may be necessary to cause ownership of the property to be confirmed in the surviving spouse.

(3) Issue an order ~~that the~~ *describing any* property which is not ~~community property or quasi-community~~ property passing to the surviving spouse, *determining that the property does not pass to the surviving spouse, and determining that the property* is subject to administration under this division.

(c) Upon becoming final, an order (1) determining that property is ~~community property or quasi-community~~ property passing to the surviving spouse or (2) confirming the ownership of the surviving spouse of property belonging to the surviving spouse under Section 100 or 101 shall be conclusive on all persons, whether or not they are in being.

Comment. Section 655 is amended to reflect the inclusion of separate property passing to the surviving spouse in the property of the decedent which need not be administered. See Section 649.1. Paragraph (3) of subdivision (b) is also amended to make the paragraph consistent with paragraph (1).

Probate Code § 656 (amended). Order to protect creditors of decedent's business

SEC. 12. Section 656 of the Probate Code is amended to read:

656. In any case in which the court finds that all or a part of the ~~community property or quasi-community~~ property passing to the surviving spouse consists of a business or an

interest in a business which the deceased spouse was operating or managing at the time of death, it shall require the surviving spouse to file a list of all of the known creditors of the business and the amount owing to each of them. The court may issue any order necessary to protect the interests of the creditors of the business, including the filing of an undertaking.

Comment. Section 656 is amended to reflect the inclusion of separate property passing to the surviving spouse in the property of the decedent which need not be administered. See Section 649.1.

Transitional provision

SEC. 13. The amendments made by this act to Sections 649.1, 649.3, 649.4, 650, 653, 655, and 656 of the Probate Code apply only to cases where the decedent died after December 31, 1984. If the decedent died before January 1, 1985, the case shall be governed by the law that would apply if those sections had not been amended by this act.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Simultaneous Deaths

September 1983

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

NOTE

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

Cite this recommendation as *Recommendation Relating to Simultaneous Deaths*, 17 Cal. L. Revision Comm'n Reports 443 (1984).

CALIFORNIA LAW REVISION COMMISSION

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September 23, 1983

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

This recommendation proposes enactment of the rule that a person must survive for at least 120 hours in order to take as a survivor under a will or other instrument or by intestate succession. The proposed rule is subject to a contrary provision in the will or other instrument.

This recommendation is submitted pursuant to 1980 Cal. Stats. res. ch. 37.

Respectfully submitted,

DAVID ROSENBERG
Chairperson

RECOMMENDATION

relating to

SIMULTANEOUS DEATHS

When two persons die in a common accident and there is evidence that one person survived the other for any amount of time, even a fraction of a second, property may pass to the survivor by will, intestate succession, or right of survivorship.¹ In this type of case, where one person dies soon after another, a serious injustice may result. For example, where a husband and wife who each have children from a former marriage die intestate in an automobile accident, all the community property will pass to the husband's children if it can be shown that he survived his wife for a fraction of a second. The wife's interest in the community property would pass to the husband in this instant of survival and then to his children. In the same way, property held in joint tenancy would go to the husband and then on his immediate death to his heirs, leaving the wife's heirs with nothing. A simple will calling only for survivorship would have the same result.

¹ Legislation enacted in 1983 on recommendation of the Law Revision Commission revised the California version of the Uniform Simultaneous Death Act (former Prob. Code §§ 296-296.8) to require "clear and convincing evidence" that one decedent survived another to avoid application of the Act. See Prob. Code §§ 103, 220-224, 230-234, as enacted by 1983 Cal. Stats. ch. 842, operative January 1, 1985. See also *Tentative Recommendation Relating to Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301, 2345-46 (1982). Under prior law, the Act applied only if there was "no sufficient evidence" that the decedents died other than simultaneously. See, e.g., *Estate of Rowley*, 257 Cal. App.2d 324, 65 Cal. Rptr. 139 (1967) (Simultaneous Death Act held inapplicable in case where testimony that one passenger in car was killed 1/150,000 of a second before the other).

The Uniform Simultaneous Death Act, when it applies, disposes of the property of each decedent as if each had survived. Prob. Code § 220 (former Prob. Code § 296). If there is no sufficient evidence that two joint tenants have died other than simultaneously, the joint tenancy property is split between the two estates. Prob. Code § 223 (former Prob. Code § 296.2). If a husband and wife die and there is no sufficient evidence that they died other than simultaneously, one-half of the community property is dealt with in each spouse's estate. Prob. Code § 103 (former Prob. Code § 296.4). If an insured and a beneficiary die and there is no sufficient evidence that they died other than simultaneously, the proceeds are distributed as if the insured survived the beneficiary. Prob. Code § 224 (former Prob. Code § 296.3).

The Commission has concluded that, as a matter of general policy, it is unfair to determine the recipients of property based on an instant of survival. The Commission recommends that the policy reflected in the Uniform Simultaneous Death Act, which generally divides property between the estates of the decedents, should be applied to situations of nearly simultaneous death. Most people who consider the question would want the taker to be someone who is likely to survive for more than a few minutes, hours, or even days. They would not want property to pass to one side of the family solely due to an instant of survival.

Opinions vary on the appropriate period of survival required to take property. A widely accepted figure is 120 hours—five days—and this is the required period of survival recommended by the Commission. The Uniform Probate Code adopts the 120-hour rule for purposes of taking by intestate succession or under a will (subject to a contrary provision in the will).² Provisions of this type have been adopted in a significant number of states in recent years.³

The 120-hour survival period would avoid litigation over survival for short periods of time. The 120-hour period is not so long that it would interfere with the ability of the survivor to deal with the property when a need arises, nor would it delay administration of the estate.

As recommended by the Commission, the 120-hour rule would apply to property passing by intestate succession and also to property passing by will, unless the will provides a different rule, in which case the will governs.⁴ The 120-hour rule should also apply to nonprobate transfers upon death,

² See Uniform Probate Code §§ 2-104 (intestate succession), 2-601 (wills) (1977).

³ At least 13 states have adopted a 120-hour survival rule. See Alaska Stat. §§ 13.11.020, 13.11.220 (1982); Ariz. Rev. Stat. Ann. §§ 14-2104, 14-2601 (1975); Colo. Rev. Stat. §§ 15-11-104, 15-11-601 (1974); Idaho Code §§ 15-2-104, 15-2-601 (1979); Me. Rev. Stat. Ann. tit. 18A, §§ 2-104, 2-601 (1981); Mich. Stat. Ann. §§ 27.5107, 27.5132 (1980); Mont. Code Ann. §§ 72-2-205, 72-2-511 (1981); Neb. Rev. Stat. §§ 30-2304, 30-2339 (1979); N.J. Stat. Ann. §§ 3B:3-32, 3B:5-1, 3B:6-6 (West 1983); N.M. Stat. Ann. §§ 45-2-104, 45-2-601 (1978); N.D. Cent. Code §§ 30.1-04-04, 30.1-09-01 (1976); Tex. Prob. Code Ann. § 47 (Vernon 1980); Utah Code Ann. §§ 75-2-104, 75-2-601 (1978). Ohio has a 30-day survival rule. Ohio Rev. Code Ann. § 2105.21 (Page 1976).

⁴ If a will has been executed before the operative date of the proposed revisions, the 120-hour rule would not apply where the will requires the devisee to survive the testator. This avoids the need to review and revise wills executed before the operative date. A provision requiring survival in a will executed after the operative date would not avoid the 120-hour rule.

such as survivorship under a joint tenancy⁵ and taking as a beneficiary of life or accident insurance,⁶ subject to a contrary provision about survival in the governing instrument. The rule of survival applicable to nonprobate transfers must be the same as the rule governing survival under a will or by intestate succession. Otherwise, capricious results would occur, as well as litigation over which rule should be applied, particularly in cases where married persons die in a common accident.⁷

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

An act to amend Section 1389.4 of the Civil Code, to amend Sections 103, 220, 222, 223, 224, 234, 6146, 6147, 6242, 6243, 6244, and 6403 of, and to amend the heading for Part 5 (commencing with Section 220) of Division 2 of, the Probate Code, relating to the period of survival required to take property.

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

Civil Code § 1389.4 (amended). Power of appointment

SECTION 1. Section 1389.4 of the Civil Code is amended to read:

1389.4. (a) 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

⁵ The 120-hour survival rule would not alter the power of the survivor to withdraw funds from a deposit account unless the deposit agreement provides otherwise.

⁶ This rule would not apply to insurance contracts in existence before the operative date of the proposed law.

⁷ For example, if the spouses hold real property in joint tenancy form and the husband dies intestate several hours after the wife, the disposition of the property may be in doubt. If the property is true joint tenancy property, it will be administered in the husband's estate, and if both spouses had children of a former marriage, the children of the wife will take nothing, the children of the husband everything. But if it can be shown that the property was actually community property held in joint tenancy form, the 120-hour survival rule would apply and the property would be divided in half between the two sets of children. See generally Hemmerling, *Death in a Common Disaster and Establishing Simultaneous Death*, in 2 California Decedent Estate Administration § 22.14, at 983 (Cal. Cont. Ed. Bar 1975).

appointee before the appointment becomes effective and the appointee leaves issue ~~surviving~~ *who survive* the donee *by 120 hours*, the surviving issue of such appointee shall take the appointed property in the same manner as the appointee would have taken had the appointee survived the donee *by 120 hours*, except that the property shall pass only to persons who are permissible appointees, including those permitted under Section 1389.5. If the surviving issue are all of the same degree of kinship to the deceased appointee they take equally, but if of unequal degree then those of more remote degree take by representation as provided in Section 240 of the Probate Code.

(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 adopt the 120-hour survival rule of Probate Code Section 220.

Probate Code § 103 (amended). Effect on community and quasi-community property where married person does not survive death of spouse by 120 hours

SEC. 2. Section 103 of the Probate Code is amended to read:

103. Except as provided by Section 224, if a husband and wife die leaving community or quasi-community property and it cannot be established by clear and convincing evidence that one spouse survived the other *by 120 hours*:

(a) One-half of the community property and one-half of the quasi-community property shall be administered upon or distributed, or otherwise dealt with, as if one spouse had survived and as if that half belonged to that spouse.

(b) The other half of the community property and the other half of the quasi-community property shall be administered upon or distributed, or otherwise dealt with, as if the other spouse had survived and as if that half belonged to that spouse.

Comment. Section 103 is amended to provide a 120-hour survival rule applicable to succession of community and quasi-community property. See also Sections 230-234 (proceeding to determine whether one spouse survived the other by 120 hours).

Probate Code - heading for Part 5 (commencing with Section 220) (amended)

SEC. 3. The heading for Part 5 (commencing with Section 220) of Division 2 of the Probate Code is amended to read:

PART 5. ~~SIMULTANEOUS DEATH~~ PERIOD OF SURVIVAL REQUIRED TO TAKE AS SURVIVOR

Probate Code § 220 (amended). Proof of survival by 120 hours

SEC. 4. Section 220 of the Probate Code is amended to read:

220. Except as otherwise provided in this chapter, if the title to property or the devolution of property depends upon priority of death and it cannot be established by clear and convincing evidence that one of the persons survived the other *by 120 hours*, the property of each person shall be administered upon or distributed, or otherwise dealt with, as if that person had survived the other.

Comment. Section 220 is amended to provide a 120-hour survival rule, drawn from Uniform Probate Code Sections 2-104 and 2-601. See also Sections 221 (provision of governing instrument prevails), 230-234 (proceeding to determine whether one person survived another by 120 hours).

Probate Code § 222 (amended). Survival of beneficiaries

SEC. 5. Section 222 of the Probate Code is amended to read:

222. (a) If property is so disposed of that the right of a beneficiary to succeed to any interest in the property is conditional upon surviving another person and it cannot be established by clear and convincing evidence that the beneficiary survived the other person *by 120 hours*, the beneficiary is deemed not to have survived the other person.

(b) If property is so disposed of that one of two or more beneficiaries would have been entitled to the property if he or she had survived the others, and it cannot be established by clear and convincing evidence that any beneficiary

survived any other beneficiary *by 120 hours*, the property shall be divided into as many equal portions as there are beneficiaries and the portion of each beneficiary shall be administered upon or distributed, or otherwise dealt with, as if that beneficiary had survived the other beneficiaries.

Comment. Section 222 is amended to provide a 120-hour survival rule. See also Section 221 (provision of governing instrument prevails), 230-234 (proceeding to determine whether one person survived another by 120 hours).

Probate Code § 223 (amended). Survival of joint tenants

SEC. 6. Section 223 of the Probate Code is amended to read:

223. (a) As used in this section, “joint tenants” includes owners of property held under circumstances that entitled one or more to the whole of the property on the death of the other or others.

(b) If property is held by two joint tenants and both of them have died and it cannot be established by clear and convincing evidence that one survived the other *by 120 hours*, the property held in joint tenancy shall be administered upon or distributed, or otherwise dealt with, one-half as if one joint tenant had survived and one-half as if the other joint tenant had survived.

(c) If property is held by more than two joint tenants and all of them have died and it cannot be established by clear and convincing evidence that any of them survived the others *by 120 hours*, the property held in joint tenancy shall be divided into as many portions as there are joint tenants and the share of each joint tenant shall be administered upon or distributed, or otherwise dealt with, as if that joint tenant had survived the other joint tenants.

(d) *Nothing in this chapter limits or affects any right a party to a joint account or other multiple-party account in a financial institution may have to withdraw funds from the account, whether or not the withdrawal is made within 120 hours after the death of another party to the account. If a person having the right to do so withdraws funds from a joint account or other multiple-party account within 120 hours after the death of another party to the account and subdivision (b) or (c) applies, the amount to which*

subdivision (b) or (c) applies is the amount remaining in the account after the funds are withdrawn.

Comment. Section 223 is amended to provide a 120-hour survival rule. See also Sections 221 (provision of governing instrument prevails), 230-234 (proceeding to determine whether one person survived another by 120 hours). Subdivision (d) is added to make clear, for example, that a joint bank account or similar account is not tied up as a consequence of this chapter during the 120-hour period after one joint account holder dies.

Probate Code § 224 (amended). Life or accident insurance

SEC. 7. Section 224 of the Probate Code is amended to read:

224. (a) If the insured and a beneficiary under a policy of life or accident insurance have died and it cannot be established by clear and convincing evidence that the beneficiary survived the insured *by 120 hours*, the proceeds of the policy shall be administered upon or distributed, or otherwise dealt with, as if the insured had survived the beneficiary.

(b) If the insured and the beneficiary are married to each other, this section applies regardless of whether the policy is community, quasi-community, or separate property.

(c) *This section does not apply to an insurance policy issued before January 1, 1985, and any such insurance policy continues to be governed by the law applicable before January 1, 1985.*

Comment. Section 224 is amended to provide a 120-hour survival rule. See also Section 221 (provision of governing instrument prevails), 230-234 (proceeding to determine whether one person survived another by 120 hours). Subdivision (c) is added to make clear that the 120-hour rule does not apply to insurance contracts issued before the operative date of this chapter.

Probate Code § 234 (amended). Hearing and order

SEC. 8. Section 234 of the Probate Code is amended to read:

234. At the hearing, the court shall hear the petition and any objections to the petition that may have been filed or presented. If the court determines that the named persons are dead and that it has not been established by clear and convincing evidence that one person survived another *by the applicable period of time*, the court shall make an order to that effect. If the court determines that the named persons are dead and that there is clear and convincing evidence that one person survived another *by the applicable period of time*, the court shall make an order setting forth the order in which the persons died. The order, when it becomes final, is a binding determination of the facts set forth in the order and is conclusive as against the personal representatives of the deceased persons named in the order and against all persons claiming by, through, or under any of the deceased persons.

Comment. Section 234 is amended to take account of the 120-hour survival rule. See Sections 220-224. See also Section 221 (provision of governing instrument prevails).

Probate Code § 6146 (amended). Requirement that devisee survive testator by 120 hours or until future time

SEC. 9. Section 6146 of the Probate Code is amended to read:

6146. (a) A devisee who fails to survive the testator or until any future time required by the will does not take under the will. For the purposes of this subdivision, unless a contrary intention is indicated by the will, a devisee of a future interest (including one in class gift form) is required by the will to survive to the time when the devise is to take effect in enjoyment.

(b) ~~In the absence of a contrary provision in the will~~
Subject to subdivisions (c) and (d):

(1) If it cannot be established by clear and convincing evidence that the devisee has survived the testator *by 120 hours*, it is deemed that the devisee did not survive the testator.

(2) If it cannot be established by clear and convincing evidence that the devisee survived until a future time

required by the will, it is deemed that the devisee did not survive until the required future time.

(c) The requirement of subdivision (b) that a devisee survive the testator by 120 hours does not apply if both of the following requirements are satisfied:

(1) The will contains (A) a provision dealing explicitly with simultaneous deaths or deaths in a common disaster, (B) a provision requiring the devisee to survive the testator for a stated period in order to take under the will, or (C) a presumption as to survivorship.

(2) The provision or presumption results in a distribution of property different from that provided by this chapter.

(d) The requirement of paragraph (1) of subdivision (c) is satisfied as to a will executed before January 1, 1985, if the will requires the devisee to survive the testator but states no time period.

Comment. Section 6146 is amended to provide a general rule requiring a devisee to survive the testator by 120 hours. Subdivision (c) makes clear that a contrary provision in the will prevails over the general 120-hour rule. For rules governing survival by beneficiaries in cases not governed by this section, see Sections 221 and 222. Subdivision (d) has the result of avoiding application of the 120-hour rule to wills executed before the operative date of the rule even if the will provides simply that the devisee must survive the testator. Wills executed on or after January 1, 1985, however, must satisfy the requirement of subdivision (c) (1) to make the 120-hour rule inapplicable.

Probate Code § 6147 (amended). Anti-lapse

SEC. 10. Section 6147 of the Probate Code is amended to read:

6147. (a) As used in this section, "devisee" means a devisee who is kindred of the testator or kindred of a surviving, deceased, or former spouse of the testator.

(b) Subject to subdivision (c), if a devisee is dead when the will is executed, or is treated as if he or she predeceased the testator, or fails to survive the testator *by 120 hours* or until a future time required by the will, the issue of the deceased devisee take in his or her place by representation. A devisee under a class gift is a devisee for the purpose of

this subdivision unless his or her death occurred before the execution of the will and that fact was known to the testator when the will was executed.

(c) The issue of a deceased devisee do not take in his or her place if the will expresses a contrary intention or substitute disposition. With respect to multiple devisees or a class of devisees, a contrary intention or substitute disposition is not expressed by a devise to the “surviving” devisees or to “the survivor or survivors” of them, or words of similar import, unless one or more of the devisees had issue living at the time of the execution of the will and that fact was known to the testator when the will was executed.

Comment. Section 6147 is amended to recognize the 120-hour survival rule provided in Section 6146.

Probate Code § 6242 (amended). Full text of paragraph 2.1 of all California statutory wills

SEC. 11. Section 6242 of the Probate Code is amended to read:

6242. The following is the full text of paragraph 2.1 of both California statutory will forms appearing in this chapter:

If my spouse survives me *by 120 hours*, I give my spouse all my books, jewelry, clothing, personal automobiles, household furnishings and effects, and other tangible articles of a household or personal use. If my spouse does not survive me *by 120 hours*, the executor shall distribute those items among my children who survive me *by 120 hours*, and shall distribute those items in as nearly equal shares as feasible in the executor’s discretion. If none of my children survive me *by 120 hours*, the items described in this paragraph shall become part of the residuary estate.

Comment. Section 6242 is amended to recognize the 120-hour survival rule provided in Section 6146.

Probate Code § 6243 (amended). Full text of property disposition clauses of California statutory will

SEC. 12. Section 6243 of the Probate Code is amended to read:

6243. The following are the full text of the property disposition clauses referred to in paragraph 2.3 of the California statutory will form set forth in Section 6240:

(a) TO MY SPOUSE IF LIVING; IF NOT LIVING, THEN TO MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD.

If my spouse survives me *by 120 hours*, then I give all my residuary estate to my spouse. If my spouse does not survive me *by 120 hours*, then I give all my residuary estate to my descendants who survive me *by 120 hours*.

(b) TO MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD. I LEAVE NOTHING TO MY SPOUSE, IF LIVING.

I give all my residuary estate to my descendants who survive me *by 120 hours*. I leave nothing to my spouse, even if my spouse survives me.

(c) TO BE DISTRIBUTED AS IF I DID NOT HAVE A WILL:

The executor shall distribute my residuary estate to my heirs at law, their identities and respective shares to be determined according to the laws of the State of California in effect on the date of my death relating to intestate succession.

Comment. Section 6243 is amended to recognize the 120-hour survival rule provided in Section 6146.

Probate Code § 6244 (amended). Full text of property disposition clauses of California statutory will with trust

SEC. 13. Section 6244 of the Probate Code is amended to read:

6244. The following are the full texts of the property disposition clauses referred to in paragraph 2.3 of the California statutory will with trust form set forth in Section 6241:

(a) TO MY SPOUSE IF LIVING; IF NOT LIVING, THEN IN ONE TRUST TO PROVIDE FOR THE SUPPORT AND EDUCATION OF MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD UNTIL I HAVE NO LIVING CHILD UNDER 21 YEARS OF AGE.

(1) If my spouse survives me *by 120 hours*, then I give all my residuary estate to my spouse.

(2) If my spouse does not survive me *by 120 hours* and if any child of mine under 21 years of age survives me *by 120 hours*, then I give all my residuary estate to the trustee, in trust, on the following terms:

(A) As long as any child of mine under 21 years of age is living, the trustee shall distribute from time to time to or for the benefit of any one or more of my children and the descendants of any deceased child (the beneficiaries) of any age as much, or all, of the (i) principal or (ii) net income of the trust, or (iii) both, as the trustee deems necessary for their health, support, maintenance, and education. Any undistributed income shall be accumulated and added to the principal. "Education" includes, but is not limited to, college, graduate, postgraduate, and vocational studies, and reasonably related living expenses. Consistent with the trustee's fiduciary duties, the trustee may distribute trust income or principal in equal or unequal shares and to any one or more of the beneficiaries to the exclusion of other beneficiaries. In deciding on distributions, the trustee may take into account, so far as known to the trustee, the beneficiaries' other income, outside resources, or sources of support, including the capacity for gainful employment of a beneficiary who has completed his or her education.

(B) The trust shall terminate when there is no living child of mine under 21 years of age. The trustee shall distribute any remaining principal and accumulated net income of the trust to my descendants who are then living.

(3) If my spouse does not survive me *by 120 hours* and if no child of mine under 21 years of age survives me *by 120 hours*, then I give all my residuary estate to my descendants who survive me *by 120 hours*.

(b) TO MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD IN ONE TRUST TO PROVIDE FOR THEIR SUPPORT AND EDUCATION UNTIL I HAVE NO LIVING CHILD UNDER 21 YEARS OF AGE. I LEAVE NOTHING TO MY SPOUSE, IF LIVING.

(1) I give all my residuary estate to the trustee, in trust, on the following terms:

(A) As long as any child of mine under 21 years of age is living, the trustee shall distribute from time to time to or for the benefit of any one or more of my children and the descendants of any deceased child (the beneficiaries) of any age as much, or all, of the (i) principal, or (ii) net income of the trust, or (iii) both, as the trustee deems necessary for their health, support, maintenance, and education. Any undistributed income shall be accumulated and added to the principal. "Education" includes, but is not limited to, college, graduate, postgraduate, and vocational studies, and reasonably related living expenses. Consistent with the trustee's fiduciary duties, the trustee may distribute trust income or principal in equal or unequal shares and to any one or more of the beneficiaries to the exclusion of other beneficiaries. In deciding on distributions, the trustee may take into account, so far as known to the trustee, the beneficiaries' other income, outside resources, or sources of support, including the capacity for gainful employment of a beneficiary who has completed his or her education.

(B) The trust shall terminate when there is no living child of mine under 21 years of age. The trustee shall distribute any remaining principal and accumulated net income of the trust to my descendants who are then living.

(2) If no child of mine under 21 years of age survives me *by 120 hours*, then I give all my residuary estate to my descendants who survive me *by 120 hours*.

(3) I leave nothing to my spouse, even if my spouse survives me.

Comment. Section 6244 is amended to recognize the 120-hour survival rule provided in Section 6146.

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

SEC. 14. Section 6403 of the Probate Code is amended to read:

6403. A person who fails to survive the decedent *by 120 hours* is deemed to have predeceased the decedent for the

purpose of intestate succession, and the heirs are determined accordingly. If it cannot be established by clear and convincing evidence that a person who would otherwise be an heir has survived the decedent *by 120 hours*, it is deemed that the person ~~failed to survive~~ *predeceased* the decedent. *The requirement of this section that a person who survives the decedent must survive the decedent by 120 hours does not apply if the application of the 120-hour survival requirement would result in the escheat of property to the state.*

Comment. Section 6403 is amended to provide a 120-hour survival rule. See also Sections 230-234 (proceeding to determine whether one person survived another by 120 hours).

Act does not apply if death occurs before January 1, 1985

SEC. 15. This act does not apply in any case where any of the decedents upon whose time of death the disposition of property depends died before January 1, 1985, and such case continues to be governed by the law applicable to the case before January 1, 1985.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Notice of Will

September 1983

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

NOTE

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

Cite this recommendation as *Recommendation Relating to Notice of Will*, 17 Cal. L. Revision Comm'n Reports 461 (1984).

CALIFORNIA LAW REVISION COMMISSION

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September 23, 1983

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

This recommendation proposes the establishment of a voluntary registration system for wills in the office of the Secretary of State. After January 1, 1990, a certified copy of the notice on file or a certificate that no notice is on file must be obtained from the office of the Secretary of State and filed in any proceeding in which the existence of a will is relevant.

This recommendation is submitted pursuant to 1980 Cal. Stats. res. ch. 37.

Respectfully submitted,

DAVID ROSENBERG
Chairperson

RECOMMENDATION

relating to

NOTICE OF WILL

After a person dies it is necessary to determine whether the person made a will and, if so, where it is located.¹ Even if the existence and location of a will are known, it is still necessary to search for codicils and any later wills. To assist in this process, the Law Revision Commission recommends establishment of a voluntary registration system whereby notice of a will may be filed with the Secretary of State.² Under this scheme, for a small fee a person may choose to file identifying information and the location of a will, but not the will itself. The information in the notice is kept in strict confidence until the death of the testator. After the death of the testator, a certified copy of the notice on file or a certificate reporting that no notice is on file must be obtained from the Secretary of State and then filed in any proceeding in which the existence of a will made by the testator is relevant. The proposed scheme also permits the testator to file additional notices to change any relevant information or to give notice that a will has been revoked. Neither the failure to file nor the filing of any notice has any effect on the validity of a will.

The Commission anticipates that this notice of will registry, involving a relatively modest cost,³ will result in finding wills that otherwise might not be found. This view is supported by British Columbia's experience with a similar system for registration of will notices in place since

¹ See Farrand, *Immediate Arrangements*, in 1 California Decedent Estate Administration § 1.16, at 16 (Cal. Cont. Ed. Bar 1971).

² A registry system is not unknown to California since the Uniform International Wills Act (Prob. Code §§ 60-60.8, to be superseded by Prob. Code §§ 6380-6388, operative January 1, 1985) permits filing of information with the Secretary of State concerning an international will. Use of an international will is intended to facilitate proving the validity of a will in countries that are signatories to the international convention. The registry established by the Uniform International Wills Act applies only to wills that are executed in conformity with the Act.

³ The fee for filing the notice of will or for requesting a certificate is \$10.

1945.⁴ The Law Reform Commission of British Columbia has reported the following:⁵

The surprisingly high volume of registrations in the Wills Registry belies criticisms of voluntary systems. In 1971 there were 19,250 notices of wills filed. Four years later this figure had doubled to 37,275, and in 1978 46,217 notices were filed with the Registry. These figures are impressive in light of the relatively small population of the Province and the fact that the scheme is not advertised. Another significant statistic is the number of positive responses to searches. The Wills Registration Division of the Vital Statistics Branch has indicated that in 1971 there were four times as many negative as positive responses issued. In 1978 the office issued 12,450 negative certificates and 7,255 positive certificates. One expects that in the future the number of positive responses will continue to increase.

The requirement that a certified copy or a certificate of the Secretary of State be filed in proceedings where relevant would apply only after January 1, 1990. This delay will allow time for a sufficient number of filings to be made to justify searching the records.

Proposed Legislation

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

An act to add Chapter 10 (commencing with Section 6360) to Part 1 of Division 6 of the Probate Code, relating to wills.

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

SECTION 1. Chapter 10 (commencing with Section 6360) is added to Part 1 of Division 6 of the Probate Code, to read:

⁴ See Wills Act, B.C. Rev. Stat. ch. 434, §§ 33-40 (1979).

⁵ Law Reform Comm'n of British Columbia, Report on the Making and Revocation of Wills 114 (1981).

CHAPTER 10. FILING NOTICE OF WILL

§ 6360. Filing notice of will

6360. (a) A person who has made a will may file a notice of will in the office of the Secretary of State.

(b) The notice of will shall contain the following information:

- (1) The name of the testator.
- (2) The testator's address.
- (3) The testator's social security or other individual-identifying number established by law, if any.
- (4) The testator's date and place of birth.
- (5) A statement that the testator has made a will and the date of the will.

(6) The place where the will is kept.

(c) The notice may include any of the following:

- (1) The name and address of the testator's attorney.
- (2) The name and address of a person who has custody of the will or custody of a copy of the will.

(d) If the testator's name is changed or if the place where the will is kept is changed, the testator may file a new notice of will containing the correct information. The new notice of will may also refer to the earlier notice of will.

(e) The filing of a notice of will, or the failure to file a notice of will, under this section does not affect the validity of the will.

Comment. Section 6360 provides a new voluntary procedure for filing a notice of the existence and location of a will. Registration is voluntary, but a search of the records is required for any proceeding in which the existence of a will is relevant. See Section 6364. Section 6360 does not require or permit the filing of the will itself. The procedure provided by this chapter is distinct from that provided under the International Wills Act. See Section 6389 (registry system for international wills information).

§ 6361. Filing notice of revocation

6361. (a) A person who has filed a notice of will pursuant to Section 6360 and who has revoked the will referred to in the notice may file in the office of the Secretary of State a notice of revocation of will.

(b) The notice of revocation of will shall contain the following information:

- (1) The name of the person who is revoking the will.
- (2) The person's address.
- (3) The person's social security or other individual-identifying number established by law, if any.
- (4) The person's date and place of birth.
- (5) A statement that the will referred to in a notice of will filed by the person pursuant to Section 6360 has been revoked.

(c) The filing of a notice of revocation under this section does not itself revoke the will. The failure to file a notice of revocation under this section does not affect the validity of a revocation of a will. No inference that a will has not been revoked may be drawn from the failure to file a notice of revocation.

Comment. Section 6361 is new. This section is intended to provide information as to the revocation of a will. Subdivision (c) makes clear that the filing or nonfiling of a notice of revocation has no effect on the revocation or validity of a will.

§ 6362. Filing and indexing of notices; fee

6362. Upon presentation of a notice of will or notice of revocation of will for filing and tender of the filing fee to the office of the Secretary of State, the notice shall be filed and indexed. The fee for filing and indexing a notice of will or notice of revocation of will is ten dollars (\$10).

Comment. Section 6362 is new.

§ 6363. Release of information

6363. (a) Information filed pursuant to this chapter shall be kept in strictest confidence until the death of the testator.

(b) After the death of the testator, upon the request of a person who presents a death certificate or other satisfactory evidence of the testator's death, the Secretary of State shall issue a certified copy of any information on file about the testator's will. If no information on the testator's will is on file, the Secretary of State shall issue a certificate stating that fact. The fee for a certified copy or a certificate under this section is ten dollars (\$10).

Comment. Subdivision (a) of Section 6363 is similar to a portion of Section 6389 in the International Wills Act. Subdivision (b) is drawn in part from Section 6389 of the International Wills Act. A certified copy or a certificate from the Secretary of State is necessary in proceedings under this code where the existence of a will is relevant, as provided in Section 6364.

§ 6364. Filing of certificate in probate and other proceedings

6364. (a) A certified copy or a certificate of the Secretary of State issued pursuant to Section 6363 shall be filed with the court:

(1) In proceedings for probate of a will or for administration, at a time before any distribution is made or before the time for filing claims expires, whichever is earlier.

(2) In any other proceeding in which the existence of a will is relevant, promptly after the commencement of the proceeding.

(b) This section becomes operative on January 1, 1990.

Comment. Subdivision (a) of Section 6364 makes clear that a petitioner in any proceeding concerning the disposition of property upon death must file a certified copy or the Secretary of State's certificate relating to whether there is a notice of a will on file. Subdivision (b) delays the application of this requirement to allow time for a significant number of notices to be filed.

§ 6365. Regulations

6365. The Secretary of State may prescribe the form of the notices, certificates, and requests for information under this chapter.

Comment. Section 6365 is similar to authority provided elsewhere. See, *e.g.*, Code Civ. Proc. §§ 488.375, 488.405 (notice of attachment prescribed by Secretary of State).

§ 6366. Destruction of obsolete records

6366. Ten years after the Secretary of State has received a request under this chapter for information accompanied by a death certificate or other satisfactory evidence of the testator's death, the Secretary of State may destroy the information filed pursuant to this chapter by the deceased testator and the record of that information.

Comment. Section 6366 permits destruction of obsolete records. The Secretary of State is permitted, but not required, to destroy the records.

§ 6367. Microfilming notices; destruction of originals

6367. (a) The Secretary of State may microfilm or reproduce by other techniques any notice filed under this chapter and may destroy the original. The microfilming or other reproduction shall be made in the manner and on film or paper that complies with the minimum standards of quality approved by the National Bureau of Standards.

(b) The microfilm or other reproduction of a notice under this chapter shall be deemed to be an original record.

Comment. Section 6367 is new and is drawn from other comparable provisions. See Com. Code § 9407.1; Gov't Code §§ 27322.2, 27322.4, 71007.

§ 6368. Protection of attorney from liability

6368. An attorney is not subject to liability or professional disciplinary action based on failure of the attorney to advise a client to file or not to file any notice that may be filed under this chapter, whether or not the client previously has filed a notice under this chapter.

Comment. Section 6368 is included to ensure that the filing of notices under this chapter is voluntary and that notices will not be filed merely because the attorney for the person making the will fears that the attorney may be liable for failure to advise the client, for example, to file a notice of will, to file a new notice of will to correct information contained in a previously filed notice, or to file a notice of revocation where a notice of will was previously filed. See Sections 6360 and 6361 and the Comments to those sections.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

**Garnishment of Amounts
Payable to Trust Beneficiary**

September 1983

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

NOTE

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

Cite this recommendation as *Recommendation Relating to Garnishment of Amounts Payable to Trust Beneficiary*, 17 Cal. L. Revision Comm'n Reports 471 (1984).

CALIFORNIA LAW REVISION COMMISSION

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September 23, 1983

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Commission recommends that amounts payable to a trust beneficiary be made subject to garnishment under a writ of execution to the same extent as earnings. This will avoid the need to obtain a court determination that garnishment is an appropriate means to reach these amounts. In addition, adoption of the wage garnishment standard will provide clear rules for determining the amount to be paid to the creditor by the trustee.

This recommendation is submitted pursuant to 1974 Cal. Stats. res. ch. 45 (creditors' remedies) and 1980 Cal. Stats. res. ch. 37 (probate law).

Respectfully submitted,

DAVID ROSENBERG
Chairperson

RECOMMENDATION

relating to

GARNISHMENT OF AMOUNTS PAYABLE TO TRUST BENEFICIARY

Existing law does not permit a judgment creditor to levy on the amounts payable to the judgment debtor from a trust.¹ Instead, the creditor must petition the probate court for an order that payments from the trust be applied to the satisfaction of the judgment by such means as the court, in its discretion, determines are proper.²

If the trust is a spendthrift trust, the court must also determine the amount necessary for the education and support of the beneficiary. This is the amount that is protected from the creditor if the trust is a spendthrift trust.³ A station-in-life test is used to determine the protected amount.⁴ The "surplus" income over the protected amount is subject to the creditor's claim.⁵

The Commission recommends that the amounts payable to a trust beneficiary be made subject to garnishment under

¹ Code Civ. Proc. § 699.720(a) (8).

² Code Civ. Proc. § 709.010.

³ See, e.g., *Canfield v. Security-First Nat'l Bank*, 13 Cal.2d 1, 11-12, 87 P.2d 830 (1939); see generally 7 B. Witkin, *Summary of California Law Trusts* § 94, at 5452-54 (8th ed. 1974).

⁴ See *Canfield v. Security-First Nat'l Bank*, 13 Cal.2d 1, 21-24, 87 P.2d 830 (1939); *Magner v. Crooks*, 139 Cal. 640, 642, 73 P. 585 (1903). Use of the station-in-life test has seldom given a creditor payment on a claim. Powell, *The Rule Against Perpetuities and Spendthrift Trusts in New York: Comments and Suggestions*, 71 Colum. L. Rev. 688, 699 (1971). The California Supreme Court has rejected the more extreme New York cases, but has continued to embrace the station-in-life test which considers factors such as the social background of the beneficiary and the need for servants. See, e.g., *Canfield v. Security-First Nat'l Bank*, 13 Cal.2d 1, 24-28, 87 P.2d 830 (1939). For criticisms of the station-in-life test, see Costigan, *Those Protective Trusts Which Are Miscalled "Spendthrift Trusts" Reexamined*, 22 Calif. L. Rev. 471, 484 (1934); Evans, *"Observations on the State, Etc., of the California Laws of Uses and Trusts"*, 28 S. Cal. L. Rev. 111, 112-13 (1955); Note, 40 Calif. L. Rev. 441, 446-47 (1952).

⁵ Civil Code § 859. See also Code Civ. Proc. §§ 699.720(a) (8) (interest of trust beneficiary not subject to levy of execution), 709.010 (judicial procedure for reaching interest of trust beneficiary). If the trustee has discretion to determine the disposition of the trust income, the trustee may defeat the creditor's attempt to reach the "surplus" by reducing the amount to be paid to the beneficiary to the amount determined by the court to be necessary for the support and education of the beneficiary. See *Estate of Canfield*, 80 Cal. App.2d 443, 181 P.2d 732 (1947); E. Griswold, *Spendthrift Trusts* § 428 (2d ed. 1947).

a writ of execution to the same extent as earnings. This will avoid the need to obtain a court determination that garnishment is an appropriate means to reach these amounts. In addition, adoption of the wage garnishment standard will provide detailed rules for determining the amount to be paid to the creditor by the trustee.

The Wage Garnishment Law provides a statutory formula for determining amounts that are to be withheld from earnings to satisfy a money judgment. Under existing law,⁶ \$435.50 per month is protected from a general creditor. A general creditor can reach the amount over \$435.50 up to \$580.66 and can reach one-fourth of the amount payable where monthly payments exceed \$580.66. Where the debtor can show that a greater amount is necessary for his or her support or the support of his or her dependents, a hardship claim may be made.⁷ Where the garnishment is made to collect delinquent amounts payable under a judgment for the support of a child or spouse or former spouse of the debtor, the creditor can reach one-half of the amount payable,⁸ but any party may apply to the court for an equitable division that varies this 50-50 division rule.⁹

The wage garnishment rules would replace the existing rule that permits a creditor of the beneficiary of a spendthrift trust to reach the surplus over the amount necessary for education and support of the beneficiary. Under existing law, it is necessary to obtain a court determination of the amount of the surplus in every case. Adoption of the wage garnishment rules would avoid the need for a court determination except in an unusual case.

The most convincing modern justification for protecting amounts payable from a spendthrift trust is that the "protection of impecunious beneficiaries is in accord with

⁶ Code Civ. Proc. § 706.050. This provision incorporates the federal standard provided in 15 U.S.C. § 1673(a) (1976) which protects an amount of disposable earnings per week equal to 30 times the federal minimum wage (currently \$3.35). Disposable earnings are earnings remaining after the deduction of taxes and other amounts required by law to be deducted. 15 U.S.C. § 1672(b) (1976).

⁷ Code Civ. Proc. § 706.051.

⁸ Code Civ. Proc. § 706.052.

⁹ Code Civ. Proc. § 706.052(b). The court may reduce the amount to be withheld, but federal law limits the extent to which the court can increase the amount to be withheld. Under certain circumstances, as much as 65% may be withheld. See Code Civ. Proc. § 706.052(c) and the Comment thereto.

public policy, at least to the extent of keeping such beneficiaries from becoming public charges.”¹⁰ The exemptions governing wage garnishment represent a balancing of the interest of the creditor and the interest of the debtor and are designed to minimize the need for judicial determinations. Wage garnishment exemptions are also applied when certain private retirement benefits or periodic payments of damages for personal injury or wrongful death are garnished.¹¹ It is appropriate to apply the same standards to the garnishment of payments from a spendthrift trust. To provide more protection from creditors for beneficiaries of inherited wealth than is provided for wage earners is a discrimination that can no longer be tolerated.¹²

In the case of a spendthrift or support trust, the recommended legislation limits the amounts payable to the beneficiary that can be reached by the creditor to the amounts that could be reached on a like amount of earnings regardless of whether the creditor uses a writ of execution or some other procedure.¹³ The creditor of a beneficiary of a trust other than a spendthrift or support trust can reach this same amount by garnishment under a writ of execution and will continue to have the right provided by existing law to apply for a court order to reach the entire interest of the beneficiary in the trust.

¹⁰ *Canfield v. Security-First Nat'l Bank*, 13 Cal.2d 1, 11, 87 P.2d 830 (1939). A similar policy supports the various exemptions from enforcement of a money judgment. See *Holmes v. Marshall*, 145 Cal. 777, 778-79, 79 P. 534 (1905); *Tentative Recommendation Proposing the Enforcement of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001, 2075-76 (1980).

¹¹ Code Civ. Proc. §§ 704.115(f) (retirement), 704.140(d) (personal injury), 704.150(c) (wrongful death).

¹² Professor Jesse Dukeminier emphasizes this: "What is wrong with the spendthrift trust is that it is symbolically wrong: it signals that we protect the beneficiaries of inherited wealth from creditors when we do not so protect wage earners. That is the wrong symbol in a democracy. Wage earners are not deserving of less protection and should not be symbolically treated as second-class citizens. All income recipients should be treated alike, regardless of the source of the income." Letter from Jesse Dukeminier to John H. DeMouly (Aug. 18, 1983) (on file in office of Commission).

¹³ This limitation would not apply against a public entity which is seeking reimbursement for support provided to a beneficiary of a spendthrift or support trust. See *Estate of Lackmann*, 156 Cal. App.2d 674, 320 P.2d 186 (1958).

The recommended legislation would apply to all trusts, whether created before or after the date the legislation goes into effect.¹⁴

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

An act to amend Sections 699.720 and 709.010 of the Code of Civil Procedure, relating to trusts.

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

Code of Civil Procedure § 699.720 (technical amendment). Property not subject to execution

SECTION 1. Section 699.720 of the Code of Civil Procedure is amended to read:

699.720. (a) The following types of property are not subject to execution:

(1) An alcoholic beverage license that is transferable under Article 5 (commencing with Section 24070) of Chapter 6 of Division 9 of the Business and Professions Code.

(2) The interest of a partner in a partnership where the partnership is not a judgment debtor.

(3) A cause of action that is the subject of a pending action or special proceeding.

(4) A judgment in favor of the judgment debtor prior to the expiration of the time for appeal from such judgment or, if an appeal is filed, prior to the final determination of the appeal.

(5) A debt (other than earnings) owing and unpaid by a public entity.

(6) The loan value of an unmatured life insurance, endowment, or annuity policy.

¹⁴ It has long been settled that debtors have no vested right in exemption laws. See E. Griswold, *Spendthrift Trusts* § 391, at 483 (2d ed. 1947); Vukowich, *Debtor's Exemption Rights*, 62 Geo. L.J. 779, 865 (1974); 35 C.J.S. *Exemptions* § 6 (1960). See also Code Civ. Proc. §§ 703.050, 703.060. Application of a 10 percent garnishment statute to existing trusts was upheld in *New York. Brearly School v. Ward*, 201 N.Y. 358, 94 N.E. 1001 (1911).

(7) A franchise granted by a public entity and all the rights and privileges thereof.

(8) The interest of a trust beneficiary, *other than amounts subject to execution under subdivision (c) of Section 709.010.*

(9) A contingent remainder, executory interest, or other interest in property that is not vested.

(10) Property in a guardianship or conservatorship estate.

(b) Nothing in subdivision (a) affects or limits the right of the judgment creditor to apply property to the satisfaction of a money judgment pursuant to any applicable procedure other than execution.

Comment. Subdivision (a) (8) of Section 699.720 is amended to conform to subdivision (c) of Section 709.010 which permits execution on amounts payable to a judgment debtor as beneficiary under a trust.

**Code of Civil Procedure § 709.010 (amended).
Enforcement against trusts**

SEC. 2. Section 709.010 of the Code of Civil Procedure is amended to read:

709.010. (a) As used in this section, “trust” has the meaning provided in Section 1138 of the Probate Code but includes a trust subject to court supervision under Article 1 (commencing with Section 1120) of Chapter 19 of Division 3 of the Probate Code.

(b) ~~The~~ *Except as provided in subdivision (c), the* judgment debtor’s interest as a beneficiary of a trust is subject to enforcement of a money judgment only upon petition under this section by the judgment creditor to the court prescribed in Chapter 19 (commencing with Section 1120) of Division 3 of the Probate Code (administration of trusts). The judgment debtor’s interest in the trust may be applied to the satisfaction of the money judgment by such means as the court, in its discretion, determines are proper, including but not limited to imposition of a lien on or sale of the judgment debtor’s interest, collection of trust income, and liquidation and transfer of trust assets by the trustee.

(c) If payments in the form of cash or its equivalent are being made to the beneficiary from the trust or are to be made in the future, the amounts payable are subject to execution before payment. The amount of the payments that may be applied to the satisfaction of a money judgment by levy under a writ of execution is the amount that may be withheld from a like amount of earnings under Chapter 5 (commencing with Section 706.010) (Wage Garnishment Law). Any court determinations in connection with a levy under this subdivision, including but not limited to an exemption claim under Section 706.051 or a motion under Section 706.052, shall be made by the court where the judgment sought to be enforced was entered unless the levy is made pursuant to a court determination made under subdivision (b).

(d) Amounts payable to a beneficiary from a spendthrift trust or a support trust may be applied to the satisfaction of a money judgment only in the amount determined as provided in subdivision (c), whether the amounts are sought to be applied to the satisfaction of the judgment in a proceeding under subdivision (b) or by execution under subdivision (c) or both. If the trust is not a spendthrift trust or a support trust, the amount that may be applied to the satisfaction of a money judgment in a proceeding under subdivision (b) is not limited to the amount determined as provided in subdivision (c). Nothing in this subdivision limits the right of the state or other public entity to recover for support provided to a trust beneficiary or to recover for payments made for the support of a trust beneficiary.

~~*(e) Nothing in this section affects the law relating to enforcement of a money judgment against the judgment debtor's interest in a spendthrift trust, but surplus*~~

~~*(e) Subject to subdivision (d), surplus amounts from a spendthrift trust liable pursuant to Section 859 of the Civil Code are subject to enforcement of a money judgment under this section.*~~

Comment. Subdivision (c) is added to Section 709.010 to make amounts payable to a trust beneficiary subject to garnishment under a writ of execution. This avoids the need to commence a proceeding under subdivision (b) to apply the beneficiary's interest to satisfaction of the money judgment. If

levy is made under a writ of execution as provided in subdivision (c), the trustee is required to pay to the levying officer the nonexempt portion of payments that would otherwise be made to the beneficiary, regardless of the nature of the trust. See Sections 700.170 (levy on general intangibles), 701.010 (duty of garnishee), 701.050 (duty of account debtor). This duty continues during the period of the execution lien. See Sections 697.710 (duration of execution lien), 701.010 (duty of garnishee).

The amount to be applied to the satisfaction of the money judgment under a levy pursuant to subdivision (c) is the amount that could be withheld under the Wage Garnishment Law. The Wage Garnishment Law provides a formula for determining the amount to be paid to the judgment creditor. In the case of an ordinary judgment, the amount is determined by Section 706.050. Where the trust beneficiary can show that a greater amount is necessary for his or her support or the support of his or her dependents, the trust beneficiary may claim an exemption under Section 706.051. Where the execution is to collect delinquent amounts payable under a judgment for the support of a child, or spouse or former spouse, of the judgment debtor, the amount to be withheld is determined by Section 706.052. See also Sections 706.074 and 706.076.

In the case of a spendthrift or support trust, subdivision (c) provides the standard for determining the entire amount of payments that may be reached in the hands of the trustee. See subdivision (d). No greater amount of payments from such trusts may be subjected to enforcement of a money judgment. However, the last sentence of subdivision (d) makes clear that this limitation does not apply against a public entity seeking reimbursement for support provided to a beneficiary. See *Estate of Lackmann*, 156 Cal. App.2d 674, 320 P.2d 186 (1958).

If the trust is not a spendthrift or support trust, the creditor may first levy on the amount permitted by subdivision (c) and also apply for a court order under subdivision (b) to reach the remainder of any payments. As an alternative, the creditor may apply to the court under subdivision (b) at the outset and the amount of payments subject to enforcement is determined under subdivision (d). The court in a hearing under subdivision (b) may determine any issue concerning whether the trust is a spendthrift or support trust and, if it is, the applicable exemption.

Application to existing trusts

SEC. 3. This act applies to all trusts (as defined in Section 709.010 of the Code of Civil Procedure), whether the trust is created before or after the operative date of this act.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Bonds for Personal Representatives

September 1983

**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 Bonds for Personal Representatives*, 17 Cal. L. Revision Comm'n Reports 483 (1984).

CALIFORNIA LAW REVISION COMMISSION

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BEATRICE P. LAWSON

September 23, 1983

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Commission recommends clarifying amendments to the Probate Code to make clear that (1) a bond is not required, absent a showing of good cause, where all the beneficiaries or all the heirs have waived bond, and (2) a bond is not required of a special administrator when no bond will be required when the same person is later appointed as executor or administrator.

This recommendation is submitted pursuant to 1980 Cal. Stats. res. ch. 37.

Respectfully submitted,

DAVID ROSENBERG
Chairperson



RECOMMENDATION

relating to

BONDS FOR PERSONAL REPRESENTATIVES

The purpose of a bond for the personal representative of a decedent's estate is to ensure that the personal representative will faithfully perform the duties of the office.¹ The bond protects the persons interested in the estate by giving them security in the form of a promise by the surety to pay if there is a breach of trust.²

The annual cost of a required bond can be charged against the estate in an amount not exceeding \$50 for a bond of up to \$4,000, and half of one percent of the amount over \$4,000.³ For example, the annual cost that can be charged against the estate for a bond in the amount of \$100,000 is \$530.

The Probate Code includes provisions designed to permit the testator or all the persons who will take the decedent's estate to avoid the cost of a bond. If a will waives bond for the named executor, no bond is required if the named executor qualifies.⁴ If the will does not expressly require a bond, or if there is no will, the court is authorized—but not required—to direct that no bond be filed if all beneficiaries under the will, or all the heirs, waive bond.⁵ Where the will waives the bond or the court has directed that no bond be filed, the court may nevertheless order a bond be given if there is good cause to do so.⁶ The court may make such an order either on the petition of a person interested in the estate or on its own motion.⁷

¹ Prob. Code § 541.

² Code Civ. Proc. §§ 995.850, 996.410-996.495.

³ Prob. Code § 541.5.

⁴ Prob. Code § 541.

⁵ Prob. Code § 541. The allegation that all beneficiaries under the will, or all the heirs, have waived bond is made in a verified petition for letters testamentary or of administration. *Id.*

⁶ Prob. Code § 543.

⁷ Prob. Code § 543.

The Commission is informed that some courts require a bond without a showing of good cause even where all the beneficiaries or all the heirs have waived bond. The Commission recommends that the relevant statutory provisions be amended to make clear that a bond cannot be required if all the beneficiaries or heirs waive bond unless the court determines that there is good cause to require a bond.

The existing statute governing bonds for special administrators⁸ includes no provision governing waiver of bond. To recognize the existing practice of at least some courts, the Commission recommends that an express provision be added to the statute to make clear that, absent good cause, a bond is not required for a special administrator (1) where the will waives bond for the executor and the person named as executor in the will is appointed special administrator or (2) where all the beneficiaries or all the heirs waive bond for the special administrator.

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

An act to amend Sections 462, 541, and 543 of the Probate Code, relating to bonds.

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

Probate Code § 462 (amended). Bond and oath of special administrator

SECTION 1. Section 462 of the Probate Code is amended to read:

462. (a) Before letters issue to a special administrator, except to a public administrator, ~~he must give the special administrator~~ *shall do both of the following:*

(1) *Except as provided in subdivision (c), give a bond in such sum as the court or judge may direct, with sureties to the satisfaction of the court or judge, conditioned for the*

⁸ Prob. Code § 462.

faithful performance of his duties; and he must take that the special administrator shall faithfully execute the duties of the trust according to law.

(2) *Take the usual oath, and have the same indorsed on his the letters.*

(b) ~~Thereupon~~ *When the requirements of this section are satisfied, the clerk shall issue special letters of administration to him the special administrator.*

(c) *Subject to Section 543:*

(1) *Unless the will provides for a requirement of a bond, if a verified petition for special letters of administration alleges that all beneficiaries under the decedent's will, or that all the decedent's heirs if there is no will, have waived the filing of a bond, the court, if the petition so requests, shall direct that no bond be filed.*

(2) *If the will waives the requirement of a bond for the executor and the person named as executor in the will is appointed special administrator, the court shall direct that no bond be filed.*

Comment. Subdivision (c) is added to Section 462 to dispense with bond of the special administrator where all the persons interested in the estate waive the filing of bond or where the will waives bond for the executor who is appointed special administrator. Even though the will waives bond or all the beneficiaries or all the heirs waive bond, the court nevertheless, for good cause, can require a bond. See Section 543. Subdivision (c) is drawn in part from subdivision (b) of Section 541 (bond of person to whom letters testamentary or of administration are directed to issue). The revisions of subdivisions (a) and (b) make no substantive change.

Probate Code § 541 (amended). Bond of executor or administrator

SEC. 2. Section 541 of the Probate Code is amended to read:

541. (a) Except as otherwise provided in this section, every person to whom letters testamentary or of administration are directed to issue (unless the testator has waived such requirement) shall, before receiving them, execute a bond to the State of California, to be approved by a judge of the superior court, conditioned that the executor

or administrator shall faithfully execute the duties of the trust according to law. If the bond is to be given by personal sureties, the amount shall be not less than twice the value of the personal property and twice the value of the probable annual income from the real property belonging to the estate, which values shall be ascertained by the court or judge by examining on oath the party applying, and any other persons. If the bond is to be given by an admitted surety insurer, the court in its discretion may fix the amount of the bond at not less than the value of the personal property and the probable value of the annual rents, issues and profits of all of the property belonging to the estate.

(b) ~~Unless Subject to Section 543, unless~~ the will provides for a requirement of a bond, if a verified petition for letters testamentary or of administration alleges that all beneficiaries under the ~~last will and testament of the decedent~~ *decedent's will*, or that all ~~heirs at law of the decedent~~ *the decedent's heirs if there is no will*, have waived the filing of a bond, the court, on the hearing of the petition, if the petition so requests, ~~may~~ *shall* direct that no bond be filed.

Comment. Subdivision (b) of Section 541 is amended to substitute "shall" for "may" and to add the reference to Section 543. The other revisions are not substantive. Even though the will waives bond or all the beneficiaries or all the heirs waive bond, the court nevertheless, for good cause, can require a bond on the hearing of the petition or later. See Section 543.

Probate Code § 543 (amended). Requiring bond or increased bond notwithstanding provision in will or prior court direction

SEC. 3. Section 543 of the Probate Code is amended to read:

543. When it is provided in the will that no bond shall be required of the executor, *or a petition requests pursuant to Section 462 or 541 that no bond be filed*, or the court pursuant to Section 462 or 541 has directed that no bond be filed or that it be filed in a reduced amount or sum, the court, upon its own motion or upon petition of any person interested in the estate, nevertheless, for good cause, may

require one to be given or the amount as in other cases thereof increased, either before or at any time after the issuance of letters.

Comment. Section 543 is amended to add a reference to Section 462 which dispenses with bond for a special administrator under specified circumstances and makes clear that the court, for good cause, may require a bond even though all the beneficiaries or all the heirs have waived bond under Section 462 or 541.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Recording Affidavit of Death

November 1983

**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 Recording Affidavit of Death*, 17 Cal. L. Revision Comm'n Reports 493 (1984).

CALIFORNIA LAW REVISION COMMISSION

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November 5, 1983

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Law Revision Commission herewith submits its recommendation to codify the existing practice of recording an affidavit of death to help clear title to joint tenancy and other real property interests affected by the death of a person. Although this recommendation will not change existing practice, it will provide useful clarification, standardization, and statutory support for an important aspect of California law. This recommendation is made pursuant to 1983 Cal. Stats. res. ch. 40 (California Probate Code and real property law).

Respectfully submitted,

DAVID ROSENBERG
Chairperson

RECOMMENDATION

relating to

RECORDING AFFIDAVIT OF DEATH

Upon the death of a joint tenant the surviving joint tenant takes title to the property by right of survivorship. However, because recorded title to the property does not reflect the fact of the death of a joint tenant, the marketability of the survivor's title is impaired until steps are taken to make the decedent's death a matter of record. A similar situation applies to the title of a remainderman upon the death of a life tenant and to the title of a surviving spouse in community property where the deceased spouse has not made a testamentary disposition of the decedent's interest in the property.

The law provides a relatively expeditious proceeding to enable a survivor to obtain a court decree of the fact of death in these situations.¹ In an uncontested case the court may make the decree *ex parte* upon affidavits submitted to it, and the decree may be recorded and is *prima facie* evidence of the fact of death. Although the decree only establishes the fact of death and does not confirm the title of the survivor, it nonetheless enables the survivor to obtain title insurance and thus, as a practical matter, the decree is effective to clear title to the property.²

Although the court imprimatur is useful to establish the fact of death, in many cases there is no dispute and a court proceeding is wasteful. A practice has developed in such cases of simply recording an affidavit of the death of the decedent, which county recorders are willing to accept and record and which title insurers are willing to rely on,³ notwithstanding the fact that there is no legal authority for the practice. An affidavit of death is not an instrument for

¹ Prob. Code §§ 1170-1175 (establishment of fact of death).

² See, e.g., 1 A. Bowman, *Ogden's Revised California Real Property Law* § 7.17 (1974); Broll, *Property Not Subject to Probate Administration*, in 1 California Decedent Estate Administration §§ 4.5-4.15 (Cal. Cont. Ed. Bar 1971).

³ See, e.g., 18 Ops. Cal. Att'y Gen. 270 (1951).

which recordation is permitted or required by statute,⁴ nor is such an affidavit entitled to any presumptive effect.⁵

The affidavit procedure has obvious advantages over the court proceeding to establish the fact of death in cases where the fact of death is undisputed. The affidavit procedure is a simple, fast, and inexpensive means of clearing title to property that, in the common situation, passes to the surviving spouse by joint tenancy survivorship or community property succession. The procedure has become an accepted and integral part of California's scheme for passing clear title to property in many situations without the need for probate or other court proceedings.⁶

The use of the affidavit procedure to establish the fact of death for the purpose of clearing real property titles should be sanctioned by express statutory authority. This is consistent with legislation to achieve clear titles enacted in other jurisdictions,⁷ as well as with the declared California public policy to simplify and facilitate real property title transactions by enabling persons to rely on the record.⁸

The practice of county recorders to accept such affidavits for recordation should be recognized. The affidavit is executed under penalty of perjury⁹ and is supported by a certificate of the decedent's death.¹⁰ Recognition of the recordability of such affidavits will provide the recorder with necessary legal authority and will promote uniformity in recording practices throughout the state.

The practice of title insurers to rely on such recorded affidavits should likewise be confirmed. The recorded

⁴ Only statutorily authorized documents are entitled to recordation, subject to local ordinance. See Gov't Code § 27322; 63 Ops. Cal. Att'y Gen. 905 (1980). A unilateral declaration by a person claiming an interest in property is not a recordable instrument within the meaning of Government Code Section 27280 (instrument affecting title to property).

⁵ *But see* Health & Safety Code § 8628 (affidavit of death of joint tenant of cemetery plot may be relied on by cemetery authority).

⁶ The affidavit procedure is so entrenched that a 1951 law to require use of the court proceeding to establish the fact of death of a joint tenant created such a popular outcry the law had to be repealed on an urgency basis the next session. For more details, see Sterling, *Joint Tenancy and Community Property in California*, 14 Pac. L.J. 927, 953 (1983).

⁷ See, e.g., P. Basye, *Clearing Land Titles* § 33 (2d ed. 1970).

⁸ Civil Code § 880.020 (marketable record title).

⁹ Code Civ. Proc. §§ 2003, 2015.5 (affidavits).

¹⁰ The certificate of death is itself a recordable document in some instances. Health & Safety Code §§ 10060 and 10570 (birth and death certificates).

affidavit should be given prima facie effect so that third persons as well as title insurers may rely on it with some assurance of security. This is consistent with the treatment California law gives generally to instruments that establish the fact of death.¹¹ But it does not preclude a person from disputing the fact of death in the rare situation where a disagreement arises.¹²

Although these proposals would largely codify existing practice, they will provide useful clarification, standardization, and statutory support for an important aspect of California law.

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

An act to amend the heading of Chapter 21 (commencing with Section 1170) of Division 3 of, to add Part 7 (commencing with Section 250) to Division 2 of, to repeal and add Part 4 (commencing with Section 200) of Division 2 of, to repeal Article 1 (commencing with Section 1170) of Chapter 21 of Division 3 of, and to repeal the heading of Article 2 (commencing with Section 1190) of Chapter 21 of Division 3 of, the Probate Code, relating to death.

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

Probate Code §§ 200-206 (repealed)

SECTION 1. Part 4 (commencing with Section 200) of Division 2 of the Probate Code, as enacted by Chapter 842 of the Statutes of 1983, is repealed.

Comment. Former Part 4 (Effect of Homicide) is reenacted as Part 7 (commencing with Section 250).

¹¹ See, e.g., Health & Safety Code § 10577 (death certificate prima facie evidence of fact of death); Prob. Code § 1174 (court decree prima facie evidence of fact of death).

¹² Prima facie evidence is rebuttable; in this situation the presumption created affects the burden of producing evidence. Evid. Code §§ 602 (prima facie evidence establishes rebuttable presumption), 603 (presumption affecting burden of producing evidence facilitates determination of action).

Probate Code §§ 200-212 (added)

SEC. 2. Part 4 (commencing with Section 200) is added to Division 2 of the Probate Code, to read:

PART 4. ESTABLISHING FACT OF DEATH**CHAPTER 1. PROCEEDINGS TO ESTABLISH DEATH****§ 200. Proceedings authorized**

200. If title to or an interest in real or personal property is affected by the death of a person, another person who claims an interest in the property may commence proceedings pursuant to this chapter to establish the fact of the death.

Comment. Section 200 continues the substance of the first portion of former Section 1170. This chapter is intended to provide an expeditious procedure for establishing the fact of death for the purpose of clearing title to property. See Chapter 2 (commencing with Section 210) (recording evidence of death). Other proceedings to establish the fact of death for other purposes include Health and Safety Code Sections 10550-10558 (court proceedings to establish record of birth, death, or marriage) and Probate Code Sections 300-453 (opening probate) and 1350-1359 (administration of estates of missing persons presumed dead).

§ 201. Commencement of proceedings

201. (a) Proceedings under this chapter shall be commenced in the superior court of the county of which the decedent was a resident at the time of death or in the superior court of any county in which the property is situated.

(b) Proceedings under this chapter shall be commenced by filing a verified petition that sets forth all of the following information:

- (1) The jurisdictional facts.
- (2) A particular description of the affected property and of the interest of the petitioner in the property.

Comment. Section 201 continues the substance of the last portion of former Section 1170.

§ 202. Pending administration proceedings

202. If proceedings for the administration of the decedent's estate are pending, proceedings under this chapter may be combined with the administration proceedings in the following manner:

(a) The petition shall be filed in the administration proceedings by the person affected or by the executor or administrator.

(b) The petition shall be filed at any time before the filing of a petition for final distribution. The petition may be included in a verified petition for probate of the will of the decedent or for letters of administration.

(c) The petition shall be filed without additional fee.

Comment. Section 202 continues the substance of former Section 1171.

§ 203. Notice of hearing

203. (a) The clerk shall set the petition for hearing by the court.

(b) Except as provided in subdivision (c):

(1) The clerk shall give notice of the hearing in the manner prescribed in Section 1200.

(2) The person who commenced the proceedings shall cause notice of the hearing to be given in the manner prescribed in Section 1200.5.

(c) If the person who commenced the proceedings files an affidavit with the petition stating that the person has no reason to believe there is any opposition to, or contest of, the petition, the court may act ex parte.

Comment. Section 203 continues the substance of former Section 1172.

§ 204. Hearing and judgment

204. (a) The petition and supporting affidavits may be received in evidence and acted upon by the court with the same force and effect as if the petitioner and affiants were personally present and testified to the facts set forth.

(b) The court may render judgment establishing the fact of the death. The judgment is prima facie evidence of the fact of the death. The presumption established by this

subdivision is a presumption affecting the burden of producing evidence.

Comment. Section 204 continues the substance of former Section 1174. The judgment establishing the fact of death does not establish the title of the person who commenced the proceedings. The judgment may be recorded pursuant to Chapter 2 (commencing with Section 210).

CHAPTER 2. RECORDING EVIDENCE OF DEATH

§ 210. Recording authorized

210. If title to real property is affected by the death of a person, any person may record in the county in which the property is situated any of the following documents establishing the fact of the death:

(a) An affidavit of death executed by a person having knowledge of the facts. The affidavit shall include a particular description of the real property and an attested or certified copy of a record of the death made and filed in a designated public office as required by law.

(b) A certified copy of a court order that determines the fact of death made pursuant to Chapter 1 (commencing with Section 200) or pursuant to another statute that provides for a determination of the fact of death.

Comment. Section 210 makes clear that a document establishing the death of a person is entitled to recordation. *Cf.* Gov't Code §§ 27280 (recordation of instrument or judgment affecting title to property), 27322 (recordation of instrument required or permitted by law to be recorded).

Subdivision (a) codifies existing practice. See, *e.g.*, 1 A. Bowman, *Ogden's Revised California Real Property Law* § 7.17 (1974); *cf.* Health & Safety Code § 8628 (affidavit of death of joint tenant of cemetery plot). It is comparable to authority found in a number of jurisdictions for affidavits as to death. See, *e.g.*, P. Basye, *Clearing Land Titles* § 33 (2d ed. 1970). An affidavit must be made under oath or upon penalty of perjury. Code Civ. Proc. §§ 2003, 2015.5 (affidavits). Independent authority for recordation of a death certificate may be found in Health & Safety Code Sections 10060 and 10570.

Subdivision (b) continues the substance of former Section 1175 (recordation of decree establishing fact of death). Other proceedings establishing the fact of death include Health and

Safety Code Sections 10550-10558 (court proceedings to establish record of birth, death, or marriage) and Probate Code Sections 1350-1359 (administration of estates of missing persons presumed dead).

§ 211. Recording and indexing

211. (a) A document establishing the fact of death recorded pursuant to this chapter is subject to all statutory requirements for recorded documents, including acknowledgment or proof and certification.

(b) The county recorder shall index a document establishing the fact of death recorded pursuant to this chapter in the index of grantors and grantees. The index entry shall be for the grantor, and for the purpose of this index, the person whose death is established shall be deemed to be the grantor.

Comment. Section 211 provides indexing only for the decedent and not for the person who records a document establishing the fact of death. Recordation gives notice only of the fact of death; it does not establish the claim of any person who claims an interest in the property. See Section 212 (effect of recording).

§ 212. Effect of recording

212. A document establishing the fact of the death of a person recorded pursuant to this chapter is *prima facie* evidence of the death insofar as the document identifies real property situated in the county, title to which is affected by the death. The presumption established by this section is a presumption affecting the burden of producing evidence.

Comment. Section 212 is consistent with Section 204 (hearing and judgment) and Health and Safety Code Section 10577 (death certificate *prima facie* evidence of fact of death). This section is subject to express statutory provisions giving greater effect to a document that establishes the fact of the decedent's death. See, *e.g.*, Sections 1021 (conclusive effect of decree of distribution), 1082 (conclusive effect of determination of heirship).

Probate Code §§ 250-256 (added)

SEC. 3. Part 7 (commencing with Section 250) is added to Division 2 of the Probate Code, to read:

PART 7. EFFECT OF HOMICIDE**§ 250. Wills and intestate succession**

250. (a) A person who feloniously and intentionally kills the decedent is not entitled to any of the following:

(1) Any property, interest, or benefit under the will of the decedent, including any general or special power of appointment conferred by the will on the killer and any nomination of the killer as executor, trustee, or guardian made by the will.

(2) Any property of the decedent by intestate succession.

(3) Any of the decedent's quasi-community property the killer would otherwise acquire under Section 101 or 102 upon the death of the decedent.

(4) Any property of the decedent under Part 3 (commencing with Section 6500) of Division 6.

(b) In the cases covered by subdivision (a):

(1) The estate of the decedent passes as if the killer had predeceased the decedent and Section 6147 does not apply.

(2) Property appointed by the will of the decedent to or for the benefit of the killer passes as if the killer had predeceased the decedent and Section 1389.4 of the Civil Code does not apply.

(3) Provisions of the will of the decedent nominating the killer as executor, trustee, or guardian shall be interpreted as if the killer had predeceased the decedent.

Comment. This part—Sections 250-256—supersedes former Section 258. This part is the same in substance as Section 2-803 of the Uniform Probate Code except that language is added to Section 250 so that the antilapse statute (Section 6147) will not substitute the killer's issue for the disqualified killer. This part makes three substantive changes in prior law:

(1) Under this part, the killer is disqualified from taking from the victim only if the killing is felonious and intentional. Under former Section 258, the killer was disqualified if the killing was accidental but was one within the felony murder rule.

(2) Under Section 254, the civil standard of proof (preponderance of the evidence) is used in the civil proceeding to disqualify the killer from taking from the victim. Under prior law, the criminal burden of proof (beyond a reasonable doubt) was used in the civil proceeding. *Estate of McGowan*, 35 Cal. App.3d 611, 619, 111 Cal. Rptr. 39, 45 (1973).

(3) Under Section 254, an acquittal after a criminal trial has no effect in a subsequent civil proceeding. Under former Section 258, an acquittal was given conclusive effect in the later civil proceeding.

Under paragraph (3) of subdivision (a) of Section 250, one who feloniously and intentionally kills a spouse is entitled to no share of the decedent's quasi-community property, since for most purposes the decedent's quasi-community property is treated as the decedent's separate property during the decedent's lifetime. See 7 B. Witkin, *Summary of California Law Community Property* § 125, at 5219 (8th ed. 1974). Under paragraph (2) of subdivision (a), however, the spousal killer is disqualified from taking the decedent's half of the community property by intestate succession, but the killer's one-half ownership interest in the community property (see Civil Code § 5105) is not affected. See also Prob. Code §§ 100, 103.

§ 251. Joint assets

251. A joint tenant who feloniously and intentionally kills another joint tenant thereby effects a severance of the interest of the decedent so that the share of the decedent passes as the decedent's property and the killer has no rights by survivorship. This section applies to joint tenancies in real and personal property, joint and multiple-party accounts in financial institutions, and any other form of co-ownership with survivorship incidents.

Comment. Section 251 is the same in substance as Section 2-803(b) of the Uniform Probate Code, and is consistent with prior California law. See, e.g., *Estate of Hart*, 135 Cal. App.3d 684, 185 Cal. Rptr. 544 (1982); *Johansen v. Pelton*, 8 Cal. App.3d 625, 87 Cal. Rptr. 784 (1970). See also the Comment to Section 250.

§ 252. Life insurance and beneficiary designations

252. A named beneficiary of a bond, life insurance policy, or other contractual arrangement who feloniously and intentionally kills the principal obligee or the person

upon whose life the policy is issued is not entitled to any benefit under the bond, policy, or other contractual arrangement, and it becomes payable as though the killer had predeceased the decedent.

Comment. Under Sections 252 and 253, if the killer is treated as having predeceased the decedent for the purpose of life insurance or other contractual benefits, the killer's heirs are similarly disqualified. *Meyer v. Johnson*, 115 Cal. App. 646, 2 P.2d 456 (1931). *Cf. Estate of Jeffers*, 134 Cal. App.3d 729, 182 Cal. Rptr. 300 (1982) (killer may not designate alternate beneficiary of insurance proceeds). See also the Comment to Section 250.

§ 253. Other cases

253. In any case not described in Section 250, 251, or 252 in which one person feloniously and intentionally kills another, any acquisition of property, interest, or benefit by the killer as a result of the killing of the decedent shall be treated in accordance with the principles of this part.

Comment. Section 253 makes clear that any other acquisition by the killer is treated in accordance with the principles of this part. See *Estate of Jeffers*, 134 Cal. App.3d 729, 182 Cal. Rptr. 300 (1982) (killer may not designate alternate beneficiary of insurance proceeds).

§ 254. Determination of whether killing was felonious and intentional

254. (a) A final judgment of conviction of felonious and intentional killing is conclusive for purposes of this part.

(b) In the absence of a conviction of felonious and intentional killing, the court may determine by a preponderance of evidence whether the killing was felonious and intentional for purposes of this part. The burden of proof is on the party seeking to establish that the killing was felonious and intentional for the purposes of this part.

Comment. See the Comment to Section 250. The last sentence of Section 254 is new but is consistent with Uniform Probate Code Section 2-803(e).

§ 255. Good faith purchasers

255. This part does not affect the rights of any person who, before rights under this part have been adjudicated, purchases from the killer for value and without notice property which the killer would have acquired except for this part, but the killer is liable for the amount of the proceeds or the value of the property.

Comment. See the Comment to Section 250.

§ 256. Protection of obligors

256. An insurance company, financial institution, or other obligor making payment according to the terms of its policy or obligation is not liable by reason of this part unless prior to payment it has received at its home office or principal address written notice of a claim under this part.

Comment. See the Comment to Section 250.

Probate Code §§ 1170-1192 (chapter heading)

SEC. 4. The heading of Chapter 21 (commencing with Section 1170) of Division 3 of the Probate Code is amended to read:

**CHAPTER 21. ESTABLISHING ~~FACT OF DEATH~~
OR ~~HEIRSHIP~~ IDENTITY OF HEIRS**

Probate Code §§ 1170-1175 (repealed)

SEC. 5. Article 1 (commencing with Section 1170) of Chapter 21 of Division 3 of the Probate Code is repealed.

Comment. The substance of former Article 1, consisting of Sections 1170 to 1175 (establishment of fact of death), is continued in Part 4 of Division 2 as Sections 200-204 (proceedings to establish death) and Section 210 (recording authorized).

Probate Code §§ 1190-1192 (article heading)

SEC. 6. The heading of Article 2 (commencing with Section 1190) of Chapter 21 of Division 3 of the Probate Code is repealed.

Article 2. Identity of Heirs

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Execution of Witnessed Wills

September 1983

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

NOTE

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

Cite this recommendation as *Recommendation Relating to Execution of Witnessed Wills*, 17 Cal. L. Revision Comm'n Reports 509 (1984).

CALIFORNIA LAW REVISION COMMISSION

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BEATRICE P. LAWSON

September 23, 1983

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

This recommendation proposes two changes to simplify the requirements for execution of a will. First, it substitutes the requirement that the witnesses sign the will not later than 30 days after execution by the testator for the existing requirement that the witnesses be "present at the same time" to observe the testator sign the will or acknowledge it. Second, it permits a will to be acknowledged before a notary public as an alternative to being witnessed by at least two persons.

This recommendation is submitted pursuant to 1980 Cal. Stats. res. ch. 37.

Respectfully submitted,

DAVID ROSENBERG
Chairperson

RECOMMENDATION

relating to

EXECUTION OF WITNESSED WILLS

Introduction

This recommendation proposes two changes in the requirements for execution of a witnessed will. First, it substitutes the requirement that the witnesses sign the will not later than 30 days after the will is executed by the testator for the existing requirement that the witnesses be “present at the same time” to observe the testator sign the will or to hear the testator acknowledge his or her signature on the will. Second, it permits a will to be acknowledged before a notary public as an alternative to being witnessed by at least two persons. These proposals are discussed below.

Witnesses Present at the Same Time

In California and nearly every other state, witnesses to a will need not actually see the testator sign the will. It is sufficient if the testator acknowledges to the witnesses the genuineness of his or her signature already made.¹ Three-quarters of the states permit the testator to sign or acknowledge the will in the presence of one witness, and later to complete the attestation formalities by acknowledging the signature to a second witness.² An occasional case holds that the attestation must be completed within a reasonable time after the testator signs the will.³

¹ 7 W. Bowe & D. Parker, *Page on the Law of Wills* §§ 65.3-65.53, at 7-544 (part 3, rev. ed. 1982); Prob. Code § 6110, operative January 1, 1985. Unless otherwise indicated, all references to the Probate Code are references to provisions enacted by 1983 Cal. Stats. ch. 842, operative January 1, 1985.

² See 7 W. Bowe & D. Parker, *supra* note 1; see also 79 Am. Jur.2d *Wills* § 282, at 475-76 (1975). A few states require three witnesses to the will. See 7 W. Bowe & D. Parker, *supra*.

³ *E.g., In re Harty's Estate*, 85 Misc. 628, 148 N.Y.S. 1052 (1914). In this case, the testatrix did not obtain the signature of the second witness until nearly three years after she

California is among the minority of states that require the testator to sign or acknowledge the will in the presence of both witnesses, "present at the same time."⁴ No other technical requirement causes wills to fail as often as this one.⁵ In a leading California case, the testatrix signed her will in the presence of one witness in the morning. In the afternoon of the same day, the testatrix acknowledged her signature to a second witness. The will was held invalid because the witnesses were not present at the same time.⁶

The California requirement that the witnesses be present at the same time can be traced to a 1917 California case which was based on the English Wills Act as revised in 1837.⁷ The holding of this case was incorporated into California statute law when the Probate Code was enacted in 1931, although the chief draftsman of the Probate Code thought the rule was undesirable.⁸ The requirement that the

and the first witness had signed the will. Although there was no statute governing the question at that time, the court held the will invalid, saying: "The signing or acknowledgment by the testator, and the publication and the attestation of the witnesses, must be successive, continuous, and contemporaneous acts, and the lapse of over two years after the instrument was signed by one witness before it was signed by the other, exceeds all reasonable limitations."

⁴ Prob. Code § 6110; 7 W. Bowe & D. Parker, *supra* note 1. The minority of states that require the witnesses to be present at the same time are Arkansas, California, Florida, Indiana, Kentucky, Louisiana, New Mexico, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wisconsin. *Id.*

⁵ Letter from Professor Jesse Dukeminier to California Law Revision Commission (December 17, 1982).

⁶ *In re Estate of Emart*, 175 Cal. 238, 165 P. 707 (1917). Other illustrations may be found in the reported decisions of the unjust results produced by strict application of the simultaneous presence requirement:

(1) The testator had dinner with friends. After dinner, he asked two of his friends to witness his will. One friend witnessed the will in the dining room while the other was in an adjacent room. Then the second guest came into the dining room and signed the will as a witness. The will was held invalid because the witnesses were not present at the same time. *In re Groffman*, [1969] 1 W.L.R. 733.

(2) The testator was a hospital patient and asked the patient in the next bed and his nurse to witness his will. The testator started to sign the will in the presence of both witnesses, but the nurse was called away while the testator was signing. In the nurse's absence, the testator completed his signature and the fellow patient signed as a witness. When the nurse returned, the testator and the fellow patient each acknowledged his signature to the nurse, and the nurse then signed as a witness. The will was held invalid because the witnesses were not present at the same time. *In re Colling*, [1972] 1 W.L.R. 1440. In invalidating the will, the court said, "I come to this conclusion with the greatest regret, and only because I feel compelled to do so despite its so patently defeating the intention of the testator and involving no advantage, as far as I can see, in the avoidance of any fraud." *Id.* at 1442-43.

⁷ See *In re Estate of Emart*, 175 Cal. 238, 165 P. 707 (1917).

⁸ See Evans, *Comments on the Probate Code of California*, 19 Cal. L. Rev. 602, 609 (1931). See also note 14 *infra*.

witnesses be present at the same time was deleted from the English statute in 1982.⁹

The purpose of the present-at-the-same-time requirement is to provide witnesses each of whose testimony regarding the testator's mental capacity and freedom from duress will relate to the same moment in time.¹⁰ If the will is acknowledged to the second witness months or even years after the first witness has signed, the witnesses will not be attesting under the same state of facts.¹¹ However, this purpose does not justify invalidating a will where one witness attests the will in the morning and the other in the afternoon. Ordinarily, changes in the testator's mental capacity occur gradually. If the second witness attests within a few days of the first, both may testify to substantially the same set of facts, and the purpose of the present-at-the-same-time requirement is thereby served.

The modern trend has been to eliminate the present-at-the-same-time requirement in those jurisdictions which have had it.¹² Populous industrial states such as New York, Massachusetts, New Jersey, Illinois, and Texas do not have the requirement, nor does the Uniform Probate Code.¹³ The draftsman of the 1931 California Probate Code¹⁴ and other commentators¹⁵ have called for the elimination of the requirement in California. It is unrealistic and undesirable to require everyone to execute a will with the same strict formality followed by estate

⁹ English Administration of Justice Act 1982, part IV.

¹⁰ See *In re Estate of Emart*, *supra* note 7, at 239. Two other purposes served by the witnessing ceremony are to ensure that the testator intended the instrument to be a will, and to minimize the opportunity for fraudulent alteration of the will or substitution of another instrument for it. Mechem, *Why Not A Modern Wills Act?*, 33 Iowa L. Rev. 501, 504-05 (1948). The requirement that the witnesses be present at the same time does nothing to ensure testamentary intent or to minimize fraud.

¹¹ *In re Estate of Emart*, *supra* note 7, at 239; 79 Am. Jur.2d *Wills* § 282, at 475-76 (1975).

¹² Letter from Professor Jesse Dukeminier to California Law Revision Commission (December 17, 1982). England, from which the California requirement was drawn, repealed the requirement in 1982. See note 9 *supra*.

¹³ See 7 W. Bowe & D. Parker, *supra* note 1; Uniform Probate Code § 2-502.

¹⁴ Evans, *supra* note 8, at 609. Professor Evans, who was the draftsman of the 1931 Probate Code, made this comment on the present-at-the-same-time requirement: "[I]s there any need for this provision? A holographic will may be given effect even though there be no witnesses to its execution. It may be extremely inconvenient to have both of the desired witnesses present at the same time. Why not permit the testator to acknowledge his signature and declare his will to the second witness after the first witness has left?" Evans, *supra*.

¹⁵ E.g., Niles, *Probate Reform in California*, 31 Hastings L.J. 185, 210 (1979).

planning specialists drawing wills for affluent clients.¹⁶ The governing philosophy should be to validate wills when there is no hint of impropriety and no suspicion of fraud, and the law should take account of the habits and practices of ordinary people.¹⁷ The reported cases suggest that an unsophisticated testator is likely to proceed one witness at a time.¹⁸ Any marginal benefit of the present-at-the-same-time requirement is clearly outweighed by the injustice caused when an otherwise good will is invalidated for technical noncompliance with the literal demands of the requirement.

The Commission recommends that the California present-at-the-same-time requirement be replaced by a requirement that the witnesses sign the will before the testator's death and not later than 30 days after the will is signed by or for the testator.¹⁹ New York has this requirement: The New York statute requires that the attestation formalities be completed not later than 30 days after the testator signs the will.²⁰ This reasonable limitation avoids invalidating the will where the purpose of the present-at-the-same-time requirement is satisfied. At the same time, the will is not validated in the extreme case where the testator does not obtain the signature of the last witness until months or years after the testator signs the will. There is no reason to expect that this change in California law will cause lawyers to change the way they conduct their will execution ceremonies. But the change will avoid invalidating a will merely because the traditional ritual is not strictly followed.

Acknowledgment of Will Before Notary Public

The requirement that there be at least two witnesses to the will is in part to ensure that there will be someone available to testify after the testator's death when admission

¹⁶ Mechem, *supra* note 10, at 503.

¹⁷ Mechem, *supra* note 10, at 503; General Comment to Part 5 of Article 2 of the Uniform Probate Code.

¹⁸ Mechem, *supra* note 10, at 505.

¹⁹ This recommendation does not extend to the California statutory will. The witnesses must watch the testator sign a California statutory will. See Prob. Code §§ 6240, 6241. There is no provision for the testator to acknowledge to the witnesses the testator's signature on a California statutory will.

²⁰ N.Y. Est. Powers & Trusts Law § 3-2.1 (McKinney 1981).

of the will to probate is sought.²¹ If the person witnessing the will is a notary public,²² there is usually a public record of the person's whereabouts,²³ making it more likely that the person will be available after the testator's death to testify in the probate proceeding. Moreover, a notary's certificate of acknowledgment indicates the date of the acknowledgment,²⁴ and the notary's journal affords a permanent record of the date of each official act and the character of every instrument acknowledged or proved before the notary.²⁵ For these reasons, a notary public is in a uniquely advantageous position to serve as a witness to a will.

The Commission recommends that the requirement that a will be witnessed be satisfied by the will being acknowledged before a notary public at any place within this state.²⁶ This will provide a simple and reliable alternative to the two-witness requirement to prove that the person who signed the will is the testator and to prove the date the will was acknowledged. This recommendation is consistent with the requirements for execution of a durable power of attorney for health care which may be acknowledged before a notary public as an alternative to having two witnesses to the instrument.²⁷

Recommended Legislation

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

²¹ See 79 Am. Jur.2d *Wills* §§ 259-260, at 459 (1975).

²² A notary public who witnesses a will has been treated as an ordinary witness, acceptable as one of the required two witnesses to the will. See *Szarat v. Schuerr*, 365 Ill. 323, 6 N.E.2d 625 (1937); 2 W. Bowe & D. Parker, *Page on the Law of Wills* § 19.129, at 247 (rev. ed. 1960).

²³ See Gov't Code § 8201.5.

²⁴ See Civil Code § 1189. A will executed in the traditional manner need not be dated. *McCarroll & Smith, Formal and Technical Aspects of Wills*, in *California Will Drafting* § 4.16, at 132 (Cal. Cont. Ed. Bar 1965). The Commission's recommendation prescribes a form for the notary's certificate which is drawn from Civil Code Section 1189, but also provides for a statement by the notary as to the testator's soundness of mind and freedom from duress, fraud, and undue influence.

²⁵ Gov't Code § 8206.

²⁶ This recommendation does extend to California statutory wills.

²⁷ See Civil Code § 2432 (enacted by 1983 Cal. Stats. ch. 1204, § 10).

An act to amend Sections 6110, 6240, and 6241 of, and to add Section 6110.5 to, the Probate Code, relating to wills.

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

Probate Code § 6110 (amended). Execution of witnessed will

SECTION 1. Section 6110 of the Probate Code is amended to read:

6110. (a) Except as provided in this part, a will shall be in writing and satisfy the requirements of this section.

(b) The will shall be signed either (1) by the testator or (2) in the testator's name by some other person in the testator's presence and by the testator's direction.

(c) The will shall be witnessed by ~~being~~ *one of the following methods:*

(1) Be signed, before the testator's death and not later than 30 days after the will is signed pursuant to subdivision (b), by at least two persons each of whom ~~(1)~~ being present at the same time, (i) witnessed either the signing of the will or the testator's acknowledgment of the signature or of the will and ~~(2)~~ (ii) understand that the instrument they sign is the testator's will.

(2) Be acknowledged before a notary public at any place within this state.

Comment. Section 6110 is amended to substitute for the former requirement that the witnesses be "present at the same time" the new requirement that they sign before the testator's death and not later than 30 days after the will is signed by the testator (or by some other person for the testator). This new requirement is drawn from New York law. See N.Y. Est. Powers & Trusts Law § 3-2.1 (McKinney 1981). Under Section 6110, only two witnesses who sign within 30 days of execution by the testator are needed to establish the validity of the will, even where there are three or more persons who sign as witnesses. Because California recognizes a nonstatutory presumption of due execution (see, e.g., Estate of Gray, 75 Cal. App.2d 386, 392, 171 P.2d 113 (1946)), the burden is on one contesting the will to establish that the 30-day requirement has not been satisfied.

Section 6110 is also amended to add the alternative of having a will acknowledged before a notary public. The form of the

notary's certificate of acknowledgment is prescribed by Section 6110.5. See also Gov't Code §§ 8200-8230. Under paragraph (2) of subdivision (c), the acknowledgment must be made before a notary, and not before one of the various other officers referred to in Civil Code Section 1181 (judge, district attorney, etc.).

Probate Code § 6110.5 (added). Form of notary's certificate

SEC. 2. Section 6110.5 is added to the Probate Code, to read:

6110.5. If a will is acknowledged before a notary public as provided in Section 6110, the certificate of acknowledgment shall be substantially in the following form:

State of California }
County of _____ } ss.

On this _____ day of _____, in the year _____,
before me, _____,

(here insert name of notary public)

personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to this instrument, and acknowledged that he or she executed it. I declare under penalty of perjury that the person whose name is subscribed to this instrument appears to be of sound mind and under no duress, fraud, or undue influence.

NOTARY SEAL

(Signature of Notary Public)

Comment. Section 6110.5 provides a form of notary's certificate for use in connection with wills acknowledged before a notary as provided in Section 6110. Section 6110.5 is drawn from Section 1189 of the Civil Code. See also Sections 6240, 6241 (acknowledgment before notary of California statutory will).

Probate Code § 6240 (amended). California Statutory Will Form

SEC. 3. Section 6240 of the Probate Code is amended to read:

6240. The following is the California statutory will form:

CALIFORNIA STATUTORY WILL

NOTICE TO THE PERSON WHO SIGNS THIS WILL:

1. IT MAY BE IN YOUR BEST INTEREST TO CONSULT WITH A CALIFORNIA LAWYER BECAUSE THIS STATUTORY WILL HAS SERIOUS LEGAL EFFECTS ON YOUR FAMILY AND PROPERTY.

2. THIS WILL DOES NOT DISPOSE OF PROPERTY WHICH PASSES ON YOUR DEATH TO ANY PERSON BY OPERATION OF LAW OR BY ANY CONTRACT. FOR EXAMPLE, THE WILL DOES NOT DISPOSE OF JOINT TENANCY ASSETS OR YOUR SPOUSE'S SHARE OF COMMUNITY PROPERTY, AND IT WILL NOT NORMALLY APPLY TO PROCEEDS OF LIFE INSURANCE ON YOUR LIFE OR YOUR RETIREMENT PLAN BENEFITS.

3. THIS WILL IS NOT DESIGNED TO REDUCE DEATH TAXES OR ANY OTHER TAXES. YOU SHOULD DISCUSS THE TAX RESULTS OF YOUR DECISIONS WITH A COMPETENT TAX ADVISOR.

4. YOU CANNOT CHANGE, DELETE, OR ADD WORDS TO THE FACE OF THIS CALIFORNIA STATUTORY WILL. IF YOU DO, THE CHANGE OR THE DELETED OR ADDED WORDS WILL BE DISREGARDED AND THIS WILL MAY BE GIVEN EFFECT AS IF THE CHANGE, DELETION, OR ADDITION HAD NOT BEEN MADE. YOU MAY REVOKE THIS CALIFORNIA STATUTORY WILL AND YOU MAY AMEND IT BY CODICIL.

5. IF THERE IS ANYTHING IN THIS WILL THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER TO EXPLAIN IT TO YOU.

6. THE FULL TEXT OF THIS CALIFORNIA STATUTORY WILL, THE DEFINITIONS AND RULES OF CONSTRUCTION, THE PROPERTY DISPOSITION CLAUSES, AND THE MANDATORY CLAUSES FOLLOW THE END OF THIS WILL AND ARE CONTAINED IN THE PROBATE CODE OF CALIFORNIA.

7. THE WITNESSES TO THIS WILL SHOULD NOT BE PEOPLE WHO MAY RECEIVE PROPERTY UNDER THIS WILL. YOU SHOULD CAREFULLY READ AND FOLLOW THE WITNESSING PROCEDURE DESCRIBED AT THE END OF THIS WILL. *IF YOU USE WITNESSES, ALL OF THE WITNESSES MUST WATCH YOU SIGN THIS WILL. INSTEAD OF USING WITNESSES, YOU MAY ACKNOWLEDGE THIS WILL BEFORE A NOTARY PUBLIC IN CALIFORNIA.*

8. YOU SHOULD KEEP THIS WILL IN YOUR SAFE-DEPOSIT BOX OR OTHER SAFE PLACE.

9. THIS WILL TREATS MOST ADOPTED CHILDREN AS IF THEY ARE NATURAL CHILDREN.

10. IF YOU MARRY OR DIVORCE AFTER YOU SIGN THIS WILL, YOU SHOULD MAKE AND SIGN A NEW WILL.

11. IF YOU HAVE CHILDREN UNDER 21 YEARS OF AGE, YOU MAY WISH TO USE THE CALIFORNIA STATUTORY WILL WITH TRUST OR ANOTHER TYPE OF WILL.

[A printed form for a California statutory will shall set forth the above notice in 10-point bold face type.]

CALIFORNIA STATUTORY WILL OF

(Insert Your Name)

Article 1. Declaration

This is my will and I revoke any prior wills and codicils.

Article 2. Disposition of My Property

2.1. PERSONAL AND HOUSEHOLD ITEMS. I give all my furniture, furnishings, household items, personal automobiles and personal items to my spouse, if living; otherwise they shall be divided equally among my children who survive me.

2.2. CASH GIFT TO A PERSON OR CHARITY. I make the following cash gift to the person or charity in the amount stated in words and figures in the box which I have completed and signed. If I fail to sign in the box, no gift is made. If the person mentioned does not survive me, or the charity designated does not accept the gift, then no gift is made. No death tax shall be paid from this gift.

<p>FULL NAME OF PERSON OR CHARITY TO RECEIVE CASH GIFT (Name only one. Please print.).</p>	<p>AMOUNT OF GIFT \$ _____</p> <p>AMOUNT WRITTEN OUT: _____ Dollars</p> <p>_____ Signature of Testator</p>

2.3. ALL OTHER ASSETS (MY "RESIDUARY ESTATE"). I adopt only one Property Disposition Clause in this paragraph 2.3 by writing my signature in the box next to the title of the Property Disposition Clause I wish to adopt. I sign in only one box. I write the words "not used" in the remaining boxes. If I sign in more than one box or if I fail to sign in any box, the property will be distributed as if I did not make a will.

PROPERTY DISPOSITION CLAUSES (Select one.)

- (a) TO MY SPOUSE IF LIVING; IF NOT LIVING, THEN TO MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD.

- (b) TO MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD. I LEAVE NOTHING TO MY SPOUSE, IF LIVING.

- (c) TO BE DISTRIBUTED AS IF I DID NOT HAVE A WILL. ____

Article 3. Nominations of Executor and Guardian**3.1. EXECUTOR (Name at least one.)**

I nominate the person or institution named in the first box of this paragraph 3.1 to serve as executor of this will. If that person or institution does not serve, then I nominate the others to serve in the order I list them in the other boxes.

FIRST EXECUTOR. ____

SECOND EXECUTOR. _____

THIRD EXECUTOR. _____

3.2. GUARDIAN (If you have a child under 18 years of age, you should name at least one guardian of the child's person and at least one guardian of the child's property. The guardian of the child's person and the guardian of the child's property may, but need not, be the same. An individual can serve as guardian of either the person or the property, or as guardian of both. An institution can serve only as guardian of the property.)

If a guardian is needed for any child of mine, then I nominate the individual named in the first box of this paragraph 3.2 to serve as guardian of the person of that child, and I nominate the individual or institution named in the second box of this paragraph 3.2 to serve as guardian of the property of that child. If that person or institution does not serve, then I nominate the others to serve in the order I list them in the other boxes.

FIRST GUARDIAN OF
THE PERSON. _____FIRST GUARDIAN OF
THE PROPERTY. _____

**SECOND GUARDIAN OF
THE PERSON.** _____

**SECOND GUARDIAN OF
THE PROPERTY.** _____

**THIRD GUARDIAN OF
THE PERSON.** _____

**THIRD GUARDIAN OF
THE PROPERTY.** _____

3.3. BOND. My signature in this box means that a bond is not required for any individual named in this will as executor or guardian. If I do not sign in this box, then a bond is required for each of those persons as set forth in the Probate Code. (The bond provides a fund to pay those who do not receive the share of your estate to which they are entitled, including your creditors, because of improper performance of duties by the executor or guardian. Bond premiums are paid out of your estate.)

I sign my name to this California Statutory Will
 on _____ at _____, _____
 Date City State

 Signature of Testator

STATEMENT OF WITNESSES ~~(You~~ *(If you elect to use witnesses instead of having the will notarized, you must use two adult witnesses and three would be preferable.)*

Each of us declares under penalty of perjury under the laws of California that the testator signed this California statutory will in our presence, all of us being present at the same time, and we now, at the testator's request, in the testator's presence, and in the presence of each other, sign below as witnesses, declaring that the testator appears to be of sound mind and under no duress, fraud, or undue influence.

Signature _____ Residence Address: _____
 Print Name _____
 Here: _____

Signature _____ Residence Address: _____
 Print Name _____
 Here: _____

Signature _____ Residence Address: _____
 Print Name _____
 Here: _____

**CERTIFICATE OF ACKNOWLEDGMENT OF
 NOTARY PUBLIC**

(You may use acknowledgment before a notary public instead of the statement of witnesses.)

State of California }
County of _____ } ss.

On this _____ day of _____, in the year _____,
 before me, _____,

(here insert name of notary public)

personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to this instrument, and acknowledged that he or she executed it. I declare under penalty of perjury that the person whose name is subscribed to this instrument appears to be of sound mind and under no duress, fraud, or undue influence.

NOTARY SEAL

 (Signature of Notary Public)

Comment. Section 6240 is amended to permit a California statutory will to be acknowledged before a notary public at any place within this state instead of using two witnesses, consistent with general wills law. See Sections 6110, 6110.5.

Probate Code § 6241 (amended). California Statutory Will With Trust Form

SEC. 4. Section 6241 of the Probate Code is amended to read:

6241. The following is the California statutory will with trust form:

CALIFORNIA STATUTORY WILL WITH TRUST

NOTICE TO THE PERSON WHO SIGNS THIS WILL:

1. THIS FORM CONTAINS A TRUST FOR YOUR DESCENDANTS. IF YOU DO NOT WANT TO CREATE A TRUST, DO NOT USE THIS FORM.

2. IT MAY BE IN YOUR BEST INTEREST TO CONSULT WITH A CALIFORNIA LAWYER BECAUSE THIS STATUTORY WILL HAS SERIOUS

LEGAL EFFECTS ON YOUR FAMILY AND PROPERTY.

3. THIS WILL DOES NOT DISPOSE OF PROPERTY WHICH PASSES ON YOUR DEATH TO ANY PERSON BY OPERATION OF LAW OR BY ANY CONTRACT. FOR EXAMPLE, THE WILL DOES NOT DISPOSE OF JOINT TENANCY ASSETS OR YOUR SPOUSE'S SHARE OF COMMUNITY PROPERTY, AND IT WILL NOT NORMALLY APPLY TO PROCEEDS OF LIFE INSURANCE ON YOUR LIFE OR YOUR RETIREMENT PLAN BENEFITS.

4. THIS WILL IS NOT DESIGNED TO REDUCE DEATH TAXES OR ANY OTHER TAXES. YOU SHOULD DISCUSS THE TAX RESULTS OF YOUR DECISIONS WITH A COMPETENT TAX ADVISOR.

5. YOU CANNOT CHANGE, DELETE, OR ADD WORDS TO THE FACE OF THIS CALIFORNIA STATUTORY WILL. IF YOU DO, THE CHANGE OR THE DELETED OR ADDED WORDS WILL BE DISREGARDED AND THIS WILL MAY BE GIVEN EFFECT AS IF THE CHANGE, DELETION, OR ADDITION HAD NOT BEEN MADE. YOU MAY REVOKE THIS CALIFORNIA STATUTORY WILL AND YOU MAY AMEND IT BY CODICIL.

6. IF THERE IS ANYTHING IN THIS WILL THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER TO EXPLAIN IT TO YOU.

7. THE FULL TEXT OF THIS CALIFORNIA STATUTORY WILL, THE DEFINITIONS AND RULES OF CONSTRUCTION, THE PROPERTY DISPOSITION CLAUSES, AND THE MANDATORY CLAUSES FOLLOW THE END OF THIS WILL AND ARE CONTAINED IN THE PROBATE CODE OF CALIFORNIA.

8. THE WITNESSES TO THIS WILL SHOULD NOT BE PEOPLE WHO MAY RECEIVE PROPERTY UNDER THIS WILL. YOU SHOULD CAREFULLY READ AND FOLLOW THE WITNESSING PROCEDURE DESCRIBED AT THE END OF THIS WILL. ~~ALL~~ IF YOU USE WITNESSES, ALL OF THE

WITNESSES MUST WATCH YOU SIGN THIS WILL. INSTEAD OF USING WITNESSES, YOU MAY ACKNOWLEDGE THIS WILL BEFORE A NOTARY PUBLIC IN CALIFORNIA.

9. YOU SHOULD KEEP THIS WILL IN YOUR SAFE-DEPOSIT BOX OR OTHER SAFE PLACE.

10. THIS WILL TREATS MOST ADOPTED CHILDREN AS IF THEY ARE NATURAL CHILDREN.

11. IF YOU MARRY OR DIVORCE AFTER YOU SIGN THIS WILL, YOU SHOULD MAKE AND SIGN A NEW WILL.

[A printed form for a California Statutory Will With Trust shall set forth the above notice in 10-point bold face type.]

CALIFORNIA STATUTORY WILL WITH TRUST OF

(Insert Your Name)

Article 1. Declaration

This is my will and I revoke any prior wills and codicils.

Article 2. Disposition of My Property

2.1. PERSONAL AND HOUSEHOLD ITEMS. I give all my furniture, furnishings, household items, personal automobiles, and personal items to my spouse, if living; otherwise they shall be divided equally among my children who survive me.

2.2. CASH GIFT TO A PERSON OR CHARITY. I make the following cash gift to the person or charity in the amount stated in words and figures in the box which I have completed and signed. If I fail to sign in the box, no gift is made. If the person mentioned does not survive me, or the charity designated does not accept the gift, then no gift is made. No death tax shall be paid from this gift.

<p>FULL NAME OF PERSON OR CHARITY TO RECEIVE CASH GIFT (Name only one. Please print.).</p>	<p>AMOUNT OF GIFT \$ _____</p> <p>AMOUNT WRITTEN OUT: _____ Dollars</p>
	<p>_____ Signature of Testator</p>

2.3. ALL OTHER ASSETS (MY "RESIDUARY ESTATE"). I adopt only one Property Disposition Clause in this paragraph 2.3 by writing my signature in the box next to the title of the Property Disposition Clause I wish to adopt. I sign in only one box. I write the words "not used" in the remaining boxes. If I sign in more than one box or if I fail to sign in any box, the property will be distributed as if I did not make a will.

PROPERTY DISPOSITION CLAUSES (Select one.)

- (a) **TO MY SPOUSE IF LIVING; IF NOT LIVING, THEN IN ONE TRUST TO PROVIDE FOR THE SUPPORT AND EDUCATION OF MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD UNTIL I HAVE NO LIVING CHILD UNDER 21 YEARS OF AGE.** _____

--

- (b) TO MY CHILDREN
AND THE DE-
SCENDANTS OF
ANY DECEASED
CHILD IN ONE
TRUST TO PRO-
VIDE FOR THEIR
SUPPORT AND ED-
UCATION UNTIL I
HAVE NO LIVING
CHILD UNDER 21
YEARS OF AGE. I
LEAVE NOTHING
TO MY SPOUSE, IF
LIVING. _____

**Article 3. Nominations of Executor, Trustee, and
Guardian**

3.1. EXECUTOR (Name at least one.)

I nominate the person or institution named in the first box of this paragraph 3.1 to serve as executor of this will. If that person or institution does not serve, then I nominate the others to serve in the order I list them in the other boxes.

FIRST EXECUTOR. _____

SECOND EXECUTOR. _____

THIRD EXECUTOR. _____

3.2. TRUSTEE (Name at least one.)

Because it is possible that after I die my property may be put into a trust, I nominate the person or institution named in the first box of this paragraph 3.2 to serve as trustee of that trust. If that person or institution does not serve, then I nominate the others to serve in the order I list them in the other boxes.

FIRST TRUSTEE. _____

SECOND TRUSTEE. _____

THIRD TRUSTEE. _____

3.3. GUARDIAN (If you have a child under 18 years of age, you should name at least one guardian of the child's person and at least one guardian of the child's property. The guardian of the child's person and the guardian of the child's property may, but need not, be the same. An individual can serve as guardian of either the person or the property, or as guardian of both. An institution can serve only as guardian of the property.)

If a guardian is needed for any child of mine, then I nominate the individual named in the first box of this paragraph 3.3 to serve as guardian of the person of that child, and I nominate the individual or institution named

in the second box of this paragraph 3.3 to serve as guardian of the property of that child. If that person or institution does not serve, then I nominate the others to serve in the order I list them in the other boxes.

**FIRST GUARDIAN OF
THE PERSON.** _____

**FIRST GUARDIAN OF
THE PROPERTY.** _____

**SECOND GUARDIAN OF
THE PERSON.** _____

**SECOND GUARDIAN OF
THE PROPERTY.** _____

**THIRD GUARDIAN OF
THE PERSON.** _____

**THIRD GUARDIAN OF
THE PROPERTY.** _____

3.4. BOND. My signature in this box means that a bond is not required for any individual named in this will as executor, trustee, or guardian. If I do not sign in this box, then a bond is required for each of those persons as set forth in the Probate Code. (The bond provides a fund to pay those who do not receive the share of your estate to which they are entitled, including your creditors, because of improper performance of duties by the executor, trustee, or guardian. Bond premiums are paid out of your estate.)

I sign my name to this California Statutory Will
With Trust on _____ at _____, _____
Date City State

Signature of Testator

STATEMENT OF WITNESSES ~~You~~ *(If you elect to use witnesses instead of having the will notarized, you must use two adult witnesses, and three witnesses would be preferable.)*

Each of us declares under penalty of perjury under the laws of California that the testator signed this California statutory will with trust in our presence, all of us being present at the same time, and we now, at the testator's request, in the testator's presence, and in the presence of each other, sign below as witnesses, declaring that the testator appears to be of sound mind and under no duress, fraud, or undue influence.

Signature _____ Residence Address: _____
 Print Name _____
 Here: _____

Signature _____ Residence Address: _____
 Print Name _____
 Here: _____

Signature _____ Residence Address: _____
 Print Name _____
 Here: _____

***CERTIFICATE OF ACKNOWLEDGMENT OF
 NOTARY PUBLIC (You may use acknowledgment
 before a notary public instead of the statement of
 witnesses.)***

State of California }
 County of _____ } ss.

On this _____ day of _____, in the year _____,
 before me, _____,

(here insert name of notary public)

*personally appeared _____, personally known to
 me (or proved to me on the basis of satisfactory
 evidence) to be the person whose name is subscribed to
 this instrument, and acknowledged that he or she
 executed it. I declare under penalty of perjury that the
 person whose name is subscribed to this instrument
 appears to be of sound mind and under no duress, fraud,
 or undue influence.*

NOTARY SEAL

(Signature of Notary Public)

Comment. Section 6241 is amended to permit a California statutory will with trust to be acknowledged before a notary public at any place within this state instead of using two witnesses, consistent with general wills law. See Sections 6110, 6110.5.

Transitional provision

SEC. 5. Section 6110 of the Probate Code, as amended by this act, shall apply to any case where the decedent dies after December 31, 1984.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Revision of Wills and Intestate
Succession Law

November 1983

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 Wills and Intestate Succession Law*, 17 Cal. L. Revision Comm'n Reports 537 (1984).

CALIFORNIA LAW REVISION COMMISSION

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

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BEATRICE P. LAWSON

November 4, 1983

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

Upon Commission recommendation, comprehensive legislation relating to wills and intestate succession was enacted in 1983. See 1983 Cal. Stats. ch. 842; *Tentative Recommendation Relating to Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301 (1982).

The operative date of the 1983 legislation was delayed until January 1, 1985, so that any needed revisions could be enacted at the 1984 session and become operative at the same time as the 1983 legislation.

This recommendation proposes necessary technical and substantive changes in the 1983 legislation. The Commission is indebted to the lawyers, judges, court commissioners, and others who provided suggestions that assisted the Commission in preparing this recommendation.

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

Respectfully submitted,

DAVID ROSENBERG
Chairperson

RECOMMENDATION

relating to

REVISION OF WILLS AND INTESTATE SUCCESSION LAW

Introduction

In 1983, acting at the recommendation of the California Law Revision Commission,¹ the Legislature enacted a comprehensive statute relating to wills and intestate succession.² The Commission has reviewed the new law and has considered the suggestions of interested persons and organizations for revisions in the new law.³ This recommendation is the result of the Commission's review.

Gift to Interested Witness

If a will makes a devise to a subscribing witness, the new law creates a presumption that the witness procured the devise by duress, menace, fraud, or undue influence.⁴ If the witness is unable to overcome the presumption, the devise to that witness fails. The new law should be revised to provide that the presumption does not apply if there are two other subscribing witnesses to the will who are disinterested witnesses. Where there are two disinterested witnesses, the interested witness is superfluous, and there is no reason to apply the adverse presumption.⁵

The new law also provides that a beneficiary under the will may contest a gift to a subscribing witness without

¹ See *Tentative Recommendation Relating to Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301 (1982).

² See 1983 Cal. Stats. ch. 842, operative January 1, 1985.

³ To provide time for this review and the enactment of any needed revisions, the operative date of this new law was deferred until January 1, 1985. 1983 Cal. Stats. ch. 842, § 58.

⁴ Prob. Code § 6112. Unless otherwise indicated, all references to sections in the Probate Code are to the new provisions which become operative January 1, 1985.

⁵ This is consistent with the former law which permitted an interested witness to take under the will if there were two disinterested subscribing witnesses to the will. See former Probate Code Section 51 (devise to subscribing witness void unless there were two other and disinterested witnesses to the will).

forfeiting any benefits under the will pursuant to a no-contest clause in the will if the witness is "needed to establish the validity of the will."⁶ The limitation which makes this provision applicable only if the witness is needed to establish the validity of the will may create difficult practical problems. For example, if there are three witnesses to the will, two of whom receive benefits under the will, which of the two witnesses is needed to establish the validity of the will? Is this choice to be made by the executor or by the person contesting the gift? In view of the general policy against no-contest clauses in wills,⁷ the Commission recommends that a beneficiary under the will be permitted to contest a gift to an interested witness without forfeiting benefits pursuant to a no-contest clause without regard to whether the witness is needed to establish the validity of the will.

Division by Representation

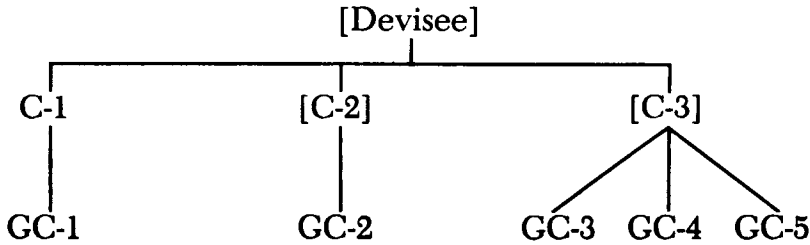
Under California's new rule of representation,⁸ the property is divided into as many equal shares as there are living members of the nearest generation of issue then living and deceased members of that generation who leave issue then living. Each living member of the nearest generation of issue then living receives one share. The share of each deceased member of that generation who leaves issue then living is divided in the same manner among his or her then living issue. This is the rule for intestate succession. Unless the will expresses a contrary intent, the same rule is used when a will calls for distribution per stirpes or by representation, or provides for issue or descendants to take without specifying the manner.

The operation of the new rule is illustrated by the following example. Assume that the devisee named in a will has predeceased the testator, leaving one surviving child and five surviving grandchildren:

⁶ Prob. Code § 372.5.

⁷ See Hopkins, *Introductory and Concluding Clauses*, in California Will Drafting § 7.31, at 216-17 (Cal. Cont. Ed. Bar 1965).

⁸ Prob. Code § 240.



(Brackets indicate those who have predeceased the testator)

Under California's rule of representation, the property devised to the deceased devisee is divided into three shares with one share going to the surviving child (C-1), one share to the only child of one of the deceased children (GC-2), and one share being redivided equally among the three children of the other deceased child (GC-3, GC-4, and GC-5). Thus, the four grandchildren who take by representation receive unequal shares: One grandchild (GC-2) takes a third of the property, while three other grandchildren (GC-3, GC-4, and GC-5) take one-ninth each.

Another representation scheme, called "per capita at each generation," would treat equally the four grandchildren who take by representation (GC-2, GC-3, GC-4, and GC-5) in this example. Under this scheme, after C-1's one-third share is allotted, the remaining two-thirds is redivided per capita among the living members of the next generation whose parent is deceased.⁹ Thus, each grandchild who takes by representation (GC-2, GC-3, GC-4, and GC-5) would each receive one-sixth of the devised property.

It would be helpful to one drafting a will to have an easy shorthand way of adopting this alternative representation scheme. The Commission recommends enactment of a statutory definition of "per capita at each generation" that could be incorporated in a will by using the defined term. The existing California representation scheme would

⁹ See Waggoner, *A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants*, 66 Nw. U.L. Rev. 626, 632-33 (1971).

continue to apply to a will which calls for distribution per stirpes or by representation or which is silent on the matter.

Application of Representation Rules to Trusts

Trust instruments often provide that when the trust terminates the trust property shall be distributed to the descendants of any deceased distributee by right of representation.¹⁰ The new California rule of representation applies to wills and intestate succession, but makes no express reference to trusts.¹¹ The Commission recommends that it be made clear that when a trust instrument that expresses no contrary intention calls for distribution per stirpes or by representation or provides for issue or descendants to take without specifying the manner, the statutory provision for representation governs the trust, the same as for wills.

Amendment of Pour-over Trust After Testator's Death

A will may leave property to a trust that was in existence during the testator's lifetime. If the will fails to provide that the testamentary assets shall be administered according to the terms of the trust as it may be amended after the testator's death, then post-death amendments to the trust are effective with respect to the inter vivos assets but ineffective with respect to the testamentary assets.¹² Most testators would prefer to have the trust assets governed by a single set of rules, regardless of whether they are inter vivos or testamentary assets. The Commission recommends that the law be revised so that the testamentary assets will be subject to post-death amendments of the trust, the same as the inter vivos assets, unless the testator's will provides to the contrary.

¹⁰ See, e.g., *Drafting California Irrevocable Inter Vivos Trusts*, at 377 (Cal. Cont. Ed. Bar 1973). In some cases, this may be accomplished simply by referring in the trust instrument to the rules of intestate succession. See *Maud v. Catherwood*, 67 Cal. App.2d 636, 155 P.2d 111 (1945).

¹¹ See Prob. Code § 240. The rule of representation of Section 240 applies to a will that expresses no contrary intention and calls for distribution per stirpes or by representation or provides for issue or descendants to take without specifying the manner.

¹² Prob. Code § 6300.

Abatement After Payment of Share of Omitted Spouse or Children

If the testator's will omits to provide for the testator's spouse or children and it does not appear from the will that the omission was intentional, the omitted spouse or children may elect to take a statutory share of the testator's estate.¹³ In such a case, the statutory share is taken first from that portion of the estate, if any, not disposed of by the decedent's will. If that is not sufficient, the share is taken from residuary beneficiaries under the will. When the residuary estate is exhausted, the share is taken from all other devisees in proportion to the value of each devisee's share.¹⁴

It is unfair to residuary takers and probably contrary to the testator's intent to require that the residuary estate be exhausted before requiring other devisees to share in the apportionment. Residuary takers are usually the immediate members of the testator's family who are the natural objects of the testator's bounty. A fairer rule, and one more consistent with the intent of most testators, would be one that imposes liability proportionately on all beneficiaries under the will, general, specific, and residuary beneficiaries alike. Accordingly, the Commission recommends that the law be revised to provide for proportional contribution from all takers under the will to pay a statutory share of an omitted spouse or omitted children.¹⁵ This is the rule that formerly applied in the case of an omitted child.¹⁶

Technical and Clarifying Revisions

The recommended legislation includes technical and clarifying revisions. The more significant of the revisions are the following:¹⁷

¹³ See Prob. Code §§ 6560-6561, 6570-6571.

¹⁴ See Prob. Code §§ 6562, 6573. The court may exempt specific devisees from the apportionment if it appears necessary to carry out the testator's intent and there is other sufficient estate. Prob. Code § 750.

¹⁵ The Commission plans to study the question of what rule should be used in situations other than the case of the omitted spouse or children in connection with the Commission's study of the administration of estates. See generally Prob. Code § 750.

¹⁶ See former Section 91, repealed as of January 1, 1985.

¹⁷ The technical revisions also include the following:

(1) The new law included a revision to the notice required in divorce cases to reflect the new rule concerning the effect of divorce on dispositive provisions in

(1) The rules that determine when a stepchild or foster child is treated as an adopted child for the purposes of intestate succession¹⁸ are made specifically applicable in determining relationship in construing a will and in construing a class gift made by a will.

(2) The "California statutory will"¹⁹ is renamed the "California statutory form will." This change will avoid confusion if the Uniform Statutory Will Act²⁰ is enacted in California. The 1983 revision of the law relating to wills requires that the forms for the California statutory wills be reprinted when the 1983 revision becomes operative on January 1, 1985. Making the change of name in 1984 will permit it to be included when the new forms are printed and will avoid the need to again reprint the forms sometime in the future merely to reflect the change of name if made after 1984.

(3) The new provisions relating to waiver by one spouse of rights in the estate of the other²¹ are amended to make clear that the waiver may be revoked in the manner specified in the waiver instrument.

the will of one divorcing spouse in favor of the other. See 1983 Cal. Stats. ch. 842, § 8. This was chaptered out by a later enactment. See 1983 Cal. Stats. ch. 1159, § 2. Accordingly, this revision should be reintroduced at the 1984 legislative session.

(2) Section 6412 provides that the estates of dower and curtesy are not recognized. However, Section 120 recognizes rights akin to dower and curtesy in California land owned by a nondomiciliary decedent. Section 6412 should be revised to recognize this limited right under Section 120.

(3) The new law contains a definition of "surviving spouse" that deals with the problem of a divorce or annulment in another state which is not recognized in California, and applies an estoppel principle. See Section 78 and the Comment thereto. The new law also uses the term "predeceased spouse" (see, e.g., Sections 6402, 6402.5), but does not define this term. The new law should provide a definition of "predeceased spouse" drawn from the definition of "surviving spouse."

Other technical revisions are noted in the Comments to the various sections in the proposed legislation.

¹⁸ Stepchildren and foster children may inherit as though they were natural children only if the parent-child relationship began during the child's minority and continued throughout the joint lifetimes of the parent and child, and it is established by clear and convincing evidence that the foster parent or stepparent would have adopted the child but for a legal barrier. Prob. Code § 6408.

¹⁹ See Prob. Code §§ 6200-6248.

²⁰ This Uniform Act is now being drafted by the National Conference of Commissioners on Uniform State Laws.

²¹ See Prob. Code §§ 140-147.

Recommended Legislation

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

An act to amend Section 4352 of the Civil Code, and to amend Sections 146, 240, 282, 372.5, 6112, 6152, 6201, 6202, 6203, 6204, 6205, 6208, 6209, 6220, 6221, 6221.5, 6222, 6223, 6225, 6226, 6240, 6241, 6242, 6243, 6244, 6245, 6246, 6247, 6248, 6300, 6401, 6412, 6562, and 6573 of, to amend the heading for Chapter 6 (commencing with Section 6200) of Part 1 of Division 6 of, to add Sections 59 and 241 to, and to repeal Section 6206 of, the Probate Code, relating to probate law and procedure.

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

Civil Code § 4352 (amended). Notice concerning will

SECTION 1. Section 4352 of the Civil Code is amended to read:

4352. Every judgment declaring a marriage a nullity or dissolving a marriage shall contain the following notice:

Notice: Please review your will. ~~Unless a provision is made in the property settlement agreement, this court proceeding does not affect your will and the ability of your former spouse to take under it.~~ *A judgment of dissolution or annulment of marriage revokes any disposition made by your will to your former spouse. You should also review your insurance policies, retirement benefit plans, and other matters that you may want to change in view of the dissolution or annulment of your marriage.*

Comment. Section 4352 is amended to reflect the change in the law concerning the effect of dissolution or annulment on provisions in the will of one spouse in favor of the other. See Prob. Code § 6122 and the Comment thereto.

Probate Code § 59 (added). Predeceased spouse

SEC. 2. Section 59 is added to the Probate Code, to read:

59. "Predeceased spouse" means a person who died before the decedent while married to the decedent, except that the term does not include any of the following:

(a) A person who obtains or consents to a final decree or judgment of dissolution of marriage from the decedent or a final decree or judgment of annulment of their marriage, which decree or judgment is not recognized as valid in this state, unless they (1) subsequently participate in a marriage ceremony purporting to marry each to the other or (2) subsequently live together as husband and wife.

(b) A person who, following a decree or judgment of dissolution or annulment of marriage obtained by the decedent, participates in a marriage ceremony to a third person.

(c) A person who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

Comment. Section 59 is new and is drawn from Section 78 ("surviving spouse" defined). See the Comment to Section 78. Under Section 59, it is possible that the decedent may have more than one predeceased spouse.

Probate Code § 146 (amended). Alteration or revocation of waiver

SEC. 3. Section 146 of the Probate Code is amended to read:

146. (a) As used in this section, "agreement" means a written agreement signed by each spouse or prospective spouse altering, amending, or revoking a waiver under this chapter.

(b) *Unless the waiver specifically otherwise provides, a waiver under this chapter may not be altered, amended, or revoked except by a subsequent written agreement signed by each spouse or prospective spouse.*

(c) An agreement is enforceable against a party to the agreement unless the court determines either of the following:

(1) A fair and reasonable disclosure of the property of the other spouse was not provided to the spouse against whom enforcement is sought prior to the execution of the agreement unless the spouse against whom enforcement is sought waived such a fair and reasonable disclosure after advice by independent legal counsel.

(2) The spouse against whom enforcement is sought was not represented by independent legal counsel at the time of execution of the agreement.

(d) Except as provided in subdivision (e), an agreement that is not enforceable under subdivision (c) is enforceable if the court determines that the agreement at the time of execution made a fair and reasonable disposition of the rights of the spouses and the spouse against whom the agreement is sought to be enforced understood the effect of and voluntarily executed the agreement.

(e) If, after considering all relevant facts and circumstances, the court finds that enforcement of the agreement pursuant to subdivision (d) would be unconscionable under the existing facts and circumstances, the court may refuse to enforce the agreement, enforce the remainder of the agreement without the unconscionable provisions, or limit the application of the unconscionable provisions to avoid an unconscionable result.

Comment. Subdivision (b) of Section 146 is amended to make clear a written waiver under this chapter may itself provide for the manner in which it may be altered, amended, or revoked.

Probate Code § 240 (amended). Representation

SEC. 4. Section 240 of the Probate Code is amended to read:

240. If representation is called for by this code, or if a will or trust that expresses no contrary intention calls for distribution per stirpes or by representation or provides for issue or descendants to take without specifying the manner, the property shall be divided into as many equal shares as there are living members of the nearest

generation of issue then living and deceased members of that generation who leave issue then living, each living member of the nearest generation of issue then living receiving one share and the share of each deceased member of that generation who leaves issue then living being divided in the same manner among his or her then living issue.

Comment. Section 240 is amended to apply its rule of representation to inter vivos and testamentary trusts where no contrary intention is expressed in the trust instrument.

Probate Code § 241 (added). Per capita at each generation

SEC. 5. Section 241 is added to the Probate Code, to read:

241. If a will or trust that expresses no contrary intention calls for distribution "per capita at each generation" or provides for issue or descendants to take "per capita," the property is divided into as many equal shares as there are living members of the nearest generation of issue then living and deceased members of that generation who leave issue then living. Each living member of the nearest generation of issue then living is allocated one share, and the remaining shares, if any, are combined and then divided and allocated in the same manner among the remaining issue as if the issue already allocated a share and their descendants were then deceased.

Comment. Section 241 is new and permits one drafting a will or an inter vivos or testamentary trust to adopt the distribution scheme of this section by providing in the will or trust for distribution "per capita at each generation." The distribution scheme of this section is that advocated in Waggoner, *A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants*, 66 Nw. U.L. Rev. 626, 632-33 (1971). If the will or trust does not specify the manner of distribution, then distribution is made pursuant to Section 240 rather than Section 241. See Section 240.

Probate Code § 282 (technical amendment). Effect of disclaimer

SEC. 6. Section 282 of the Probate Code is amended to read:

282. (a) Unless the creator of the interest provides for a specific disposition of the interest in the event of a disclaimer, the interest disclaimed shall descend, go, be distributed, or continue to be held (1) as to a present interest, as if the disclaimant had predeceased the creator of the interest or (2) as to a future interest, as if the disclaimant had died before the event determining that the taker of the interest had become finally ascertained and the taker's interest indefeasibly vested. A disclaimer relates back for all purposes to the date of the death of the creator of the disclaimed interest or the determinative event, as the case may be.

(b) Notwithstanding subdivision (a):

(1) If an interest created by intestate succession is disclaimed, the beneficiary is not treated as having predeceased the decedent for the purpose of determining the generation at which the division of the estate is to be made under Section 240 or 241.

(2) The beneficiary of a disclaimed interest is not treated as having predeceased the decedent for the purpose of applying subdivision (d) of Section 6409 or subdivision (b) of Section 6410.

Comment. Section 282 is amended to add the reference to Section 241 in paragraph (1) of subdivision (b). The purpose of this paragraph is to prevent an heir from disclaiming property for the purpose of increasing the intestate share of his or her line at the expense of other lines of the decedent's descendants.

Probate Code § 372.5 (amended). Challenge of gift to witness despite no-contest clause

SEC. 7. Section 372.5 of the Probate Code is amended to read:

372.5. Notwithstanding a provision in the will that one who contests or attacks the will or any of its provisions shall take nothing under the will or shall take a reduced share, any person interested may, without forfeiting any

benefits under the will, contest a provision of the will which benefits a witness to the will if that witness is needed to establish the validity of the will.

Comment. Section 372.5 is amended to delete the phrase that limited the application of the section to a case where the witness is needed to establish the validity of the will. As amended, the section permits a challenge of a gift to a witness without regard to whether the witness is needed to establish the validity of the will.

Probate Code § 6112 (amended). Who may witness a will

SEC. 8. Section 6112 of the Probate Code is amended to read:

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

(b) A will or any provision thereof is not invalid because the will is signed by an interested witness. *The Unless there are at least two other subscribing witnesses to the will who are disinterested witnesses, the fact that the will makes a devise to a subscribing witness creates a presumption that the witness procured the devise by duress, menace, fraud, or undue influence. This presumption is a presumption affecting the burden of proof.*

Comment. Subdivision (b) of Section 6112 is amended to limit it so that the presumption does not apply if there are two other witnesses to the will who are disinterested witnesses.

Probate Code § 6152 (technical amendment). Halfbloods, adopted persons, and persons born out of wedlock

SEC. 9. Section 6152 of the Probate Code is amended to read:

6152. Unless otherwise provided in the will:

(a) Except as provided in subdivision (b), halfbloods, adopted persons, and persons born out of wedlock, *stepchildren, foster children,* and the issue of all such persons when appropriate to the class, are included in terms of class gift or relationship in accordance with the rules for determining relationship and inheritance rights for purposes of intestate succession.

(b) In construing a devise by a testator who is not the natural parent, a person born to the natural parent shall not be considered the child of that parent unless the person lived while a minor as a regular member of the household of the natural parent or of that parent's parent, brother, sister, or surviving spouse. In construing a devise by a testator who is not the adoptive parent, a person adopted by the adoptive parent shall not be considered the child of that parent unless the person lived while a minor (either before or after the adoption) as a regular member of the household of the adopting parent or of that parent's parent, brother, sister, or surviving spouse.

(c) Subdivisions (a) and (b) also apply in determining:

(1) Persons who would be kindred of the testator or kindred of a surviving, deceased, or former spouse of the testator under Section 6147.

(2) Persons to be included as issue of a deceased devisee under Section 6147.

(3) Persons who would be the testator's or other designated person's heirs under Section 6151.

Comment. Section 6152 is amended to make clear that under some circumstances stepchildren and foster children are included in terms of class gift or relationship pursuant to the rules for intestate succession. See Section 6408 (when stepchild or foster child treated the same as adopted child).

Probate Code - heading for Chapter 6 (commencing with Section 6200) of Part 1 of Division 6

SEC. 10. The heading of Chapter 6 (commencing with Section 6200) of Part 1 of Division 6 of the Probate Code is amended to read:

CHAPTER 6. CALIFORNIA STATUTORY *FORM* WILL

Probate Code § 6201 (technical amendment). Testator

SEC. 11. Section 6201 of the Probate Code is amended to read:

6201. "Testator" means a person choosing to adopt a California statutory *form* will.

Comment. Section 6201 and various other sections in this chapter are amended to reflect the new terminology, "California statutory form will."

Probate Code § 6202 (technical amendment). Spouse

SEC. 12. Section 6202 of the Probate Code is amended to read:

6202. "Spouse" means the testator's husband or wife at the time the testator signs a California statutory *form* will.

Comment. See the Comment to Section 6201.

Probate Code § 6203 (technical amendment). Executor

SEC. 13. Section 6203 of the Probate Code is amended to read:

6203. "Executor" means both the person so designated in a California statutory *form* will and any other person acting at any time as the executor or administrator under a California statutory *form* will.

Comment. See the Comment to Section 6201.

Probate Code § 6204 (technical amendment). Trustee

SEC. 14. Section 6204 of the Probate Code is amended to read:

6204. "Trustee" means both the person so designated in a California statutory *form* will and any other person acting at any time as the trustee under a California statutory *form* will.

Comment. See the Comment to Section 6201.

Probate Code § 6205 (amended). Descendants

SEC. 15. Section 6205 of the Probate Code is amended to read:

6205. "Descendants" means children, grandchildren, and their lineal descendants of all ~~degrees~~ *generations*, *with the relationship of parent and child at each generation being determined by the definitions of child and parent in Sections 26 and 54. A reference to "descendants" in the plural includes a single descendant where the context so requires.*

Comment. Section 6205 is amended to conform the definition of “descendants” to the definition of “issue” under general law. See Section 50 (“issue” defined). Thus, for example, general law will apply in determining the extent to which the term includes adoptees and children born out of wedlock. See Sections 26, 54, 6408. See also Section 6248 (except as specifically provided, general law applies to California statutory form will). The second sentence of Section 6205 continues subdivision (b) of former Section 6206.

Probate Code § 6206 (repealed). Class designation of “descendants” or “children”

SEC. 16. Section 6206 of the Probate Code is repealed.

6206. ~~(a) A class designation of “descendants” or “children” includes (1) persons legally adopted into the class during minority and (2) persons naturally born into the class (in or out of wedlock).~~

~~(b) A reference to “descendants” in the plural includes a single descendant where the context so requires.~~

Comment. Section 6206 is repealed. Repeal of subdivision (a)—the special rule of construction for a class gift to “descendants” or “children”—makes applicable the general rule of construction in Section 6152. See Section 6248 (except as specifically provided, general law applies to California statutory form will). Subdivision (b) is continued in Section 6205.

Probate Code § 6208 (technical amendment). Use of “shall” or “may” in a California statutory form will

SEC. 17. Section 6208 of the Probate Code is amended to read:

6208. (a) If a California statutory *form* will states that a person shall perform an act, the person is required to perform that act.

(b) If a California statutory *form* will states that a person may do an act, the person’s decision to do or not to do the act shall be made in the exercise of the person’s fiduciary powers.

Comment. See the Comment to Section 6201.

Probate Code § 6209 (technical amendment). Manner of distribution to “descendants”

SEC. 18. Section 6209 of the Probate Code is amended to read:

6209. Whenever a distribution under a California statutory *form* will is to be made to a person's descendants, the property shall be divided into as many equal shares as there are then living descendants of the nearest degree of living descendants and deceased descendants of that same degree who leave descendants then living; and each living descendant of the nearest degree shall receive one share and the share of each deceased descendant of that same degree shall be divided among his or her descendants in the same manner in the manner provided in Section 240.

Comment. Section 6209 is amended to pick up by cross-reference the general rule of representation in Section 240. Since the former rule of representation in Section 6209 was consistent with Section 240, this change is not substantive.

Probate Code § 6220 (technical amendment). Persons who may execute California statutory form will

SEC. 19. Section 6220 of the Probate Code is amended to read:

6220. Any individual of sound mind and over the age of 18 may execute a California statutory *form* will under the provisions of this chapter.

Comment. See the Comment to Section 6201.

Probate Code § 6221 (technical amendment). Method of executing California statutory form will

SEC. 20. Section 6221 of the Probate Code is amended to read:

6221. A California statutory *form* will shall be executed only as follows:

(a) The testator shall complete the appropriate blanks and shall sign the will.

(b) Each witness shall observe the testator's signing and each witness shall sign his or her name in the presence of the testator.

Comment. See the Comment to Section 6201.

Probate Code § 6221.5 (technical amendment). Attestation sufficient for admission of will to probate

SEC. 21. Section 6221.5 of the Probate Code is amended to read:

6221.5. The execution of the attestation clause provided in the California statutory *form* will by two or more witnesses satisfies Section 329.

Comment. See the Comment to Section 6201.

Probate Code § 6222 (technical amendment). Two California statutory form wills; contents

SEC. 22. Section 6222 of the Probate Code is amended to read:

6222. (a) There are two California statutory *form* wills:

(1) A California statutory *form* will.

(2) A California statutory *form* will with trust.

(b) Each California statutory *form* will includes all of the following:

(1) The contents of the *form for the* appropriate California statutory *form* will *form*, including the notice set out in Section 6240 or 6241.

(2) By reference, the full texts of each of the following:

(A) The definitions and rules of construction set forth in Article 1 (commencing with Section 6200).

(B) The clause set forth in Section 6242.

(c) The property disposition clause adopted by the testator.

(d) The mandatory clauses set forth in Section 6245 and, if applicable, Section 6246.

Comment. See the Comment to Section 6201.

Probate Code § 6223 (technical amendment). Effect of selection of more than one property disposition clause; effect of failure to make selection

SEC. 23. Section 6223 of the Probate Code is amended to read:

6223. If more than one property disposition clause appearing in paragraph 2.3 of *the form* for a California statutory *form* will ~~form~~ is selected, or if none is selected, the property of a testator who signs a California statutory *form* will shall be distributed to the testator's heirs as if the testator did not make a will.

Comment. See the Comment to Section 6201.

Probate Code § 6225 (technical amendment). Revocation; amendment by codicil; effect of additions or deletions on form

SEC. 24. Section 6225 of the Probate Code is amended to read:

6225. (a) A California statutory *form* will may be revoked and may be amended by codicil in the same manner as other wills.

(b) Any additions to or deletions from the California statutory *form* will on the face of the ~~California statutory will~~ form, other than in accordance with the instructions, are ineffective and shall be disregarded.

Comment. See the Comment to Section 6201.

Probate Code § 6226 (technical amendment). Revocation by dissolution or annulment of marriage

SEC. 25. Section 6226 of the Probate Code is amended to read:

6226. (a) If after executing a California statutory *form* will the testator's marriage is dissolved or annulled, the dissolution or annulment revokes any disposition of property made by the will to the former spouse and any nomination of the former spouse as executor, trustee, or guardian made by the will. If any disposition or nomination is revoked solely by this section, it is revived by the testator's remarriage to the former spouse.

(b) In case of revocation by dissolution or annulment:

(1) Property prevented from passing to a former spouse because of the revocation passes as if the former spouse failed to survive the testator.

(2) Provisions nominating the former spouse as executor, trustee, or guardian shall be interpreted as if the former spouse failed to survive the testator.

(c) For purposes of this section, divorce or annulment means any dissolution or annulment that would exclude the spouse as a surviving spouse within the meaning of Section 78. A decree of legal separation which does not terminate the status of husband and wife is not a divorce or dissolution for purposes of this section.

(d) This section applies to any California statutory *form* will, without regard to the time when the will was executed, if the testator dies after December 31, 1984.

Comment. See the Comment to Section 6201.

Probate Code § 6240 (technical amendment). Form for California statutory form will

SEC. 26. Section 6240 of the Probate Code is amended to read:

6240. The following is the *form for the California statutory form will form*:

CALIFORNIA STATUTORY FORM WILL

NOTICE TO THE PERSON WHO SIGNS THIS WILL:

1. IT MAY BE IN YOUR BEST INTEREST TO CONSULT WITH A CALIFORNIA LAWYER BECAUSE THIS STATUTORY *FORM* WILL HAS SERIOUS LEGAL EFFECTS ON YOUR FAMILY AND PROPERTY.

2. THIS WILL DOES NOT DISPOSE OF PROPERTY WHICH PASSES ON YOUR DEATH TO ANY PERSON BY OPERATION OF LAW OR BY ANY CONTRACT. FOR EXAMPLE, THE WILL DOES NOT DISPOSE OF JOINT TENANCY ASSETS OR YOUR SPOUSE'S SHARE OF COMMUNITY PROPERTY, AND IT WILL NOT NORMALLY APPLY TO PROCEEDS OF LIFE INSURANCE ON YOUR LIFE OR YOUR RETIREMENT PLAN BENEFITS.

3. THIS WILL IS NOT DESIGNED TO REDUCE DEATH TAXES OR ANY OTHER TAXES. YOU SHOULD DISCUSS THE TAX RESULTS OF YOUR DECISIONS WITH A COMPETENT TAX ADVISOR.

4. YOU CANNOT CHANGE, DELETE, OR ADD WORDS TO THE FACE OF THIS CALIFORNIA

STATUTORY *FORM* WILL. IF YOU DO, THE CHANGE OR THE DELETED OR ADDED WORDS WILL BE DISREGARDED AND THIS WILL MAY BE GIVEN EFFECT AS IF THE CHANGE, DELETION, OR ADDITION HAD NOT BEEN MADE. YOU MAY REVOKE THIS CALIFORNIA STATUTORY *FORM* WILL AND YOU MAY AMEND IT BY CODICIL.

5. IF THERE IS ANYTHING IN THIS WILL THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER TO EXPLAIN IT TO YOU.

6. THE FULL TEXT OF THIS CALIFORNIA STATUTORY *FORM* WILL, THE DEFINITIONS AND RULES OF CONSTRUCTION, THE PROPERTY DISPOSITION CLAUSES, AND THE MANDATORY CLAUSES FOLLOW THE END OF THIS WILL AND ARE CONTAINED IN THE PROBATE CODE OF CALIFORNIA.

7. THE WITNESSES TO THIS WILL SHOULD NOT BE PEOPLE WHO MAY RECEIVE PROPERTY UNDER THIS WILL. YOU SHOULD CAREFULLY READ AND FOLLOW THE WITNESSING PROCEDURE DESCRIBED AT THE END OF THIS WILL. ALL OF THE WITNESSES MUST WATCH YOU SIGN THIS WILL.

8. YOU SHOULD KEEP THIS WILL IN YOUR SAFE-DEPOSIT BOX OR OTHER SAFE PLACE.

9. THIS WILL TREATS MOST ADOPTED CHILDREN AS IF THEY ARE NATURAL CHILDREN.

10. IF YOU MARRY OR DIVORCE AFTER YOU SIGN THIS WILL, YOU SHOULD MAKE AND SIGN A NEW WILL.

11. IF YOU HAVE CHILDREN UNDER 21 YEARS OF AGE, YOU MAY WISH TO USE THE CALIFORNIA STATUTORY *FORM* WILL WITH TRUST OR ANOTHER TYPE OF WILL.

[A printed form for a California statutory *form* will shall set forth the above notice in 10-point **bold face boldface** type.]

CALIFORNIA STATUTORY FORM WILL OF

(Insert Your Name)**Article 1. Declaration**

This is my will and I revoke any prior wills and codicils.

Article 2. Disposition of My Property

2.1. PERSONAL AND HOUSEHOLD ITEMS. I give all my furniture, furnishings, household items, personal automobiles and personal items to my spouse, if living; otherwise they shall be divided equally among my children who survive me.

2.2. CASH GIFT TO A PERSON OR CHARITY. I make the following cash gift to the person or charity in the amount stated in words and figures in the box which I have completed and signed. If I fail to sign in the box, no gift is made. If the person mentioned does not survive me, or the charity designated does not accept the gift, then no gift is made. No death tax shall be paid from this gift.

<p>FULL NAME OF PERSON OR CHARITY TO RECEIVE CASH GIFT (Name only one. Please print.).</p>	<p>AMOUNT OF GIFT \$ _____</p> <p>AMOUNT WRITTEN OUT: _____ Dollars</p> <p>_____ Signature of Testator</p>

2.3. ALL OTHER ASSETS (MY "RESIDUARY ESTATE"). I adopt only one Property Disposition Clause in this paragraph 2.3 by writing my signature in the box next to the title of the Property Disposition Clause I wish to adopt. I sign in only one box. I write the words "not used" in the remaining boxes. If I sign in more than one box or if I fail to sign in any box, the property will be distributed as if I did not make a will.

PROPERTY DISPOSITION CLAUSES (Select one.)

- (a) TO MY SPOUSE IF LIVING; IF NOT LIVING, THEN TO MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD.

- (b) TO MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD. I LEAVE NOTHING TO MY SPOUSE, IF LIVING.

- (c) TO BE DISTRIBUTED AS IF I DID NOT HAVE A WILL. ____

Article 3. Nominations of Executor and Guardian

3.1. EXECUTOR (Name at least one.)

I nominate the person or institution named in the first box of this paragraph 3.1 to serve as executor of this will.

If that person or institution does not serve, then I nominate the others to serve in the order I list them in the other boxes.

FIRST EXECUTOR. ____

SECOND EXECUTOR. ____

THIRD EXECUTOR. ____

3.2. GUARDIAN (If you have a child under 18 years of age, you should name at least one guardian of the child's person and at least one guardian of the child's property. The guardian of the child's person and the guardian of the child's property may, but need not, be the same. An individual can serve as guardian of either the person or the property, or as guardian of both. An institution can serve only as guardian of the property.)

If a guardian is needed for any child of mine, then I nominate the individual named in the first box of this paragraph 3.2 to serve as guardian of the person of that child, and I nominate the individual or institution named in the second box of this paragraph 3.2 to serve as guardian of the property of that child. If that person or institution does not serve, then I nominate the others to serve in the order I list them in the other boxes.

**FIRST GUARDIAN OF
THE PERSON.** _____

**FIRST GUARDIAN OF
THE PROPERTY.** _____

**SECOND GUARDIAN OF
THE PERSON.** _____

**SECOND GUARDIAN OF
THE PROPERTY.** _____

**THIRD GUARDIAN OF
THE PERSON.** _____

**THIRD GUARDIAN OF
THE PROPERTY.** _____

3.3. BOND. My signature in this box means that a bond is not required for any individual named in this will as executor or guardian. If I do not sign in this box, then a bond is required for each of those persons as set forth in the Probate Code. (The bond provides a fund to pay those who do not receive the share of your estate to which they are entitled, including your creditors, because of improper performance of duties by the executor or guardian. Bond premiums are paid out of your estate.)

I sign my name to this California Statutory *Form* Will
on _____ at _____, _____
Date City State

Signature of Testator

STATEMENT OF WITNESSES (You must use two adult witnesses and three would be preferable.)

Each of us declares under penalty of perjury under the laws of California that the testator signed this California statutory *form* will in our presence, all of us being present at the same time, and we now, at the testator's request, in the testator's presence, and in the presence of each other, sign below as witnesses, declaring that the testator appears to be of sound mind and under no duress, fraud, or undue influence.

Signature _____ Residence Address: _____
Print Name _____
Here: _____

Signature _____ Residence Address: _____
Print Name _____
Here: _____

Signature _____ Residence Address: _____
Print Name _____
Here: _____

Comment. See the Comment to Section 6201.

Probate Code § 6241 (technical amendment). Form for California statutory form will with trust

SEC. 27. Section 6241 of the Probate Code is amended to read:

6241. The following is the *form for the* California statutory *form* will with trust ~~form~~:

CALIFORNIA STATUTORY *FORM* WILL WITH TRUST

NOTICE TO THE PERSON WHO SIGNS THIS WILL:

1. THIS FORM CONTAINS A TRUST FOR YOUR DESCENDANTS. IF YOU DO NOT WANT TO CREATE A TRUST, DO NOT USE THIS FORM.

2. IT MAY BE IN YOUR BEST INTEREST TO CONSULT WITH A CALIFORNIA LAWYER BECAUSE THIS STATUTORY *FORM* WILL HAS SERIOUS LEGAL EFFECTS ON YOUR FAMILY AND PROPERTY.

3. THIS WILL DOES NOT DISPOSE OF PROPERTY WHICH PASSES ON YOUR DEATH TO ANY PERSON BY OPERATION OF LAW OR BY ANY CONTRACT. FOR EXAMPLE, THE WILL DOES NOT DISPOSE OF JOINT TENANCY ASSETS OR YOUR SPOUSE'S SHARE OF COMMUNITY PROPERTY, AND IT WILL NOT NORMALLY APPLY TO PROCEEDS OF LIFE INSURANCE ON YOUR LIFE OR YOUR RETIREMENT PLAN BENEFITS.

4. THIS WILL IS NOT DESIGNED TO REDUCE DEATH TAXES OR ANY OTHER TAXES. YOU SHOULD DISCUSS THE TAX RESULTS OF YOUR DECISIONS WITH A COMPETENT TAX ADVISOR.

5. YOU CANNOT CHANGE, DELETE, OR ADD WORDS TO THE FACE OF THIS CALIFORNIA

STATUTORY *FORM* WILL. IF YOU DO, THE CHANGE OR THE DELETED OR ADDED WORDS WILL BE DISREGARDED AND THIS WILL MAY BE GIVEN EFFECT AS IF THE CHANGE, DELETION, OR ADDITION HAD NOT BEEN MADE. YOU MAY REVOKE THIS CALIFORNIA STATUTORY WILL AND YOU MAY AMEND IT BY CODICIL.

6. IF THERE IS ANYTHING IN THIS WILL THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER TO EXPLAIN IT TO YOU.

7. THE FULL TEXT OF THIS CALIFORNIA STATUTORY *FORM* WILL, THE DEFINITIONS AND RULES OF CONSTRUCTION, THE PROPERTY DISPOSITION CLAUSES, AND THE MANDATORY CLAUSES FOLLOW THE END OF THIS WILL AND ARE CONTAINED IN THE PROBATE CODE OF CALIFORNIA.

8. THE WITNESSES TO THIS WILL SHOULD NOT BE PEOPLE WHO MAY RECEIVE PROPERTY UNDER THIS WILL. YOU SHOULD CAREFULLY READ AND FOLLOW THE WITNESSING PROCEDURE DESCRIBED AT THE END OF THIS WILL. ALL OF THE WITNESSES MUST WATCH YOU SIGN THIS WILL.

9. YOU SHOULD KEEP THIS WILL IN YOUR SAFE-DEPOSIT BOX OR OTHER SAFE PLACE.

10. THIS WILL TREATS MOST ADOPTED CHILDREN AS IF THEY ARE NATURAL CHILDREN.

11. IF YOU MARRY OR DIVORCE AFTER YOU SIGN THIS WILL, YOU SHOULD MAKE AND SIGN A NEW WILL.

[A printed form for a California Statutory *Form* Will With Trust shall set forth the above notice in 10-point ~~bold face~~ *boldface* type.]

**CALIFORNIA STATUTORY *FORM* WILL
WITH TRUST OF**

(Insert Your Name)

Article 1. Declaration

This is my will and I revoke any prior wills and codicils.

Article 2. Disposition of My Property

2.1. PERSONAL AND HOUSEHOLD ITEMS. I give all my furniture, furnishings, household items, personal automobiles, and personal items to my spouse, if living; otherwise they shall be divided equally among my children who survive me.

2.2. CASH GIFT TO A PERSON OR CHARITY. I make the following cash gift to the person or charity in the amount stated in words and figures in the box which I have completed and signed. If I fail to sign in the box, no gift is made. If the person mentioned does not survive me, or the charity designated does not accept the gift, then no gift is made. No death tax shall be paid from this gift.

<p style="text-align: center;">FULL NAME OF PERSON OR CHARITY TO RECEIVE CASH GIFT (Name only one. Please print.).</p>	<p>AMOUNT OF GIFT \$ _____</p> <p>AMOUNT WRITTEN OUT: _____ Dollars</p>
	<p style="text-align: center;">_____ Signature of Testator</p>

2.3. ALL OTHER ASSETS (MY "RESIDUARY ESTATE"). I adopt only one Property Disposition Clause in this paragraph 2.3 by writing my signature in the box next to the title of the Property Disposition Clause I wish to adopt. I sign in only one box. I write the words "not

used" in the remaining boxes. If I sign in more than one box or if I fail to sign in any box, the property will be distributed as if I did not make a will.

PROPERTY DISPOSITION CLAUSES (Select one.)

- (a) TO MY SPOUSE IF LIVING; IF NOT LIVING, THEN IN ONE TRUST TO PROVIDE FOR THE SUPPORT AND EDUCATION OF MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD UNTIL I HAVE NO LIVING CHILD UNDER 21 YEARS OF AGE. _____

--

- (b) TO MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD IN ONE TRUST TO PROVIDE FOR THEIR SUPPORT AND EDUCATION UNTIL I HAVE NO LIVING CHILD UNDER 21 YEARS OF AGE. I LEAVE NOTHING TO MY SPOUSE, IF LIVING. _____

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Article 3. Nominations of Executor, Trustee, and Guardian

3.1. EXECUTOR (Name at least one.)

I nominate the person or institution named in the first box of this paragraph 3.1 to serve as executor of this will. If that person or institution does not serve, then I nominate the others to serve in the order I list them in the other boxes.

FIRST EXECUTOR. _____

SECOND EXECUTOR. _____

THIRD EXECUTOR. _____

3.2. TRUSTEE (Name at least one.)

Because it is possible that after I die my property may be put into a trust, I nominate the person or institution named in the first box of this paragraph 3.2 to serve as trustee of that trust. If that person or institution does not serve, then I nominate the others to serve in the order I list them in the other boxes.

FIRST TRUSTEE. _____

SECOND TRUSTEE. _____

THIRD TRUSTEE. _____

3.3. GUARDIAN (If you have a child under 18 years of age, you should name at least one guardian of the child's person and at least one guardian of the child's property. The guardian of the child's person and the guardian of the child's property may, but need not, be the same. An individual can serve as guardian of either the person or the property, or as guardian of both. An institution can serve only as guardian of the property.)

If a guardian is needed for any child of mine, then I nominate the individual named in the first box of this paragraph 3.3 to serve as guardian of the person of that child, and I nominate the individual or institution named in the second box of this paragraph 3.3 to serve as guardian of the property of that child. If that person or institution does not serve, then I nominate the others to serve in the order I list them in the other boxes.

FIRST GUARDIAN OF
THE PERSON. _____FIRST GUARDIAN OF
THE PROPERTY. _____

**SECOND GUARDIAN OF
THE PERSON.** _____

**SECOND GUARDIAN OF
THE PROPERTY.** _____

**THIRD GUARDIAN OF
THE PERSON.** _____

**THIRD GUARDIAN OF
THE PROPERTY.** _____

3.4. BOND. My signature in this box means that a bond is not required for any individual named in this will as executor, trustee, or guardian. If I do not sign in this box, then a bond is required for each of those persons as set forth in the Probate Code. (The bond provides a fund to pay those who do not receive the share of your estate to which they are entitled, including your creditors, because of improper performance of duties by the executor, trustee, or guardian. Bond premiums are paid out of your estate.)

I sign my name to this California Statutory *Form Will*
With Trust on _____ at _____, _____.
Date City State

Signature of Testator

STATEMENT OF WITNESSES (You must use two adult witnesses, and three witnesses would be preferable.)

Each of us declares under penalty of perjury under the laws of California that the testator signed this California statutory *form* will with trust in our presence, all of us being present at the same time, and we now, at the testator's request, in the testator's presence, and in the presence of each other, sign below as witnesses, declaring that the testator appears to be of sound mind and under no duress, fraud, or undue influence.

Signature _____ Residence Address: _____
 Print Name _____
 Here: _____

Signature _____ Residence Address: _____
 Print Name _____
 Here: _____

Signature _____ Residence Address: _____
 Print Name _____
 Here: _____

Comment. See the Comment to Section 6201.

Probate Code § 6242 (technical amendment). Full text of paragraph 2.1 of all California statutory form wills

SEC. 28. Section 6242 of the Probate Code is amended to read:

6242. The following is the full text of paragraph 2.1 of both California statutory ~~will forms~~ *form wills* appearing in this chapter:

If my spouse survives me, I give my spouse all my books, jewelry, clothing, personal automobiles, household furnishings and effects, and other tangible articles of a household or personal use. If my spouse does not survive me, the executor shall distribute those items among my children who survive me, and shall distribute those items in as nearly equal shares as feasible in the executor's discretion. If none of my children survive me, the items described in this paragraph shall become part of the residuary estate.

Comment. See the Comment to Section 6201.

Probate Code § 6243 (technical amendment). Full text of property disposition clauses of California statutory form will

SEC. 29. Section 6243 of the Probate Code is amended to read:

6243. The following are the full texts of the property disposition clauses referred to in paragraph 2.3 of the *form for the California statutory form will* ~~form~~ set forth in Section 6240:

(a) TO MY SPOUSE IF LIVING; IF NOT LIVING, THEN TO MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD.

If my spouse survives me, then I give all my residuary estate to my spouse. If my spouse does not survive me, then I give all my residuary estate to my descendants who survive me.

(b) TO MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD. I LEAVE NOTHING TO MY SPOUSE, IF LIVING.

I give all my residuary estate to my descendants who survive me. I leave nothing to my spouse, even if my spouse survives me.

(c) TO BE DISTRIBUTED AS IF I DID NOT HAVE A WILL:.

The executor shall distribute my residuary estate to my heirs at law, their identities and respective shares to be

determined according to the laws of the State of California in effect on the date of my death relating to intestate succession.

Comment. See the Comment to Section 6201.

Probate Code § 6244 (technical amendment). Full text of property disposition clauses of California statutory form will with trust

SEC. 30. Section 6244 of the Probate Code is amended to read:

6244. The following are the full texts of the property disposition clauses referred to in paragraph 2.3 of the *form for the California statutory form will with trust form* set forth in Section 6241:

(a) TO MY SPOUSE IF LIVING; IF NOT LIVING, THEN IN ONE TRUST TO PROVIDE FOR THE SUPPORT AND EDUCATION OF MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD UNTIL I HAVE NO LIVING CHILD UNDER 21 YEARS OF AGE.

(1) If my spouse survives me, then I give all my residuary estate to my spouse.

(2) If my spouse does not survive me and if any child of mine under 21 years of age survives me, then I give all my residuary estate to the trustee, in trust, on the following terms:

(A) As long as any child of mine under 21 years of age is living, the trustee shall distribute from time to time to or for the benefit of any one or more of my children and the descendants of any deceased child (the beneficiaries) of any age as much, or all, of the (i) principal or (ii) net income of the trust, or (iii) both, as the trustee deems necessary for their health, support, maintenance, and education. Any undistributed income shall be accumulated and added to the principal. "Education" includes, but is not limited to, college, graduate, postgraduate, and vocational studies, and reasonably related living expenses. Consistent with the trustee's fiduciary duties, the trustee may distribute trust income or principal in equal or unequal shares and to any one or

more of the beneficiaries to the exclusion of other beneficiaries. In deciding on distributions, the trustee may take into account, so far as known to the trustee, the beneficiaries' other income, outside resources, or sources of support, including the capacity for gainful employment of a beneficiary who has completed his or her education.

(B) The trust shall terminate when there is no living child of mine under 21 years of age. The trustee shall distribute any remaining principal and accumulated net income of the trust to my descendants who are then living.

(3) If my spouse does not survive me and if no child of mine under 21 years of age survives me, then I give all my residuary estate to my descendants who survive me.

(b) TO MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD IN ONE TRUST TO PROVIDE FOR THEIR SUPPORT AND EDUCATION UNTIL I HAVE NO LIVING CHILD UNDER 21 YEARS OF AGE. I LEAVE NOTHING TO MY SPOUSE, IF LIVING.

(1) I give all my residuary estate to the trustee, in trust, on the following terms:

(A) As long as any child of mine under 21 years of age is living, the trustee shall distribute from time to time to or for the benefit of any one or more of my children and the descendants of any deceased child (the beneficiaries) of any age as much or all, of the (i) principal, or (ii) net income of the trust, or (iii) both, as the trustee deems necessary for their health, support, maintenance, and education. Any undistributed income shall be accumulated and added to the principal. "Education" includes, but is not limited to, college, graduate, postgraduate, and vocational studies, and reasonably related living expenses. Consistent with the trustee's fiduciary duties, the trustee may distribute trust income or principal in equal or unequal shares and to any one or more of the beneficiaries to the exclusion of other beneficiaries. In deciding on distributions, the trustee may take into account, so far as known to the trustee, the

beneficiaries' other income, outside resources, or sources of support, including the capacity for gainful employment of a beneficiary who has completed his or her education.

(B) The trust shall terminate when there is no living child of mine under 21 years of age. The trustee shall distribute any remaining principal and accumulated net income of the trust to my descendants who are then living.

(2) If no child of mine under 21 years of age survives me, then I give all my residuary estate to my descendants who survive me.

(3) I leave nothing to my spouse, even if my spouse survives me.

Comment. See the Comment to Section 6201.

Probate Code § 6245 (technical amendment). Mandatory clauses of all California statutory form wills

SEC. 31. Section 6245 of the Probate Code is amended to read:

6245. The mandatory clauses of all California statutory *form* wills are as follows:

(a) **INTESTATE DISPOSITION.** If the testator has not made an effective disposition of the residuary estate, the executor shall distribute it to the testator's heirs at law, their identities and respective shares to be determined according to the laws of the State of California in effect on the date of the testator's death relating to intestate succession.

(b) **POWERS OF EXECUTOR.** (1) In addition to any powers now or hereafter conferred upon executors by law, including all powers granted under the Independent Administration of Estates Act, the executor shall have the power to: (A) sell estate assets at public or private sale, for cash or on credit terms, (B) lease estate assets without restriction as to duration, and (C) invest any surplus moneys of the estate in real or personal property, as the executor deems advisable.

(2) The executor may distribute estate assets otherwise distributable to a minor beneficiary to (A) the

guardian of the minor's person or estate, (B) any adult person with whom the minor resides and who has the care, custody, or control of the minor, or (C) a custodian, serving on behalf of the minor under the *Uniform Transfers to Minors Act* or the Uniform Gifts to Minors Act of any state.

The executor is free of liability and is discharged from any further accountability for distributing assets in compliance with the provisions of this paragraph.

(3) On any distribution of assets from the estate, the executor shall have the discretion to partition, allot, and distribute the assets (A) in kind, including undivided interests in an asset or in any part of it, or (B) partly in cash and partly in kind, or (C) entirely in cash. If a distribution is being made to more than one beneficiary, the executor shall have the discretion to distribute assets among them on a pro rata or non-pro rata basis, with the assets valued as of the date of distribution.

(c) **POWERS OF GUARDIAN.** A guardian of the person nominated in the California statutory *form* will shall have the same authority with respect to the person of the ward as a parent having legal custody of a child would have. A guardian of the estate nominated in a California statutory *form* will shall have all of the powers conferred by law. All powers granted to guardians in this paragraph may be exercised without court authorization.

Comment. Section 6245 is amended to reflect the new terminology, "California statutory form will," and to add the reference to the Uniform Transfers to Minors Act of any state.

Probate Code § 6246 (technical amendment). Additional mandatory clauses for California statutory form will with trust

SEC. 32. Section 6246 of the Probate Code is amended to read:

6246. In addition to the mandatory clauses contained in Section 6245, the *form for the California statutory form* will with trust ~~form~~ shall also incorporate the following mandatory clauses:

(a) **INEFFECTIVE DISPOSITION.** If, at the termination of any trust created in the California

statutory *form* will with trust, there is no effective disposition of the remaining trust assets, then the trustee shall distribute those assets to the testator's then living heirs at law, their identities and respective shares to be determined as though the testator had died on the date of the trust's termination and according to the laws of the State of California then in effect relating to intestate succession.

(b) **POWERS OF TRUSTEE.** (1) In addition to any powers now or hereafter conferred upon trustees by law, the trustee shall have all the powers listed in Section 1120.2. The trustee may exercise those powers without court authorization.

(2) In addition to the powers granted in the foregoing paragraph, the trustee may:

(A) Hire and pay from the trust the fees of investment advisors, accountants, tax advisors, agents, attorneys, and other assistants for the administration of the trust and for the management of any trust asset and for any litigation affecting the trust.

(B) On any distribution of assets from the trust, the trustee shall have the discretion to partition, allot, and distribute the assets (i) in kind, including undivided interests in an asset or in any part of it, or (ii) partly in cash and partly in kind, or (iii) entirely in cash. If a distribution is being made to more than one beneficiary, the trustee shall have the discretion to distribute assets among them on a pro rata or non-pro rata basis, with the assets valued as of the date of distribution.

(C) The trustee may, upon termination of the trust, distribute assets to a custodian for a minor beneficiary under the *Uniform Transfers to Minors Act* or the *Uniform Gifts to Minors Act* of any state.

(3) The trustee is free of liability and is discharged from any further accountability for distributing assets in compliance with the provisions of this paragraph.

(c) **TRUST ADMINISTRATIVE PROVISIONS.** The following provisions shall apply to any trust created by a California statutory *form* will with trust:

(1) The interests of trust beneficiaries are not transferable by voluntary or involuntary assignment or

by operation of law and shall be free from the claims of creditors and from attachment, execution, bankruptcy, or other legal process to the fullest extent permissible by law.

(2) The trustee is entitled to reasonable compensation for ordinary and extraordinary services, and for all services in connection with the complete or partial termination of any trust created by this will.

(3) All persons who have any interest in a trust under a California statutory *form* will with trust are bound by all discretionary determinations the trustee makes in good faith under the authority granted in the California statutory *form* will with trust.

Comment. Section 6246 is amended to reflect the new terminology, "California statutory form will with trust," and to add the reference to the Uniform Transfers to Minors Act of any state.

Probate Code § 6247 (technical amendment). Will includes only texts of clauses as they exist when will executed

SEC. 33. Section 6247 of the Probate Code is amended to read:

6247. Except as specifically provided in this chapter, a California statutory *form* will shall include only the texts of the property disposition clauses and the mandatory clauses as they exist on the day the California statutory *form* will is executed.

Comment. See the Comment to Section 6201.

Probate Code § 6248 (technical amendment). Application of general law

SEC. 34. Section 6248 of the Probate Code is amended to read:

6248. Except as specifically provided in this chapter, ~~nothing in this chapter changes the substantive the~~ *general law of California applies to a California statutory form will.*

Comment. Section 6248 is amended to make clear that, except as provided in this chapter, general law applies to a California statutory form will.

Probate Code § 6300 (amended). Testamentary additions to trusts

SEC. 35. Section 6300 of the Probate Code is amended to read:

6300. A devise, the validity of which is determinable by the law of this state, may be made by a will to the trustee of a trust established or to be established by the testator or by the testator and some other person or by some other person (including a funded or unfunded life insurance trust, although the trustor has reserved any or all rights of ownership of the insurance contracts) if the trust is identified in the testator's will and its terms are set forth in a written instrument (other than a will) executed before or concurrently with the execution of the testator's will or in the valid last will of a person who has predeceased the testator (regardless of the existence, size, or character of the corpus of the trust). The devise is not invalid because the trust is amendable or revocable, or both, or because the trust was amended after the execution of the will or after the death of the testator. Unless the testator's will provides otherwise, the property so devised (1) is not deemed to be held under a testamentary trust of the testator but becomes a part of the trust to which it is given and (2) shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before *or after* the death of the testator (regardless of whether made before or after the execution of the testator's will) ~~and, if the testator's will so provides, including any amendments to the trust made after the death of the testator.~~ *A Unless otherwise provided in the will, a revocation or termination of the trust before the death of the testator causes the devise to lapse.*

Comment. Section 6300 is amended to change the former rule that with respect to the testamentary assets the trust may not be amended after the testator's death unless the testator's will so provides. Under the new rule, the trust may be amended after the testator's death unless the testator's will provides that it may not be amended with respect to the testamentary assets.

Probate Code § 6401 (technical amendment). Intestate share of surviving spouse

SEC. 36. Section 6401 of the Probate Code is amended to read:

6401. (a) As to community property, the intestate share of the surviving spouse is the one-half of the community property that belongs to the decedent under Section 100.

(b) As to quasi-community property, the intestate share of the surviving spouse is the one-half of the quasi-community property that belongs to the decedent under Section 101.

(c) As to separate property, the intestate share of the surviving spouse is as follows:

(1) The entire intestate estate if the decedent did not leave any surviving issue, parent, brother, sister, or issue of a deceased brother or sister.

(2) One-half of the intestate estate in the following cases:

(A) Where the decedent leaves only one child or the issue of a deceased child.

(B) Where the decedent leaves no issue but leaves ~~the~~ a parent or parents or their issue or the issue of either of them.

(3) One-third of the intestate estate in the following cases:

(A) Where the decedent leaves more than one child living.

(B) Where the decedent leaves one child living and the issue of one or more deceased children.

(C) Where the decedent leaves issue of two or more deceased children.

Comment. Section 6401 is amended to make a nonsubstantive technical change.

Probate Code § 6412 (technical amendment). Dower and curtesy not recognized

SEC. 37. Section 6412 of the Probate Code is amended to read:

6412. *The Except to the extent provided in Section 120, the estates of dower and curtesy are not recognized.*

Comment. Section 6412 is amended to recognize that Section 120 gives the surviving spouse rights in California real property of a nondomiciliary decedent that may be akin to dower or curtesy in the decedent's state of domicile. This amendment is clarifying, and not substantive.

Probate Code § 6562 (amended). Manner of satisfying share of omitted spouse

SEC. 38. Section 6562 of the Probate Code is amended to read:

6562. ~~In (a) Except as provided in subdivision (b), in satisfying a share provided by this article; the devises made by the will abate as provided in Chapter 13 (commencing with Section 750) of Division 3.:~~

(1) The share shall first be taken from the testator's estate not disposed of by will, if any.

(2) If that is not sufficient, so much as may be necessary to satisfy the share shall be taken from all devisees in proportion to the value they may respectively receive under the testator's will. Such value shall be determined as of the date of the decedent's death.

(b) If the obvious intention of the testator in relation to some specific devise or other provision of the will would be defeated by the application of subdivision (a), the specific devise or provision may be exempted from the apportionment under subdivision (a), and a different apportionment, consistent with the intention of the testator, may be adopted.

Comment. Section 6562 is amended to provide a proportional rule of abatement for payment of an omitted spouse's share, drawn from former Section 91. The second sentence of paragraph (2) of subdivision (a) (value determined at date of death) is new.

For the rule in other contexts, see Sections 750 (payment of debts, expenses of administration, and family allowance), 6573 (omitted children).

Probate Code § 6573 (amended). Manner of satisfying share of omitted child

SEC. 39. Section 6573 of the Probate Code is amended to read:

6573. In (a) *Except as provided in subdivision (b), in satisfying a share provided by this article; the devisees made by the will abate as provided in Chapter 13 (commencing with Section 750) of Division 3.*

(1) *The share shall first be taken from the testator's estate not disposed of by will, if any.*

(2) *If that is not sufficient, so much as may be necessary to satisfy the share shall be taken from all devisees in proportion to the value they may respectively receive under the testator's will. Such value shall be determined as of the date of the decedent's death.*

(b) *If the obvious intention of the testator in relation to some specific devise or other provision of the will would be defeated by the application of subdivision (a), the specific devise or provision may be exempted from the apportionment under subdivision (a), and a different apportionment, consistent with the intention of the testator, may be adopted.*

Comment. Section 6573 is amended to provide a proportional rule of abatement for payment of an omitted child's share, drawn from former Section 91. The second sentence of paragraph (2) of subdivision (a) (value determined at date of death) is new.

For the rule in other contexts, see Sections 750 (payment of debts, expenses of administration, and family allowance), 6562 (omitted spouse).