STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATIONS

relating to

Probate Law

Notice to Creditors in Estate Administration

Disposition of Small Estate by Public Administrator

Court-Authorized Medical Treatment

Survival Requirement for Beneficiary of Statutory Will

Execution or Modification of Lease Without Court Order

Limitation Period for Action Against Surety in Guardianship or Conservatorship Proceeding

Repeal of Probate Code Section 6402.5 (In-Law Inheritance)

Access to Decedent's Safe Deposit Box

Priority of Conservator or Guardian for Appointment as Administrator

December 1989

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

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PREFACE

This publication contains nine recommendations relating to probate law. The nine recommendations are listed in the Table of Contents (page 505).

Each recommendation contains proposed legislation. A list of the sections affected by the proposed legislation in the recommendations contained in this publication is found at the end of this publication. For each section listed, the table indicates the recommendation relating to that section.

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NOTE

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

Cite this recommendation as *Recommendation Relating to Notice to Creditors in Estate Administration*, 20 Cal. L. Revision Comm'n Reports 507 (1990).

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

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December 1, 1989

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

The California Law Revision Commission submitted its *Recommendation Relating to Notice to Creditors in Probate Proceedings*, 20 Cal. L. Revision Comm'n Reports 165 (1990), to the 1989 legislative session. The legislation was not enacted because of legislative concern about the one-year statute of limitations proposed in the recommendation. The Senate Judiciary Committee requested that the Commission give further study to this aspect of the recommendation.

The Commission has given further study to this matter and renews its recommendation for a one-year statute of limitations from the date of death for all claims against a decedent. The factors the Commission considers to be significant in renewing this recommendation are outlined in the attached revised recommendation.

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

Respectfully submitted,

Edwin K. Marzec
Chairperson

RECOMMENDATION

California law requires a personal representative in decedent estate administration proceedings to mail actual notice of administration to known creditors of the decedent,[1] in addition to publication of notice to unknown creditors.[2] All creditors, known and unknown, thereupon have four months in which to file a claim against the estate.[3]

The requirement of actual notice to known creditors was enacted on recommendation of the Law Revision Commission.[4] The former law was inequitable and of questionable constitutionality. Developments in the United States Supreme Court and in state courts had raised the likelihood that the former scheme violated due process of law.[5]

The United States Supreme Court has now ruled on this issue in the case of *Tulsa Professional Collection Services, Inc. v. Pope*.[6] That case holds that a state cannot impose a two-month claim filing requirement on known or reasonably ascertainable creditors merely by publication of notice. Actual notice is required for a short-term claim filing requirement.

The Supreme Court cites the new California statute in support of the proposition that a few states already provide for actual notice in connection with short nonclaim statutes. However, it is clear from the rationale of the opinion that the new California statute does not satisfy the announced constitutional standards in that it purports to cut off unnotified but "reasonably ascertainable" creditors with a short claim filing requirement.

To bring the California statute into conformity with constitutional requirements, the Law Revision Commission further recommends

1. Prob. Code §§ 9050-9054, enacted by 1987 Cal. Stat. ch. 923, § 93.
2. Prob. Code §§ 8100, 8120.
3. Probate Code Section 9100 requires a creditor to file a claim within the later of four months after issuance of letters to a general personal representative or, if notice is mailed as required, within 30 days after the notice is given.
4. *Recommendation Relating to Creditor Claims Against Decedent's Estate*, 19 Cal. L. Revision Comm'n Reports 299 (1988).
5. 19 Cal. L. Revision Comm'n Reports, supra, at 303.
6. 108 S. Ct. 1340 (1988).

that, notwithstanding the four-month claim filing requirement, a known or reasonably ascertainable creditor who does not have actual knowledge of the administration of the estate during the four-month claim period should be permitted to petition for leave to file a late claim.[7] If the estate has already been distributed when the known or reasonably ascertainable creditor acquires actual knowledge of the administration proceeding, the creditor would have recourse against distributees of the estate.[8] The personal representative would be protected from liability for the claim unless the personal representative acts in bad faith in failing to notify known creditors.[9]

Although known or reasonably ascertainable creditors who have no knowledge of administration would be given remedies beyond the four month claim period, these remedies must be exercised within one year after the decedent's death. The Commission believes that a new long term statute of limitations of one year commencing with the decedent's death[10] will best effectuate the strong public policies of expeditious estate administration and security of title for distributees, and is consistent with the concept that a creditor has some obligation to keep informed of the status of the debtor. While the Supreme Court declined to rule on the validity of long term statutes of limitation that run from one to five years from the date of death, a one-year statute is believed to be constitutional since it is self-

7. Existing California law already authorizes such a late claim petition, but only for a creditor whose claim is on a nonbusiness debt. Prob. Code § 9103. The present recommendation would remove the business claim limitation.

8. This would be a limited exception to the general rule that an omitted creditor has no right to require contribution from creditors who are paid or from distributees. Prob. Code § 11429. Under the Commission's proposal, the liability of a distributee would be joint and several with other distributees, and liability would be based on abatement principles. See Prob. Code §§ 21400-21406 (abatement).

9. Cf. Prob. Code § 9053 (immunity of personal representative).

10. It should be noted that such an absolute one-year statute of limitations creates the potential for the decedent's beneficiaries to wait for one year after death in order to bar creditor claims, and then proceed to probate the estate and distribute assets with impunity. However, if the creditor is concerned that the decedent's beneficiaries may fail to commence probate within the one-year period, the creditor may petition for appointment during that time. Prob. Code §§ 8000 (petition), 8461 (priority for appointment).

executing, it allows a reasonable time for the creditor to discover the decedent's death, and it is an appropriate period to afford repose and provide a reasonable cutoff for claims that soon would become stale.[11]

Selection of one year as the appropriate limitations period is based on the following considerations:

(1) In estate administration, all debts are ordinarily paid. Even under the existing four-month claim period it is unusual for an unpaid creditor problem to arise. A year is usually sufficient time for all debts to come to light. Thus it is sound public policy to limit potential liability to a year; this will avoid delay and procedural complication of every probate proceeding for the rare claim that might arise more than a year after the decedent's death.

(2) The one year limitation period would not apply to special classes of debts where public policy favors extended enforceability. These classes are (i) secured obligations,[12] (ii) tax claims,[13] and (iii) liabilities covered by insurance.[14] The rare claim that may become a problem more than a year after the decedent's death is likely to fall into one of these classes.

(3) Every jurisdiction of which the Commission is aware that has considered the due process problem addressed by the recommendation, including the Uniform Probate Code,[15] has adopted the one-year statute of limitations as part of its solution.

In sum, a general limitation period longer than one year would burden all probate proceedings for little gain. The one-year limitation period is a reasonable accomodation of interests and is widely accepted.

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11. See, e.g., Falender, *Notice to Creditors in Estate Proceedings: What Process is Due?*, 63 N.C.L. Rev. 659, 673-77 (1985).
12. Prob. Code § 9391.
13. Prob. Code § 9201.
14. Prob. Code § 550.
15. See, e.g., Uniform Probate Code § 3-803 (1989).

PROPOSED LEGISLATION

The Commission's recommendation would be enacted by the following measure.

An act to amend Section 353 of, and to repeal Section 353.5 of, the Code of Civil Procedure, and to amend Sections 551, 6611, 7664, 9103, 9201, 9391, 11429, 13109, 13156, 13204, and 13554 of, and to add Section 9392 to, the Probate Code, relating to creditors of a decedent.

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

Code of Civil Procedure § 353 (amended). Statute of limitations

SECTION 1. Section 353 of the Code of Civil Procedure is amended to read:

353. (a) If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by the person's representatives, after the expiration of that time, and within six months from the person's death.

(b) Except as provided in ~~subdivision (c)~~ *subdivisions (c) and (d)*, if a person against whom an action may be brought *on a liability of the person, whether arising in contract, tort, or otherwise,* dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced ~~against the person's representatives, after the expiration of that time, and~~ within one year after the date of death, *and the time otherwise limited for the commencement of the action does not apply. The time provided in this subdivision for commencement of an action is not tolled or extended for any reason.*

(c) If a person against whom an action may be brought died before July 1, 1988, and before the expiration of the time limited for the commencement of the action, and the cause of action survives, an action may be commenced against the person's representatives before the expiration of the later of the following times:

(1) July 1, 1989, or one year after the issuing of letters testamentary or of administration, whichever is the earlier time.

(2) The time limited for the commencement of the action.

(d) If a person against whom an action may be brought died on or after July 1, 1988, and before January 1, 1991, and before the expiration of the time limited for the commencement of the action, and the cause of action survives, an action may be commenced before the earlier of the following times:

(1) January 1, 1992.

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

Comment. Subdivision (b) of Section 353 is amended to impose a new statute of limitations on all actions against a decedent on which the statute of limitations otherwise applicable has not run at the time of death. The new statute is one year after the death of the decedent, regardless of whether the statute otherwise applicable would have expired before or after the one year period.

If a general personal representative is appointed during the one year period, the personal representative must notify known creditors, and the filing of a claim tolls the statute. Prob. Code §§ 9050 (notice required), 9352 (tolling of statute of limitations). If the creditor is concerned that the decedent's beneficiaries may not have a general personal representative appointed during the one year period, the creditor may petition for appointment during that time. Prob. Code §§ 8000 (petition), 8461 (priority for appointment); see also Prob. Code § 48 ("interested person" defined).

The reference to the decedent's "representatives" is also deleted from subdivision (b). The reference could be read to imply that the one year limitation is only applicable in actions against the decedent's personal representative. However, the one year statute of limitations is intended to apply in any action on a debt of the decedent, whether against the personal representative under Probate Code Sections 9350 to 9354 (claim on cause of action), or against another person, such as a distributee under Probate Code Section 9392 (liability of distributee), a person who takes the decedent's property and is liable for the decedent's debts under Sections 13109 (affidavit procedure for collection or transfer of personal property), 13156 (court order determining succession to real property), 13204 (affidavit procedure for real property of small value), and 13554 (passage of property to surviving spouse without administration), or a trustee.

Code of Civil Procedure § 353.5 (repealed). Limitation on action against spouse of decedent

SEC. 2. Section 353.5 of the Code of Civil Procedure is repealed.

~~353.5. If a person against whom an action may be brought dies before the expiration of the statute of limitations for the commencement of the action and the cause of action survives, an action against the surviving spouse of the person which is brought pursuant to Chapter 3 (commencing with Section 13550) of Part 2 of Division 8 of the Probate Code may be commenced within four months after the death of the person or before the expiration of the statute of limitations which would have been applicable to the cause of action against the person if the person had not died, whichever occurs later.~~

Comment. Section 353.5 is repealed because it conflicted with Code of Civil Procedure Section 353 (general one-year statute of limitations).

Probate Code § 551 (amended). Statute of limitations

SEC. 3. Section 551 of the Probate Code is amended to read:

551. ~~If~~ *Notwithstanding Section 353 of the Code of Civil Procedure, if* the limitations period otherwise applicable to the action has not expired at the time of the decedent's death, an action under this chapter may be commenced within one year after the expiration of the limitations period otherwise applicable.

Comment. Section 551 is amended to make clear that the general one-year limitation period for commencement of an action on a cause of action against a decedent under Code of Civil Procedure Section 353 does not apply to an action under this chapter.

Probate Code § 6611 (amended). Liability for unsecured debts of decedent

SEC. 4. Section 6611 of the Probate Code is amended to read:

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

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

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

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

(3) The value of any other property set aside under Section 6510 out of that property.

~~(c) The personal liability under this section ceases one year after the date the court makes its order under Section 6609, except with respect to an action or proceeding then pending in court.~~

~~(d) In~~ *(c) Subject to Section 353 of the Code of Civil Procedure, in* any action or proceeding based upon an unsecured debt of the decedent, the surviving spouse of the decedent, the child or children of the decedent, or the guardian of the minor child or children of the decedent, may assert any defense, cross-complaint, or setoff which would have been available to the decedent if the decedent had not died.

~~(e)~~ *(d)* If proceedings are commenced in this state for the administration of the estate of the decedent and the time for filing claims has commenced, any action upon the personal liability of a person under this section is barred to the same extent as provided for claims under Part 4 (commencing with Section 9000) of Division 7, except as to the following:

(1) Creditors who commence judicial proceedings for the enforcement of the debt and serve the person liable under this section with the complaint therein prior to the expiration of the time for filing claims.

(2) Creditors who have or who secure an acknowledgment in writing of the person liable under this section that that person is liable for the debts.

(3) Creditors who file a timely claim in the proceedings for the administration of the estate of the decedent.

Comment. Section 6611 is amended to delete former subdivision (c), which conflicted with Code of Civil Procedure Section 353 (statute of limitations), and to make clear that the general one-year statute of limitations applicable to all causes of action against a decedent is applicable to liability for the decedent's debts under Section 6611.

Probate Code § 7664 (amended). Liability for decedent's unsecured debts

SEC. 5. Section 7664 of the Probate Code is amended to read:

7664. A person to whom property is distributed under this article is personally liable for the unsecured debts of the decedent. Such a debt may be enforced against the person in the same manner as it could have been enforced against the decedent if the decedent had not died. ~~In~~ *Subject to Section 353 of the Code of Civil Procedure, in* an action based on the debt, the person may assert any defenses available to the decedent if the decedent had not died. The aggregate personal liability of a person under this section shall not exceed the fair market value of the property distributed, valued as of the date of the distribution, less the amount of any liens and encumbrances on the property on that date.

Comment. Section 7664 is amended to make clear that the general one-year statute of limitations applicable to all causes of action against a decedent is applicable to liability for the decedent's debts under Section 7664.

Probate Code § 9103 (amended). Late claims

SEC. 6. Section 9103 of the Probate Code is amended to read:

9103. (a) Upon petition by a creditor and notice of hearing given as provided in Section 1220, the court may allow a claim to be filed after expiration of the time for filing a claim if the creditor establishes that either of the following conditions ~~are~~ *is* satisfied:

(1) Neither the creditor nor the attorney representing the creditor in the matter had actual knowledge of the administration

of the estate ~~within~~ *more than* 15 days before expiration of the time provided in Section 9100, and the *creditor's* petition was filed within 30 days after either the creditor or the creditor's attorney had actual knowledge of the administration whichever occurred first.

(2) Neither the creditor nor the attorney representing the creditor in the matter had knowledge of the existence of the claim ~~within~~ *more than* 15 days before expiration of the time provided in Section 9100, and the *creditor's* petition was filed within 30 days after either the creditor or the creditor's attorney had knowledge of the existence of the claim whichever occurred first.

~~(b) This section applies only to a claim that relates to an action or proceeding pending against the decedent at the time of death or, if no action or proceeding is pending, to a cause of action that does not arise out of the creditor's conduct of a trade, business, or profession in this state.~~

~~(c)~~ *(b)* The court shall not allow a claim to be filed under this section after the earlier of the following times:

(1) The time the court makes an order for final distribution of the estate.

(2) One year after the ~~time letters are first issued to a general personal representative~~ *date of the decedent's death.*

~~(d)~~ *(c)* The court may condition the claim on terms that are just and equitable, and may require the appointment or reappointment of a personal representative if necessary. The court may deny the *creditor's* petition if a preliminary distribution to beneficiaries or a payment to general creditors has been made and it appears that the filing or establishment of the claim would cause or tend to cause unequal treatment among beneficiaries or creditors.

~~(e)~~ *(d)* Regardless of whether the claim is later established in whole or in part, property distributed under court order and payments otherwise properly made before a claim is filed under this section are not subject to the claim. ~~The~~ *Except to the extent*

provided in Section 9392 and subject to Section 9053, the personal representative, ~~designee~~ *distributee*, or payee is not liable on account of the prior distribution or payment.

Comment. Former subdivision (b) of Section 9103, limiting the types of claims eligible for late claim treatment, is deleted. It should be noted that a creditor who is omitted because the creditor had no knowledge of the administration is not limited to the remedy provided in this section. If assets have been distributed, a remedy may be available against distributees under Section 9392 (liability of distributee). If the creditor can establish that the lack of knowledge is a result of the personal representative's bad faith failure to notify known creditors under Chapter 2 (commencing with Section 9050) (notice to creditors), recovery may be available against the personal representative personally or on the bond, if any. See Section 11429 (unpaid creditor). See also Section 9053 (immunity of personal representative).

Paragraph (b)(2) is revised to make clear that a late claim should not be permitted if the statute of limitations has run on the claim. This is the consequence of the rule stated in Section 9253 that a claim barred by the statute of limitations may not be allowed by the personal representative or approved by the court or judge. Under Code of Civil Procedure Section 353, the statute of limitations runs one year after the decedent's death.

Probate Code § 9201 (amended). Claims governed by special statutes

SEC. 7. Section 9201 of the Probate Code is amended to read:

9201. (a) Notwithstanding any other ~~provision of this part~~ *statute*, if a claim of a public entity arises under a law, act, or code listed in subdivision (b):

(1) The public entity may use a form as is necessary to effectively administer the law, act, or code. Where appropriate, the form may require the decedent's social security number, if known.

(2) The claim is barred only after written notice or request to the public entity and expiration of the period provided in the applicable section. If no written notice or request is made, the claim is enforceable by the remedies, and is barred at the time, otherwise provided in the law, act, or code.

(b)

Law, Act, or Code	*Applicable Section*
Sales and Use Tax Law (commencing with Section 6001 of the Revenue and Taxation Code)	Section 6487.1 of the Revenue and Taxation Code
Bradley-Burns Uniform Local Sales and Use Tax Law (commencing with Section 7200 of the Revenue and Taxation Code)	Section 6487.1 of the Revenue and Taxation Code
Transactions and Use Tax Law (commencing with Section 7251 of the Revenue and Taxation Code)	Section 6487.1 of the Revenue and Taxation Code
Motor Vehicle Fuel License Tax Law (commencing with Section 7301 of the Revenue and Taxation Code)	Section 7675.1 of the Revenue and Taxation Code
Use Fuel Tax Law (commencing with Section 8601 of the Revenue and Taxation Code)	Section 8782.1 of the Revenue and Taxation Code
Personal Income Tax Law (commencing with Section 17001 of the Revenue and Taxation Code)	Section 19266 of the Revenue and Taxation Code
Cigarette Tax Law (commencing with Section 30001 of the Revenue and Taxation Code)	Section 30207.1 of the Revenue and Taxation Code
Alcoholic Beverage Tax Law (commencing with Section 32001 of the Revenue and Taxation Code)	Section 32272.1 of the Revenue and Taxation Code

Unemployment Insurance Code	Section 1090 of the Unemployment Insurance Code
State Hospitals for the Mentally Disordered (commencing with Section 7200 of the Welfare and Institutions Code)	Section 7277.1 of the Welfare and Institutions Code
Medi-Cal Act (commencing with Section 14000 of the Welfare and Institutions Code)	Section 9202 of the Probate Code
Waxman-Duffy Prepaid Health Plan Act (commencing with Section 14200 of the Welfare and Institutions Code)	Section 9202 of the Probate Code

Comment. Subdivision (a) of Section 9201 is amended to make clear that it applies notwithstanding statutes located in places other than this part. Specifically, Section 9201 applies notwithstanding Code of Civil Procedure Section 353 (general statute of limitations running one year from the decedent's death).

Probate Code § 9391 (amended). Enforcement of security interest

SEC. 8. Section 9391 of the Probate Code is amended to read:

9391. The holder of a mortgage or other lien on property in the decedent's estate, including but not limited to a judgment lien, may commence an action to enforce the lien against the property that is subject to the lien, without first filing a claim as provided in this part, if in the complaint the holder of the lien expressly waives all recourse against other property in the estate. *Section 353 of the Code of Civil Procedure does not apply to an action under this section.*

Comment. Section 9391 is amended to except an action to enforce a lien from the one-year statute of limitations in Code of Civil Procedure Section 353. The statute of limitations otherwise applicable to an action to enforce the lien continues to apply notwithstanding Section 353.

Probate Code § 9392 (added). Liability of distributee

SEC. 9. Section 9392 is added to the Probate Code, to read:

9392. (a) Subject to subdivision (b), a person to whom property is distributed is personally liable for the claim of a creditor, without a claim first having been filed, if all of the following conditions are satisfied:

(1) The identity of the creditor was known to, or reasonably ascertainable by, a general personal representative within four months after the date letters were first issued to the personal representative, and the claim of the creditor was not merely conjectural.

(2) Notice of administration of the estate was not given to the creditor under Chapter 2 (commencing with Section 9050) and neither the creditor nor the attorney representing the creditor in the matter had actual knowledge of the administration of the estate before the time the court made an order for final distribution of the property.

(3) The statute of limitations applicable to the claim under Section 353 of the Code of Civil Procedure has not expired at the time of commencement of an action under this section.

(b) Personal liability under this section is applicable only to the extent the claim of the creditor cannot be satisfied out of the estate of the decedent and is limited to the extent of the fair market value of the property on the date of the order for distribution, less the amount of any liens and encumbrances on the property at that time. Personal liability under this section is joint and several, based on the principles stated in Part 4 (commencing with Section 21400) of Division 11 (abatement).

(c) Nothing in this section affects the rights of a purchaser or encumbrancer of property in good faith and for value from a person who is personally liable under this section.

Comment. Section 9392 is new. It implements the rule of *Tulsa Professional Collection Services, Inc. v. Pope*, 108 S. Ct. 1340 (1988), that the claim of a known or reasonably ascertainable creditor whose claim is not merely conjectural but who is not given actual notice of administration may

not be cut off by a short claim filing requirement. Section 9392 is intended as a limited remedy to cure due process failures only, and is not intended as a general provision applicable to all creditors.

A creditor who has knowledge of estate administration must file a claim or, if the claim filing period has expired, must petition for leave to file a late claim. See Sections 9100 (time for filing claims) and 9103 (late claims). This rule applies whether the creditor's knowledge is acquired through notification under Section 9050 (notice required), by virtue of publication under Section 8120 (publication required), or otherwise.

Under Section 9392, a creditor who has no knowledge of estate administration before an order is made for distribution of property has a remedy against distributees to the extent payment cannot be obtained from the estate. There is a one year statute of limitations, commencing with the date of the decedent's death, for an action under this section by the creditor. Code Civ. Proc. § 353. Since liability of distributees under this section is joint and several, a distributee may join, or seek contribution from, other distributees. Subdivision (c) is a specific application of the general purpose of this section to subject a distributee to personal liability but not to require rescission of a distribution already made.

An omitted creditor may also have a cause of action against a personal representative who in bad faith fails to give notice to a known creditor. See Sections 9053 (immunity of personal representative) and Section 11429 (unpaid creditor).

Probate Code § 11429 (amended). Unpaid creditor

SEC. 10. Section 11429 of the Probate Code is amended to read:

11429. (a) Where the accounts of the personal representative have been settled and an order made for the payment of debts and distribution of the estate, a creditor who is not paid, whether or not included in the order for payment, has no right to require contribution from creditors who are paid or from distributees, *except to the extent provided in Section 9392.*

(b) Nothing in this section precludes recovery against the personal representative personally or on the bond, if any, by a creditor who is not paid, *subject to Section 9053.*

Comment. Subdivision (a) of Section 11429 is amended to recognize the liability of distributees provided by Section 9392 (liability of distributee).

Subdivision (b) is amended to make specific reference to the statutory immunity of the personal representative for actions and omissions in notifying creditors. This amendment is not a change in law, but is intended for cross-referencing purposes only. The reference to the specific immunity provided in Section 9053 should not be construed to limit the availability of any other applicable defenses of the personal representative.

Probate Code § 13109 (amended). Liability for decedent's unsecured debts

SEC. 11. Section 13109 of the Probate Code is amended to read:

13109. A person to whom payment, delivery, or transfer of the decedent's property is made under this chapter is personally liable, to the extent provided in Section 13112, for the unsecured debts of the decedent. Any such debt may be enforced against the person in the same manner as it could have been enforced against the decedent if the decedent had not died. ~~In~~ *Subject to Section 353 of the Code of Civil Procedure, in* any action based upon the debt, the person may assert any defenses, cross-complaints, or setoffs that would have been available to the decedent if the decedent had not died. Nothing in this section permits enforcement of a claim that is barred under Part 4 (commencing with Section 9000) of Division 7.

Comment. Section 13109 is amended to make clear that the general one-year statute of limitations applicable to all causes of action against a decedent is applicable to liability for the decedent's debts under Section 13109.

Probate Code § 13156 (amended). Liability for decedent's unsecured debts

SEC. 12. Section 13156 of the Probate Code is amended to read:

13156. (a) Subject to subdivisions (b) and (c), the petitioner who receives the decedent's property pursuant to an order under this chapter is personally liable for the unsecured debts of the decedent.

(b) The personal liability of any petitioner shall not exceed the fair market value at the date of the decedent's death of the property received by that petitioner pursuant to an order under this chapter, less the amount of any liens and encumbrances on the property.

(c) ~~In~~ *Subject to Section 353 of the Code of Civil Procedure, in* any action or proceeding based upon an unsecured debt of the decedent, the petitioner may assert any defense, cross-complaint, or setoff which would have been available to the decedent if the decedent had not died.

(d) Nothing in this section permits enforcement of a claim that is barred under Part 4 (commencing with Section 9000) of Division 7.

Comment. Section 13156 is amended to make clear that the general one-year statute of limitations applicable to all causes of action against a decedent is applicable to liability for the decedent's debts under Section 13156.

Probate Code § 13204 (amended). Liability for decedent's unsecured debts

SEC. 13. Section 13204 of the Probate Code is amended to read:

13204. Each person who is designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 is personally liable to the extent provided in Section 13207 for the unsecured debts of the decedent. Any such debt may be enforced against the person in the same manner as it could have been enforced against the decedent if the decedent had not died. ~~In~~ *Subject to Section 353 of the Code of Civil Procedure, in* any action based upon the debt, the person may assert any defense, cross-complaint, or setoff that would have been available to the decedent if the decedent had not died. Nothing in this section permits enforcement of a claim that is barred under Part 4 (commencing with Section 9000) of Division 7.

Comment. Section 13204 is amended to make clear that the general one-year statute of limitations applicable to all causes of action against a decedent is applicable to liability for the decedent's debts under Section 13204.

Probate Code § 13554 (amended). Enforcement of liability

SEC. 14. Section 13554 of the Probate Code is amended to read:

13554. (a) Except as otherwise provided in this chapter, any debt described in Section 13550 may be enforced against the surviving spouse in the same manner as it could have been enforced against the deceased spouse if the deceased spouse had not died.

(b) ~~In~~ *Subject to Section 353 of the Code of Civil Procedure, in* any action based upon the debt, the surviving spouse may assert any defense, cross-complaint, or setoff which would have been available to the deceased spouse if the deceased spouse had not died.

Comment. Section 13554 is amended to make clear that the general one-year statute of limitations applicable to all causes of action against a decedent is applicable to liability for the decedent's debts under Section 13554. Cf. former Code Civ. Proc. § 353.5 and Comment thereto.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Disposition of Small Estate by Public Administrator

December 1989

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

NOTE

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

Cite this recommendation as *Recommendation Relating to Disposition of Small Estate by Public Administrator*, 20 Cal. L. Revision Comm'n Reports 529 (1990).

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

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December 1, 1989

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

The legislation recommended by the Commission would make clear that the general procedure for disposition of unclaimed funds in the county treasury (Government Code Sections 50050-50056) applies to funds deposited by the public administrator under Probate Code Section 7663.

In addition, where an amount deposited under Section 7663 exceeds $10,000, the recommended legislation would require the public administrator to transmit relevant information concerning the deposit to the State Controller for compilation and reporting by the State Controller with the information concerning unclaimed estates held by the state.

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

Respectfully submitted,

Edwin K. Marzec
Chairperson

RECOMMENDATION

Probate Code Sections 7660-7666 provide a summary procedure for disposition of small estates (under $60,000) by the public administrator. Under this procedure, the public administrator may summarily liquidate assets, pay debts and expenses, and make distribution to beneficiaries, outside the normal probate notice and hearing procedures. Beneficiaries are thereafter liable to unpaid creditors, and the public administrator must file a statement of disposition with the county clerk and retain records of disposition for three years.

If the decedent has no beneficiaries, Probate Code Section 7663 requires that the public administrator deposit the balance remaining after payment of debts and expenses with the county treasurer for use in the general fund. Although there is a general procedure in the Government Code for beneficiaries to make a claim on funds deposited with the county treasurer, it is not clear that the Government Code procedure applies to funds deposited under Probate Code Section 7663.

The general Government Code procedure is found in Sections 50050-50056.[1] The general procedure is applicable to unclaimed funds deposited with the county treasurer from

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1. These provisions specify that unclaimed funds in the county treasury are subject to claim and escheat as follows:

(1) The treasurer must hold the funds for at least three years.

(2) During the three-year holding period the funds may be released to an heir, beneficiary, or duly appointed representative upon submitting proof satisfactory to the treasurer. If the treasurer rejects the claim, the claimant may commence an action to recover the funds.

(3) If the funds have not been claimed after three years, the property may be escheated to the county under a procedure that involves publication of notice in a newspaper of general circulation in the county stating the amount of money, the fund in which it is held, and the proposed date of escheat (45 to 60 days thereafter).

(4) In response to the published notice, any person who claims the funds may file a claim with the county treasurer. If the treasurer rejects the claim, the claimant may file a complaint and serve summons within 30 days and no funds may be escheated until the action is resolved.

(5) The publication procedure only applies to amounts of $10 or greater. Amounts of less than $10 may be escheated after three years without notice.

any source, including probate. Any doubt that this procedure applies as well to funds deposited with the county treasurer under Probate Code Section 7663 should be eliminated by an express reference to the Government Code procedure. This will clarify existing law and eliminate future litigation over the issue.

In addition, because deposits under Section 7663 are not publicized at the time of the deposit, the existing claim procedure outlined above should be augmented by public notice, at least where the amount deposited is substantial. Accordingly, where any amount deposited with the county treasurer exceeds $10,000, the public administrator should be required to transmit relevant information concerning the deposit to the State Controller. The State Controller should be required to compile and report the information along with the information concerning estates delivered to the State Treasurer or the Controller under Section 7643 or 7644 of the Probate Code. The Commission believes that the marginal cost of adding Section 7663 estates to the others already listed by the State Controller is modest and is justified by the public benefit of the listing.

PROPOSED LEGISLATION

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

Probate Code § 7663 (amended). Distribution of property

7663. (a) After payment of debts pursuant to Section 7662, but in no case before four months after court authorization of the public administrator to act under this article or after the public administrator takes possession or control of the estate, the public administrator shall distribute to the decedent's beneficiaries any money or other property of the decedent remaining in the possession of the public administrator.

(b) If there are no beneficiaries, the public administrator shall deposit the balance with the county treasurer for use in the general fund *of the county, subject to Article 3 (commencing with Section 50050) of Chapter 1 of Part 1 of Division 1 of Title 5 of the Government Code. If the amount deposited exceeds ten thousand dollars ($10,000), the public administrator shall at the time of the deposit give the State Controller written notice of the information specified in Section 1311 of the Code of Civil Procedure, and the Controller shall compile and report the information in the same manner as information concerning estates delivered to the State Treasurer or the Controller under Section 7643 or 7644 of the Probate Code.*

Comment. Section 7663 is amended to make clear that the procedure for disposition of unclaimed funds in the county treasury provided by Government Code Sections 50050-50056 applies to funds deposited by the public administrator under subdivision (b). Although the county treasurer has the duty to administer the funds deposited, a public record of the deposit is maintained by the State Controller under this section as well as by the public administrator pursuant to Section 7665.

It should be noted that, while claims for funds deposited under subdivision (b) are processed under the general Government Code provisions, claims for funds deposited with the county treasurer under Section 11850 are processed by the court under Section 11854. Deposit with the county treasurer under subdivision (b) is an exception to the

deposit procedure generally applicable in estate administration. See Sections 11900 (distribution to state) and 7622 (general administration rules apply except as otherwise provided in this chapter).

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Court-Authorized Medical Treatment

December 1989

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

NOTE

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

Cite this recommendation as *Recommendation Relating to Court-Authorized Medical Treatment*, 20 Cal. L. Revision Comm'n Reports 537 (1990).

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

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VAUGHN R. WALKER

December 1, 1989

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

Existing law permits a court to authorize medical treatment for a person unable to give informed consent. The court can authorize the treatment on a determination that the person's medical condition requires the treatment and, if untreated, the condition will become life-endangering or "result in a serious threat to the physical health" of the person. This recommendation proposes to expand this standard to include a serious threat to the person's mental health.

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

Respectfully submitted,

Edwin K. Marzec
Chairperson

RECOMMENDATION

If an adult for whom no conservator of the person has been appointed is in need of medical treatment, but is unable to give informed consent, an interested person can petition the court to authorize the medical treatment.[1] If a ward or conservatee is in need of medical treatment that may not be authorized by the guardian or conservator and the ward or conservatee is unable to give informed consent, the guardian or conservator can petition the court to authorize the medical treatment.[2] In either of these situations the court may authorize the treatment on a determination that the person's medical condition requires the treatment and, if untreated, the condition will become life-endangering or "result in a serious threat to the physical health" of the person.[3]

This standard is unduly narrow in its restriction of medical treatment of problems that are a threat to the person's *physical* health, as distinct from the person's *mental* health. The court's power to authorize medical treatment in these situations should be expanded to cover serious threats to the person's mental health. There are numerous protections against abuse built into the statutes, including (1) appointment of an attorney to consult with and represent the person,[4] (2) giving notice to interested persons, including the spouse and relatives of the person needing treatment,[5] (3) judicial determination that the proposed medical treatment is necessary,[6] and (4) limitations on the type of treatment that can be given.[7]

1. Prob. Code § 3201.
2. Prob. Code § 2357.
3. Prob. Code §§ 2357(h)(2), 3208(a)(2).
4. Prob. Code §§ 2357(d), 3205.
5. Prob. Code §§ 2357(f), 3206.
6. Prob. Code §§ 2357(h), 3208.
7. E.g., Prob. Code §§ 2356(a)-(d) and 3211(a)-(d) (prohibitions on involuntary placement, experimental drugs, convulsive treatment, sterilization); 2356(e) and 3211(e) (court authority subject to patient's directive under Natural Death Act and power of attorney for health care); 3208(b) (procedure initiated by interested person inapplicable where patient has capacity but refuses to consent to treatment).

The recommended legislation also clarifies the relationship between the power of a guardian or conservator to petition for an order authorizing medical treatment and the procedures under the Lanterman-Petris-Short Act (LPS) pertaining to involuntary placement in a medical treatment facility[8] and establishing conservatorships for the gravely disabled.[9] By providing authority to give necessary medical treatment affecting the mental health of the ward or conservatee, the recommended legislation resolves an anomaly in the law that would result where a ward or conservatee needs treatment but does not meet the standards applicable under LPS. The restrictions applicable under LPS to involuntary placement[10] should not stand in the way of needed medical treatment of mental conditions that do not involve involuntary detention or the appointment of a conservator for a gravely disabled person.

The recommended legislation amends sections of the new Probate Code as it will be proposed to be enacted at the 1990 legislative session by Assembly Bill 759. The recommended legislation will become operative at the same time as the new Probate Code becomes operative.

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8. Welf. & Inst. Code §§ 5150-5344.

9. Welf. & Inst. Code §§ 5350-5371.

10. The provisions of the Welfare and Institutions Code (part of the Lanterman-Petris-Short Act) cited in the exclusionary language in the second sentence of Probate Code Section 2356 govern situations where a person may be involuntarily placed (e.g., Welf. & Inst. Code §§ 5150, 5350.1), detained (e.g., Welf. & Inst. Code § 5151), confined (e.g., Welf. & Inst. Code § 5260), or committed (e.g., Welf. & Inst. Code § 5300).

PROPOSED LEGISLATION

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

Probate Code § 2356 (amended). Prohibited treatment and drugs

2356. (a) No ward or conservatee may be placed in a mental health treatment facility under this division against the will of the ward or conservatee. Involuntary civil *placement of a ward or conservatee in a* mental health treatment ~~for a ward or conservatee~~ *facility* may be obtained only pursuant to Chapter 2 (commencing with Section 5150) or Chapter 3 (commencing with Section 5350) of Part 1 of Division 5 of the Welfare and Institutions Code. Nothing in this subdivision precludes the placing of a ward in a state hospital under Section 6000 of the Welfare and Institutions Code upon application of the guardian as provided in that section. The Director of Mental Health shall adopt and issue regulations defining "mental health treatment facility" for the purposes of this subdivision.

(b) No experimental drug as defined in Section 26668 of the Health and Safety Code may be prescribed for or administered to a ward or conservatee under this division. Such an experimental drug may be prescribed for or administered to a ward or conservatee only as provided in Article 4 (commencing with Section 26668) of Chapter 6 of Division 21 of the Health and Safety Code.

(c) No convulsive treatment as defined in Section 5325 of the Welfare and Institutions Code may be performed on a ward or conservatee under this division. Convulsive treatment may be performed on a ward or conservatee only as provided in Article 7 (commencing with Section 5325) of Chapter 2 of Part 1 of Division 5 of the Welfare and Institutions Code.

(d) No minor may be sterilized under this division.

(e) This chapter is subject to any of the following instruments if valid and effective:

(1) A directive of the conservatee under Chapter 3.9 (commencing with Section 7185) of Part 1 of Division 7 of the Health and Safety Code (Natural Death Act).

(2) A power of attorney for health care, whether or not a durable power of attorney.

Comment. Subdivision (a) of Section 2356 is amended to resolve an inconsistency in language between the first and second sentences. This amendment recognizes that the provisions of the Welfare and Institutions Code (part of the Lanterman-Petris-Short Act) cited in the second sentence govern situations where a person may be involuntarily placed (e.g., Welf. & Inst. Code §§ 5150, 5350.1), detained (e.g., Welf. & Inst. Code § 5151), confined (e.g., Welf. & Inst. Code § 5260), or committed (e.g., Welf. & Inst. Code § 5300). The language as revised is also consistent with Section 3211(a). This amendment also recognizes the court's power under Section 2357 to authorize treatment in the case of a serious threat to the mental health of the ward or conservatee. See Section 2357.

Note. This amendment is made to Section 2356 of the Probate Code as it will be proposed to be enacted at the 1990 legislative session by Assembly Bill 759.

Probate Code § 2357 (amended). Court-authorized medical treatment for ward or conservatee

2357. (a) As used in this section:

(1) "Guardian or conservator" includes a temporary guardian of the person or a temporary conservator of the person.

(2) "Ward or conservatee" includes a person for whom a temporary guardian of the person or temporary conservator of the person has been appointed.

(b) If the ward or conservatee requires medical treatment for an existing or continuing medical condition which is not authorized to be performed upon the ward or conservatee under Section 2252, 2353, 2354, or 2355, and the ward or conservatee is unable to give an informed consent to such medical treatment, the guardian or conservator may petition

the court under this section for an order authorizing such medical treatment and authorizing the guardian or conservator to consent on behalf of the ward or conservatee to such medical treatment.

(c) The petition shall state, or set forth by medical affidavit attached thereto, all of the following so far as is known to the petitioner at the time the petition is filed:

(1) The nature of the medical condition of the ward or conservatee which requires treatment.

(2) The recommended course of medical treatment which is considered to be medically appropriate.

(3) The threat to the health of the ward or conservatee if authorization to consent to the recommended course of treatment is delayed or denied by the court.

(4) The predictable or probable outcome of the recommended course of treatment.

(5) The medically available alternatives, if any, to the course of treatment recommended.

(6) The efforts made to obtain an informed consent from the ward or conservatee.

(d) Upon the filing of the petition, the court shall notify the attorney of record for the ward or conservatee, if any, or shall appoint the public defender or private counsel under Section 1471, to consult with and represent the ward or conservatee at the hearing on the petition and, if such appointment is made, Section 1472 applies.

(e) The hearing on the petition may be held pursuant to an order of the court prescribing the notice to be given of the hearing. The order shall specify the period of notice of the hearing and the period so fixed shall take into account (1) the existing medical facts and circumstances set forth in the petition or in a medical affidavit attached to the petition or in a medical affidavit presented to the court and (2) the desirability, where the condition of the ward or conservatee permits, of giving adequate notice to all interested persons.

(f) A copy of the notice of hearing or of the order prescribing notice of hearing, and a copy of the petition, shall be personally served or mailed, as prescribed in the order, on all of the following:

(1) The ward or conservatee.

(2) The attorney of record for the ward or conservatee, if any, or the attorney appointed by the court to represent the ward or conservatee at the hearing.

(3) Such other persons, if any, as the court in its discretion may require in the order, which may include the spouse of the ward or conservatee and any known relatives of the ward or conservatee within the second degree.

(g) Notwithstanding subdivisions (e) and (f), the matter may be submitted for the determination of the court upon proper and sufficient medical affidavits or declarations if the attorney for the petitioner and the attorney for the ward or conservatee so stipulate and further stipulate that there remains no issue of fact to be determined.

(h) The court may make an order authorizing the recommended course of medical treatment of the ward or conservatee and authorizing the guardian or conservator to consent on behalf of the ward or conservatee to the recommended course of medical treatment for the ward or conservatee if the court determines from the evidence all of the following:

(1) The existing or continuing medical condition of the ward or conservatee requires the recommended course of medical treatment.

(2) If untreated, there is a probability that the condition will become life-endangering or result in a serious threat to the physical *or mental* health of the ward or conservatee.

(3) The ward or conservatee is unable to give an informed consent to the recommended course of treatment.

(i) Upon petition of the ward or conservatee or other interested person, the court may order that the guardian or

conservator obtain or consent to, or obtain and consent to, specified medical treatment to be performed upon the ward or conservatee. Notice of the hearing on the petition under this subdivision shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

Comment. Subdivision (h)(2) of Section 2357 is amended to include a serious threat to mental health as a condition that justifies court authorization of medical treatment. See also Section 3208.

Note. This amendment is made to Section 2357 of the Probate Code as it will be proposed to be enacted at the 1990 legislative session by Assembly Bill 759.

Probate Code § 3208 (amended). Court ordered medical treatment for person unable to consent to treatment

3208. (a) The court may make an order authorizing the recommended course of medical treatment of the patient and designating a person to give consent to the recommended course of medical treatment on behalf of the patient if the court determines from the evidence all of the following:

(1) The existing or continuing medical condition of the patient requires the recommended course of medical treatment.

(2) If untreated, there is a probability that the condition will become life-endangering or result in a serious threat to the physical *or mental* health of the patient.

(3) The patient is unable to give an informed consent to the recommended course of treatment.

(b) If the patient has the capacity to give an informed consent to the recommended course of medical treatment but refuses to do so, the court is not authorized to make an order under this part. If an order has been made under this part, the order shall be revoked if the court determines that the patient has recovered the capacity to give informed consent to the recommended course of medical treatment. Until revoked or modified, the order is effective authorization of the course of medical treatment.

Comment. Subdivision (a)(2) of Section 3208 is amended to include a serious threat to mental health as a condition that justifies court authorization of medical treatment. See also Section 2357.

Note. This amendment is made to Section 3208 of the Probate Code as it will be proposed to be enacted at the 1990 legislative session by Assembly Bill 759.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Survival Requirement for Beneficiary of Statutory Will

December 1989

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

NOTE

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

Cite this recommendation as *Recommendation Relating to Survival Requirement for Beneficiary of Statutory Will*, 20 Cal. L. Revision Comm'n Reports 549 (1990).

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

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December 1, 1989

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

This recommendation proposes to impose a 120-hour survival requirement in order for a beneficiary to take under a statutory will.

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

Respectfully submitted,

Edwin K. Marzec
Chairperson

RECOMMENDATION

Newly-enacted legislation requires that a potential heir must live at least 120 hours longer than a decedent who dies without a will in order to inherit property from that decedent.[1] The law of intestate succession is, in effect, a statutory will for persons who have failed to execute their own wills.

The policies that suggest a 120-hour survival requirement for intestate succession apply with equal force to the right to take under a California statutory will.[2] However, the statutory will statute[3] fails to include any survival requirement. Accordingly, the Commission recommends that the 120-hour survival requirement be incorporated into that statute.[4]

The recommended legislation amends sections of, and adds a section to, the new Probate Code as it will be proposed to be enacted at the 1990 legislative session by Assembly Bill 759. The recommended legislation will become operative at the same time as the new Probate Code becomes operative.

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1. Prob. Code § 6403, as amended by 1989 Cal. Stat. ch. 544, § 5.

2. These policies are to dispose of the decedent's property in a manner consistent with what the decedent would have wanted in the circumstances, to minimize litigation over the precise moment of death in common accident cases, and to apply a survival period that is long enough to recognize most deaths that occur soon after an accident but short enough that it does not interfere with estate administration or the ability of the survivor to deal with the property. See *Recommendation Relating to 120-Hour Survival Requirement*, 20 Cal. L. Revision Comm'n Reports 21 (1990).

The Commission does not recommend that the 120-hour limitation be made applicable to all written wills. When a will is drafted for a testator, the person drafting the will can include or omit a survival requirement for beneficiaries of the will, according to the direction of the testator. A 120-hour survival requirement is recommended for a statutory will because the substance of that will is fixed by statute.

3. Prob. Code §§ 6200-6248 (California statutory will).

4. The 120-hour survival requirement would not apply where the testator died before the operative date of the proposed legislation.

PROPOSED LEGISLATION

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

Probate Code § 221 (amended). Application of Uniform Simultaneous Death Act

221. (a) This chapter does not apply in any case where Section 103, 6146, *6211*, or 6403 applies.

(b) This chapter does not apply in the case of a trust, deed, or contract of insurance, or any other situation, where (1) provision is made dealing explicitly with simultaneous deaths or deaths in a common disaster or otherwise providing for distribution of property different from the provisions of this chapter or (2) provision is made requiring one person to survive another for a stated period in order to take property or providing for a presumption as to survivorship that results in a distribution of property different from that provided by this chapter.

Comment. Section 221 is amended to add a reference to Section 6211 (120-hour survival requirement under California statutory will).

Note. This amendment to Section 221 is made to Section 221 of the Probate Code as it will be proposed to be enacted at the 1990 legislative session by Assembly Bill 759.

Probate Code § 230 (amended). Proceedings to determine survival

230. A petition may be filed under this chapter for any one or more of the following purposes:

(a) To determine for the purposes of Section 103, 220, 222, 223, 224, 6146, 6147, *6211*, 6242, 6243, 6244, or 6403, or other provision of this code whether one person survived another.

(b) To determine for the purposes of Section 1389.4 of the Civil Code whether issue of an appointee survived the donee.

(c) To determine for the purposes of Section 24606 of the Education Code whether a person has survived in order to

receive benefits payable under the system.

(d) To determine for the purposes of Section 21371 of the Government Code whether a person has survived in order to receive money payable under the system.

(e) To determine for the purposes of a case governed by former Sections 296 to 296.8, inclusive, repealed by Chapter 842 of the Statutes of 1983, whether persons have died other than simultaneously.

Comment. Section 230 is amended to add a reference to Section 6211 (120-hour survival requirement under California statutory will).

Note. This amendment to Section 230 is made to Section 230 of the Probate Code as it will be proposed to be enacted at the 1990 legislative session by Assembly Bill 759.

Probate Code § 6211 (added). 120-hour survival requirement

6211. A reference in a California statutory will to a person "if living" or who "survives me" means a person who survives the decedent by 120 hours. A person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for the purpose of the California statutory will, and the beneficiaries are determined accordingly. If it cannot be established by clear and convincing evidence that a person who would otherwise be a beneficiary has survived the decedent by 120 hours, it is deemed that the person failed to survive for the required period. The requirement of this section that a person who survives the decedent must survive the decedent by 120 hours does not apply if the application of the 120-hour survival requirement would result in the escheat of property to the state.

Comment. Section 6211 is a new provision that provides a 120-hour survival rule. Section 6211 is the same in substance as Section 6403 (requirement that heir survive decedent by 120 hours). Section 6211 does not apply if the testator died before the operative date of the section. See Section 6247. See also Section 230 (petition to determine for the purposes of Section 6211 whether one person survived another).

Note. This new section is added to the Probate Code proposed to be enacted at the 1990 legislative session by Assembly Bill 759.

Probate Code § 6247 (amended). Inclusion of clauses as existing on date of execution

6247. (a) Except as specifically provided in this chapter, a California statutory will shall include only the texts of the property disposition clauses and the mandatory clauses as they exist on the day the California statutory will is executed.

(b) Sections 6205, 6206, 6226, 6243, 6245, and 6246 apply to every California statutory will, including those executed before January 1, 1985. *Section 6211 applies to every California statutory will, including those executed before July 1, 1991, except that the section does not apply if the testator died before July 1, 1991.*

(c) Notwithstanding Section 6222 and except as provided in subdivision (b), a California statutory will is governed by the law that applied prior to January 1, 1985, if the California statutory will is executed on or after January 1, 1985, on a form that (1) was prepared for use under former Sections 56 to 56.14, inclusive, repealed by Chapter 842 of the Statutes of 1983, and (2) satisfied the requirements of law that applied prior to January 1, 1985.

(d) A California statutory will does not fail to satisfy the requirement of subdivision (a) merely because the will is executed on a form that incorporates the mandatory clauses of Section 6246 that refer to former Section 1120.2, repealed by Chapter 820 of the Statutes of 1986. If the will incorporates the mandatory clauses with a reference to former Section 1120.2, the trustee has the powers listed in Article 2 (commencing with Section 16220) of Chapter 2 of Part 4 of Division 9.

Comment. Section 6247 is amended to add the second sentence to subdivision (b). See Section 6211 (120-hour survival requirement).

Note. This amendment to Section 6247 is made to Section 6247 of the Probate Code as it will be proposed to be enacted at the 1990 legislative session by Assembly Bill 759.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Execution or Modification of Lease Without Court Order

December 1989

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

NOTE

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

Cite this recommendation as *Recommendation Relating to Execution or Modification of Lease Without Court Order*, 20 Cal. L. Revision Comm'n Reports 557 (1990).

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

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VAUGHN R. WALKER

December 1, 1989

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

Existing law permits a personal representative, guardian, or conservator to execute, extend, renew, or modify a real property lease without a court order if the monthly rental does not exceed $1,500. This recommendation proposes that the $1,500 maximum be increased to $5,000.

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

Respectfully submitted,

Edwin K. Marzec
Chairperson

RECOMMENDATION

A personal representative, guardian, or conservator may execute, extend, renew, or modify a real property lease without court authorization if the monthly rental does not exceed $1,500.[1] The Commission recommends that this $1,500 maximum be increased to $5,000.

Recent price increases in the real estate market in California have resulted in substantial rises in the cost of rentals. It is not uncommon for monthly rentals, even for residential properties, to exceed $1,500.

The fiduciary should not be required to obtain a court order, with the attendant delay and cost to the estate, simply to deal with these common, short-term lease transactions.[2] Increasing the maximum rental to $5,000 monthly for independent fiduciary action would avoid the need to obtain court authorization for routine lease transactions.[3]

The recommended legislation amends provisions of the new Probate Code as it will be proposed to be enacted at the 1990 legislative session by Assembly Bill 759. The recommended legislation will become operative at the same time as the new Probate Code becomes operative.

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1. Prob. Code §§ 9832(b), 9941(a) (personal representative), 2501(b), 2555 (guardian or conservator).

2. The term of a lease that may be made without court authorization is limited. For the personal representative, the term may not exceed one year. See Prob. Code §§ 9832(b), 9941(a). For a guardian or conservator, the term may not exceed two years. See Prob. Code §§ 2501(b), 2555.

3. A person who wishes to obtain court review of the lease transaction may contest the account of the personal representative (Prob. Code § 11001(c)) or the guardian or conservator (Prob. Code § 2625).

PROPOSED LEGISLATION

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

Probate Code § 2501 (amended). Extension, renewal, or modification of lease by guardian or conservator

2501. (a) Except as provided in subdivision (b), court approval is required for a compromise, settlement, extension, renewal, or modification which affects any of the following:

(1) Title to real property.

(2) An interest in real property or a lien or encumbrance on real property.

(3) An option to purchase real property or an interest in real property.

(b) If it is to the advantage of the estate, the guardian or conservator without court approval may extend, renew, or modify a lease of real property in either of the following cases:

(1) Where under the lease as extended, renewed, or modified the rental does not exceed ~~one thousand five hundred dollars ($1,500)~~ *five thousand dollars ($5,000)* a month and the term does not exceed two years.

(2) Where the lease is from month to month, regardless of the amount of the rental.

(c) For the purposes of subdivision (b), if the lease as extended, renewed, or modified gives the lessee the right to extend the term of the lease, the length of the term shall be considered as though the right to extend had been exercised.

Comment. Subdivision (b) of Section 2501 is amended to increase the limit on extending, renewing, or modifying a lease without court approval from $1,500 to $5,000. See also Section 2555 (execution of lease by guardian or conservator). For a comparable provision relating to personal representatives, see Section 9832.

Note. This amendment to Section 2501 is made to Section 2501 of the Probate Code as it will be proposed to be enacted at the 1990 legislative session by Assembly Bill 759.

Probate Code § 2555 (amended). Execution of lease by guardian or conservator

2555. If it is to the advantage of the estate, the guardian or conservator may lease, as lessor, real property of the estate without authorization of the court in either of the following cases:

(a) Where the rental does not exceed ~~one thousand five hundred dollars ($1,500)~~ *five thousand dollars ($5,000)* a month and the term does not exceed two years.

(b) Where the lease is from month to month, regardless of the amount of the rental.

Comment. Section 2555 is amended to increase the limit on executing a lease without court approval from $1,500 to $5,000. See also Section 2501 (extension, renewal, or modification of lease by guardian or conservator). For a comparable provision relating to personal representatives, see Section 9941.

Note. This amendment to Section 2555 is made to Section 2555 of the Probate Code as it will be proposed to be enacted at the 1990 legislative session by Assembly Bill 759.

Probate Code § 9832 (amended). Extension, renewal, or modification of lease by personal representative

9832. (a) Except as provided in subdivision (b), authorization by order of court is required for a compromise, settlement, extension, renewal, or modification which affects any of the following:

(1) Title to real property.

(2) An interest in real property or a lien or encumbrance on real property.

(3) An option to purchase real property or an interest in real property.

(b) If it is to the advantage of the estate, the personal representative without prior court authorization may extend, renew, or modify a lease of real property in either of the following cases:

(1) Where under the lease as extended, renewed, or modified the rental does not exceed ~~one thousand five~~

~~hundred dollars ($1,500)~~ *five thousand dollars ($5,000)* a month and the term does not exceed one year.

(2) Where the lease is from month to month, regardless of the amount of the rental.

(c) For the purposes of subdivision (b), if the lease as extended, renewed, or modified gives the lessee the right to extend the term of the lease, the length of the term shall be considered as though the right to extend had been exercised.

Comment. Subdivision (b) of Section 9832 is amended to increase the limit on extending, renewing, or modifying a lease without court authorization from $1,500 to $5,000. See also 9941 (execution of lease by personal representative). For a comparable provision relating to guardians and conservators, see Section 2501.

Note. This amendment to Section 9832 is made to Section 9832 of the Probate Code as it will be proposed to be enacted at the 1990 legislative session by Assembly Bill 759.

Probate Code § 9941 (amended). Execution of lease by personal representative

9941. If it is to the advantage of the estate, the personal representative may lease, as lessor, real property of the estate without authorization of the court in either of the following cases:

(a) Where the rental does not exceed ~~one thousand five hundred dollars ($1,500)~~ *five thousand dollars ($5,000)* a month and the term does not exceed one year.

(b) Where the lease is from month to month, regardless of the amount of the rental.

Comment. Subdivision (a) of Section 9941 is amended to increase the limit on executing a lease without court authorization from $1,500 to $5,000. See also Section 9832 (extension, renewal, or modification of lease by personal representative). For a comparable provision relating to guardians and conservators, see Section 2555.

Note. This amendment to Section 9941 is made to Section 9941 of the Probate Code as it will be proposed to be enacted at the 1990 legislative session by Assembly Bill 759.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Limitation Period for Action Against Surety in Guardianship or Conservatorship Proceeding

December 1989

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

NOTE

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

Cite this recommendation as *Recommendation Relating to Limitation Period for Action Against Surety in Guardianship or Conservatorship Proceeding*, 20 Cal. L. Revision Comm'n Reports 565 (1990).

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

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VAUGHN R. WALKER

December 1, 1989

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

This recommendation proposes that the limitation period for commencing an action against the sureties on the bond of a guardian or conservator be conformed to the law governing decedents' estates, so there will be a uniform four-year limitation period without tolling. This will eliminate the existing provision of the guardianship-conservatorship law tolling the limitation period in case of disability.

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

Respectfully submitted,

Edwin K. Marzec
Chairperson

RECOMMENDATION

An action against sureties on the bond of a guardian or conservator must be commenced within four years from discharge or removal of the guardian or conservator, or within four years from the date the order surcharging the guardian or conservator becomes final, whichever is later.[1] If a person entitled to bring the action is under a legal disability to sue, the person may commence the action within four years after the disability is removed.[2]

For a bond given by a personal representative in a decedent's estate, the period for bringing an action on the bond is four years from the discharge of the personal representative, without any tolling period for legal disability.[3] Tolling was eliminated for decedents' estates because of the need to ensure finality. If necessary to protect the interests of a person under legal disability, a guardian ad litem may be appointed to bring the action.[4]

The need for finality is equally great in guardianship and conservatorship proceedings. The law governing guardianships and conservatorships should be made consistent with the law governing decedents' estates by eliminating tolling for legal disability in determining the time for commencing an action to recover from the sureties on the bond of the guardian or conservator. A guardian ad litem may be appointed, if necessary, for action on the bond in guardianship and conservatorship proceedings, the same as in decedents' estates.[5]

The recommended legislation amends a section of the new Probate Code as it will be proposed to be enacted at the 1990 legislative session by Assembly Bill 759. The recommended

1. Prob. Code § 2333.
2. Prob. Code § 2333.
3. See Prob. Code § 8488.
4. Prob. Code § 1003.
5. Prob. Code § 1003.

legislation will become operative at the same time as the new Probate Code becomes operative.

PROPOSED LEGISLATION

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

Probate Code § 2333 (amended). Limitation period for suit against sureties on bond of guardian or conservator

2333. (a) In case of a breach of a condition of the bond, an action may be brought against the sureties on the bond for the use and benefit of the ward or conservatee or of any person interested in the estate.

(b) ~~Except as provided in subdivision (c), no~~ *No* action may be maintained against the sureties on the bond unless commenced within four years from the discharge or removal of the guardian or conservator or within four years from the date the order surcharging the guardian or conservator becomes final, whichever is later.

~~(c) If at the time of the discharge or removal of the guardian or conservator or when the order of surcharge becomes final any person entitled to bring the action is under any legal disability to sue, such person may commence the action within four years after the disability is removed.~~

Comment. Section 2333 is amended to delete subdivision (c) to make the rule under Section 2333 consistent with the rule for decedents' estates. See Section 8488.

Note. This amendment to Section 2333 is made to Section 2333 of the Probate Code as it will be proposed to be enacted at the 1990 legislative session by Assembly Bill 759.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Repeal of Probate Code Section 6402.5 (In-Law Inheritance)

December 1989

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

NOTE

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

Cite this recommendation as *Recommendation Relating to Repeal of Probate Code Section 6402.5 (In-Law Inheritance)*, 20 Cal. L. Revision Comm'n Reports 571 (1990).

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

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ANN E. STODDEN
VAUGHN R. WALKER

December 1, 1989

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

This recommendation proposes the repeal of Probate Code Section 6402.5, the so-called in-law inheritance statute. Section 6402.5 is a provision that in some cases requires the estate of an intestate decedent to be divided into two parts, with the part attributable to a predeceased spouse of the decedent to pass to heirs of the predeceased spouse ("in-law inheritance") and the part not so attributable to pass to the decedent's heirs under ordinary rules of intestate succession.

This recommendation renews a recommendation the Commission made in 1982. The 1982 recommendation to repeal the in-law inheritance statute was included in a bill proposing a comprehensive revision of the law relating to wills and intestate succession. The bill was heard by the Senate Judiciary Committee on the last day for committee consideration of bills. At that time, a representative of a Sacramento heir-tracing firm objected to the repeal. In order to permit enactment of the comprehensive revision of the wills and intestate succession law, the author of the bill amended the bill to retain a limited form of in-law inheritance. The amendment was made with the understanding the Commission would make a further study of the in-law inheritance statute.

The Commission has made another careful study of the in-law inheritance statute and has again reached the conclusion that the statute should be repealed. In August 1989, the Commission distributed a Tentative Recommendation proposing the repeal of the in-law inheritance statute to a number of lawyers and judges active in the probate law field. The Executive Committee of the Estate Planning, Trust and Probate Law Section of the California State Bar supports the repeal of the in-law inheritance statute. Forty-three individual lawyers and judges wrote to express their view that the statute should be repealed. Some recited their own unsatisfactory experience under the statute. Five were opposed to the repeal. One favored retaining some form of in-law inheritance, but recognized the need to clarify and improve the existing statute. The persons who commented on the Tentative Recommendation are noted in the Acknowledgments which follow.

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

Respectfully submitted,

Edwin K. Marzec
Chairperson

ACKNOWLEDGMENTS

Persons who sent comments to the Commission concerning this recommendation are listed below. An overwhelming majority, including the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar of California, support the Commission's recommendation to repeal Probate Code Section 6402.5 (in-law inheritance). Five persons (identified by * following the name) oppose the repeal. One person (identified by ** following the name) prefers that the existing statute be clarified and improved rather than repealed.

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Newport Beach

Edna R. S. Alvarez
Los Angeles

Michael J. Anderson
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Henry Angerbauer
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Paul J. Goda
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John C. Hoag
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Judge Thomas M. Jenkins
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Larry M. Kaminsky
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RECOMMENDATION

Introduction

If a decedent dies intestate without a surviving spouse or issue and was predeceased by a spouse, the decedent's property must be divided into that passing to decedent's heirs under the usual intestate succession rules,[1] and that passing to the predeceased spouse's heirs under Probate Code Section 6402.5,[2] the so-called in-law inheritance statute.

The following property passes to heirs of the predeceased spouse under Section 6402.5:

---

1. Prob. Code §6402. Under Section 6402, property not attributable to the predeceased spouse passes:

(1) To the decedent's surviving parent or parents.

(2) If there is no surviving parent, to surviving issue of the decedent's parent or parents.

(3) If there is no surviving issue of a parent of the decedent, to the decedent's surviving grandparent or grandparents.

(4) If there is no surviving grandparent, to issue of the decedent's grandparent or grandparents.

(5) If there are no takers in the foregoing categories, to surviving issue of decedent's predeceased spouse.

(6) If there are no takers in the foregoing categories, to decedent's next of kin.

(7) If there are no takers in the foregoing categories, to the surviving parent or parents of a predeceased spouse.

(8) If there are no takers in the foregoing categories, to surviving issue of a parent of the predeceased spouse.

2. Under Section 6402.5, if decedent dies without surviving spouse or issue, real property attributable to decedent's predeceased spouse who died not more than 15 years before decedent, and personal property attributable to decedent's predeceased spouse who died not more than five years before decedent for which there is a written record of title or ownership and the aggregate value of which is $10,000 or more, goes back to relatives of the predeceased spouse as follows:

(1) To surviving issue of the predeceased spouse.

(2) If there is no surviving issue, to the surviving parent or parents of the predeceased spouse.

(3) If there is no surviving parent, to surviving issue of the parent or parents of the predeceased spouse.

If there is no surviving issue, parent, or issue of a parent of the predeceased spouse, property attributable to the predeceased spouse goes to decedent's relatives, the same as decedent's other intestate property. See supra note 1.

See generally Clifford, *Entitlement to Estate Distribution*, in 3 California Decedent Estate Practice §24.19 (Cal. Cont. Ed. Bar 1989).

(1) Real property attributable to the decedent's predeceased spouse[3] who died not more than 15 years before the decedent.

(2) Personal property attributable to the decedent's predeceased spouse[4] who died not more than five years before the decedent, for which there is a written record of title or ownership, and the aggregate value of which is $10,000 or more.

California is the only state with an in-law inheritance statute.[5] Six states other than California have had in-law inheritance at one time or another: Idaho, Indiana, New Mexico, New York, Ohio, and Oklahoma.[6] All six of these states have abolished in-law inheritance.

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3. It is difficult to determine exactly what is meant by property "attributable to the decedent's predeceased spouse." Probate Code Section 6402.5(f) defines it as follows:

> (1) One-half of the community property in existence at the time of the death of the predeceased spouse.
>
> (2) One-half of any community property, in existence at the time of death of the predeceased spouse, which was given to the decedent by the predeceased spouse by way of gift, descent, or devise.
>
> (3) That portion of any community property in which the predeceased spouse had any incident of ownership and which vested in the decedent upon the death of the predeceased spouse by right of survivorship.
>
> (4) Any separate property of the predeceased spouse which came to the decedent by gift, descent, or devise of the predeceased spouse or which vested in the decedent upon the death of the predeceased spouse by right of survivorship.

Under subdivision (g) of Section 6402.5, quasi-community property is treated the same as community property. For criticism of the drafting of this section and illustrations of the difficulty of determining what property it covers, see Reppy & Wright, *California Probate Code § 229: Making Sense of a Badly Drafted Provision for Inheritance by a Community Property Decedent's Former In-Laws*, 8 Community Prop. J. 107 (1981).

4. See supra note 3.

5. In 1982, the Commission recommended complete repeal of California's in-law inheritance statute. See *Tentative Recommendation Relating to Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301, 2335-38 (1982). Objections were made to the repeal, which was included in a comprehensive revision of the law relating to wills and intestate succession. The effort to repeal in-law inheritance was abandoned so as not to jeopardize enactment of the comprehensive bill. The in-law inheritance statute was continued, but it was limited to real property received from a predeceased spouse who died not more than 15 years before the decedent. See 1983 Cal. Stat. ch. 842, §55. In 1986, in-law inheritance was expanded to apply also to personal property with a written record of title or ownership and an aggregate value of $10,000 or more received from a predeceased spouse who died not more than five years before the decedent. See 1986 Cal. Stat. ch. 873, §1.

6. Annot., 49 A.L.R.2d 391 (1956). See also 7 R. Powell, Real Property ¶ 1001, at 673-77 (Rohan rev. 1989).

The Commission recommends that Probate Code Section 6402.5 be repealed. Any possible benefits resulting from applying a special rule of in-law inheritance are clearly outweighed by the additional expense and delay the statute causes in probate proceedings and by the inequitable results that sometimes occur under the statute. Other recently enacted legislation covers those situations where recognition of the equities calls for inheritance by relatives of a predeceased spouse.[7] In addition, the interpretation and application of the complex and lengthy in-law inheritance statute presents difficult problems, some of which have not been resolved. The reasons for this recommendation are discussed in more detail below.

The In-Law Inheritance Statute Increases Expense and Causes Delay in Probate Proceedings

The in-law inheritance statute imposes additional expense on the estate, adds procedural burdens, and may delay the probate proceeding.

If the decedent died without surviving spouse or issue, was predeceased by a spouse, and the estate includes property covered by the in-law inheritance statute, notice of the probate proceeding must be given to heirs of the predeceased spouse.[8]

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7. See infra text under heading "Rights of Relatives of Predeceased Spouse Under Recently Enacted Laws."

8. See Prob. Code §8110. See also B. Ross & H. Moore, California Practice Guide Probate ¶¶3:204.1-3:204.4 (Rutter Group 1988):

> [3:204.1] **Special notice provision re heirs of a predeceased spouse:** Under Prob.C. §6402.5 . . . , if decedent left no surviving spouse or issue, the heirs at law of decedent's *predeceased spouse* are entitled to notice in the following instances (note that these rules apply even in *testate* cases, because the §6402.5 heirs may have standing to file a *will contest*):
>
> 1) [3:204.2] **Real property "attributable" to predeceased spouse:** In estates which include *real property* "attributable" to the decedent's predeceased spouse who died not more than *15 years* before the decedent [Prob.C. §6402.5]; *and/or*
>
> 2) [3:204.3] **Personal property "attributable" to predeceased spouse:** In estates which include *personal property* "attributable" to the decedent's predeceased spouse who died not more than *five years* before the decedent *and* as to which (i) there is a "written record of title or ownership" and (ii) the aggregate fair market value (of such personal property) is *at least $10,000* . . .

This is true even if the decedent died with an unquestionably valid will that disposes of all of the decedent's property, because heirs of the predeceased spouse may have standing to file a will contest.[9]

The notice must be reasonably calculated to give actual notice to all persons interested in the estate.[10] The petitioner

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Conversely, petitioner need *not* give notice to a predeceased spouse's heirs who might have claim to personal property "attributable" to the predeceased spouse who died no more than five years before decedent if petitioner has a "good faith" belief that the aggregate fair market value of such property is *less than* $10,000. But if the personal property is *subsequently* determined to have an aggregate fair market value in excess of $10,000, notice must then be given to the predeceased spouse's heirs under §6402.5. . . .

[3:204.4] *PRACTICE POINTER:* The Code dispenses with the notice requirement if there is no "written record of title or ownership" to the personal property; however, the Judicial Council Form Petition requires notice whenever there is "personal property totaling $10,000 or more" (i.e., without regard to whether there is a "written record" . . .). Despite the Code's waiver provision, notice should be given in doubtful cases.

The same advice applies with respect to th *value* condition: i.e., the Code dispenses with the notice requirement when petitioner has a "good faith" belief that the aggregate fair market value of the §6402.5 personal property is less than $10,000 (above). If the estimated value is *close to* the $10,000 cut-off, it's wise to err on the side of *giving notice*, rather than risk later litigation over "good faith" and possible collateral attack on probate court orders. [brackets in original]

9. B. Ross & H. Moore, California Practice Guide Probate ¶3:204.1 (Rutter Group 1988).

10. See B. Ross & H. Moore, California Practice Guide Probate ¶3:216 (Rutter Group 1988):

[3:216] **Reasonable efforts required to effect personal or mail service:** Notice must be reasonably calculated to give *actual notice* to *all persons interested in the estate* (whether as heirs, testate beneficiaries, *creditors*, or otherwise). [*Tulsa Professional Collection Services, Inc. v. Pope* (1988) _US__, 108 S.Ct. 1340; *Greene v. Lindsey* (1982) 456 US 444; *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 US 306; *Mennonite Board of Missions v. Adams* (1983) 462 US 791 . . . .

Due process does not necessarily mandate the "best possible" manner of service (i.e., personal service). "[M]ail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice." [*Tulsa Professional Collection Services, Inc. v. Pope*, supra, 108 S.Ct. at 1347]

By the same token, mailed notice must itself be "reasonably calculated" to *reach* the proper persons. For due process purposes, therefore, petitioner may be required to make *"reasonably diligent efforts"* to *locate* the interested persons. [*Tulsa Professional Collection Services, Inc. v. Pope*, supra, 1087 S.Ct. at 1347; *Mennonite Board of Missions v. Adams*, supra] *A fortiori*, mail service to the county seat . . . will suffice only if all reasonable efforts to locate the particular heir or beneficiary (or known creditor) have failed.

for probate must make a reasonably diligent effort to determine the identities and whereabouts of heirs of the predeceased spouse.[11] Reasonable effort means more than merely questioning immediate survivors concerning the whereabouts of their relatives.[12]

Counsel should search through telephone directories, contact the Department of Motor Vehicles, use the U. S. Post Office's forwarding procedures, advertise, and review voting rolls and tax rolls. If these efforts are unsuccessful, counsel should consider asking the Social Security Administration to forward the notice.[13]

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11. Prob. Code §8110(a) (notice must be given to "known" and "reasonably ascertainable" heirs).

12. B. Ross & H. Moore, California Practice Guide Probate ¶¶3:217-3:219 (Rutter Group 1988):

> [3:217] **"Reasonable" procedures to locate "missing" heirs:** Due process does *not* require "impracticable and extended searches." [*Tulsa Professional Collection Services, Inc. v. Pope*, supra, 108 S.Ct. at 1347; *Mullane v. Central Hanover Bank*, supra, 339 US at 317-318] But "reasonably diligent efforts" to locate the heirs and beneficiaries must be made. [Cf. *Tulsa Professional Collection Services, Inc. v. Pope*, supra (in connection with identifying decedent's creditors)]
>
> Clearly, "reasonable efforts" requires more than simply questioning the immediate survivors about the whereabouts of their relatives. Counsel are expected to do some further investigation.
>
> (a) [3:218] Resort to telephone directories, the DMV, the U.S. Post Office's forwarding procedures, advertising, and review of voting rolls and tax rolls are all acceptable practices to locate missing heirs and beneficiaries.
>
> (b) [3:219] If these efforts are unsuccessful, consider requesting the Social Security Administration to forward notice to the intended recipient. By law, the Administration cannot disclose a person's address; but it can forward notice to the person's last known address or in care of the person's last known employer. [brackets and italics in original]

13. B. Ross & H. Moore, California Practice Guide Probate ¶¶3:217-3:219 (Rutter Group, rev. #1, 1988), which provides:

> [3:217] **"Reasonable" procedures to locate "missing" heirs:** Due process does *not* require "impracticable and extended searches." [*Tulsa Professional Collection Services, Inc. v. Pope*, supra, 108 S.Ct. at 1347; *Mullane v. Central Hanover Bank*, supra, 339 US at 317-318] But "reasonably diligent efforts" to locate the heirs and beneficiaries must be made. [Cf. *Tulsa Professional Collection Services, Inc. v. Pope*, supra (in connection with identifying decedent's creditors)]
>
> Clearly, "reasonable efforts" requires more than simply questioning the immediate survivors about the whereabouts of their relatives. Counsel are expected to do some further investigation.

If petitioner makes a reasonable effort but is unable to locate an heir of the predeceased spouse, notice may be mailed to the county seat where the proceedings are pending.[14] If this alternative method of notice is used, the estate attorney must prepare and present to the court a declaration detailing the efforts to locate the missing heir.[15]

The estate must bear the cost of the search for heirs of the predeceased spouse. The search may be a difficult one, especially where a number of years have passed between the deaths of the spouses.

Also, if the decedent has a valid will and left nothing to the heirs of the predeceased spouse, notice to heirs of the predeceased spouse may arouse unrealistic expectations that they will share in the estate. The estate attorney must deal with inquiries from these heirs, and must explain that the notice is a procedural formality and that under the will the heirs are not entitled to share in the estate. The extra burden on the attorney in finding, notifying, and dealing with heirs of the predeceased spouse may impose additional costs to the estate in the form of additional compensation for "extraordinary services" of the attorney.

(a) [3:218] Resort to telephone directories, the DMV, the U.S. Post Office's forwarding procedures, advertising, and review of voting rolls and tax rolls are all acceptable practices to locate missing heirs and beneficiaries.

(b) [3:219] If these efforts are unsuccessful, consider requesting the Social Security Administration to forward notice to the intended recipient. By law, the Administration cannot disclose a person's address; but it can forward notice to the person's last known address or in care of the person's last known employer. [brackets and italics in original]

14. Prob. Code §1215(d).

15. See, e.g., Contra Costa County Probate Policy Manual §303; Fresno County Probate Policy Memorandum §3.2; Humboldt County Probate Rules §12.6; Los Angeles County Probate Policy Memorandum §7.07; Madera County Probate Rules §10.6; Merced County Probate Rules §307; Orange County Probate Policy Memorandum §2.06; San Diego County Probate Rules §4.44; San Francisco Probate Manual §4.03(b)(1); San Joaquin County Probate Rules §4-201(B); Solano County Probate Rules §7.10; Tuolumne County Probate Rules §12.5.

The In-Law Inheritance Statute Defeats Reasonable Expectations and Produces Inequitable Results

Proponents of in-law inheritance argue that it is needed to avoid the inequity that may result from application of the general intestate succession provisions. But an examination of the results in the three most recent appellate decisions involving the in-law inheritance statute demonstrates that the statute defeats reasonable expectations and often produces inequitable results.

In *Estate of McInnis*,[16] decided in 1986, half the decedent's estate went to her predeceased husband's sister under the in-law inheritance statute, despite undisputed evidence that the sister had been estranged from her brother and from his wife for 28 years and that the heirs of the wife had maintained a close relationship with her and had performed various services for her for more than 10 years immediately prior to her death. The court concluded that the statute compelled this result,[17] a result obviously contrary to the desires of the first-to-die spouse and unanticipated by the last-to-die spouse.[18]

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16. 182 Cal. App. 3d 949, 227 Cal. Rptr. 604 (1986).

17. Estate of McInnis, 182 Cal. App. 3d 949, 958, 227 Cal. Rptr. 604, 610 (1986) ("principles of equity cannot be used as a means to avoid the mandate of a statute").

18. Another case where the desires of the predeceased spouse were defeated was brought to the attention of the Commission. See letter from Hyman Goldman to Robert L. Stack, Chairman of the Probate Committee, L.A. County Bar Association, dated July 20, 1989 (copy on file in office of California Law Revision Commission):

> I am probating an estate where a surviving spouse died intestate and the predeceased spouse left a will. There is no issue of the marriage of twenty-five years. The predeceased spouse, the wife, had a previous marriage of several years duration and had adopted the daughter of her first husband from whom she was divorced. After the divorce there was no contact or relationship between the predeceased spouse and her adopted daughter. The predeceased spouse disinherited her adopted daughter in her will and left her estate to her aunt with whom she had a life long close friendship.

In this case, the last-to-die spouse's estate attributable to the predeceased spouse passed under the in-law inheritance statute to the adopted daughter. Since the decedent had disinherited the adopted daughter in her will, the result under the in-law inheritance statute obviously was contrary to the wishes of the predeceased spouse.

In *Estate of Luke*,[19] a 1987 case, Raymond and Catherine Luke were married in Illinois in 1926, moved to Iowa in 1937, and lived there until Catherine's death in 1978. Soon after, Raymond moved to California where he died intestate in 1984. There were no children of the marriage. Catherine's nieces and nephews sought to take a share of the estate under the California in-law inheritance statute. Had Raymond moved to any other state, his heirs would have taken the entire estate. But because Raymond died in California, his estate was subject to California's in-law inheritance statute. Raymond was probably unaware of the California in-law inheritance statute, since California is the only state having such a statute.[20] He probably expected his estate to go to his blood relatives, not to Catherine's. This case illustrates how the in-law inheritance statute may defeat reasonable expectations of the last-to-die spouse.

Estate of Riley,[21] decided in 1981, is another case that shows the inequity that may result under the in-law inheritance statute. In *Riley*, decedent's mother made a gift of real property to her son and his wife as joint tenants. The wife died, and the son took his wife's interest as the surviving joint tenant. The son died intestate without surviving spouse or issue. Decedent's mother claimed the property as heir of the decedent. The brother and nieces and nephews of the predeceased wife claimed under the in-law inheritance statute. The Court of Appeal held that decedent's mother was entitled to all of the property under the statute in effect at the time of decedent's death.[22] However, the opposite result is required

19. 194 Cal. App. 3d 1006, 240 Cal. Rptr. 84 (1987).

20. In fact, it is unlikely that a person who has lived in California all of his or her life would be aware of the in-law inheritance statute. The purpose of intestate succession law is to provide a will substitute for a person who dies without a will. Intestate succession law should correspond to the manner in which the average decedent would dispose of property by will. See Niles, *Probate Reform in California*, 31 Hastings L.J. 185, 200 (1979).

21. 119 Cal. App. 3d 204, 173 Cal. Rptr. 813 (1981).

22. Former Prob. Code §229 (amended by 1976 Cal. Stat. ch. 649, §1 and repealed by 1983 Cal Stat. ch. 842, §19).

under the in-law inheritance statute now in effect: Heirs of the predeceased spouse would take a share of the property at the expense of the mother who gave the property to the decedent and his predeceased spouse,[23] a clearly inequitable result.

It is unclear whether the in-law inheritance statute applies to property given by one spouse to the other during marriage when the marriage ends in divorce. On the divorce, the court will confirm the separate property interest of the donee spouse. Assume the donor dies first; the donee dies last, and dies intestate. Is the property still "attributable to" the donor spouse, or does the divorce cut off rights under the in-law inheritance statute? If the gift was made during marriage, ancestral property theory suggests that divorce does not cut off rights under the in-law inheritance statute.[24] This is likely to defeat the decedent's intent in most cases.

The in-law inheritance statute also causes problems with wills that give property to the testator's "heirs":[25] Under the in-law inheritance statute, blood relatives of the predeceased

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23. See Prob. Code §6402.5. Section 6402.5 applies to "the portion of the decedent's estate attributable to the decedent's predeceased spouse." See Section 6402.5(a). The language quoted is defined as including "any community property in which the predeceased spouse had any incident of ownership and which vested in the decedent upon the death of the predeceased spouse by right of survivorship" and "any separate property of the predeceased spouse . . . which vested in the decedent upon the death of the predeceased spouse by right of survivorship." Section 6402.5(f). Accordingly, whether the joint tenancy interest of the predeceased spouse is community or separate property, it is subject to the present in-law inheritance statute.

24. Reppy & Wright, *California Probate Code § 229: Making Sense of a Badly Drafted Provision for Inheritance by a Community Property Decedent's Former In-laws*, 8 Community Prop. J. 107, 129-30 (1981). If the transfer from one spouse to other takes place after their divorce, the in-law inheritance statute does not apply. Estate of Nicholas, 69 Cal. App. 3d 976, 982, 138 Cal. Rptr. 526, 529 (1977) (in-law inheritance statute did not apply where predeceased spouse was divorced from decedent at time decedent obtained sole title as a result of right of survivorship in a joint tenancy).

25. See In re Estate of Page, 181 Cal. 537, 185 P. 383 (1919) (devise to "my lawful heirs"); In re Estate of Watts, 179 Cal. 20, 175 P. 415 (1918) (devise to "my heirs"); Estate of Baird, 135 Cal. App. 2d 333, 287 P.2d 365 (1955) (gift to "heirs" of surviving spouse on termination of testamentary trust); In re Estate of Wilson 65 Cal. App. 680, 225 P. 283 (1924) (devise to "my heirs"). See also Ferrier, *Gifts to "Heirs" in California*, 26 Calif. L. Rev. 413, 430-36 (1938).

spouse take as heirs of the decedent, not as heirs of the predeceased spouse.[26] So a dispositive provision to the testator's "heirs" may include blood relatives of the predeceased spouse. Normally, one who gives property by will to his or her "heirs" expects that the property will go to his or her own blood relatives.[27] Thus, application of the in-law inheritance statute to a will is a potential trap for one drafting a will.

The In-Law Inheritance Statute is Complex and Difficult to Interpret and Apply

Section 6402.5 is a long, complex statute that is difficult to understand and apply. Interpretation and application of the statute wastes judicial resources and imposes litigation costs on the estate. Law review articles have analyzed the statute, pointing out difficulties of interpretation and defects in the statute.[28] Some articles conclude that the in-law inheritance statute should be repealed.[29]

Tracing and Apportionment Problems

The in-law inheritance statute requires that the estate be separated into property attributable to the predeceased spouse and property not so attributable. This causes difficult

26. Note, *Confusion Surrounding the Determination of Heirs by Application of Sections 228 and 229 of the California Probate Code*, 7 Hastings L.J. 336 (1956).

27. Note, *Confusion Surrounding the Determination of Heirs by Application of Sections 228 and 229 of the California Probate Code*, 7 Hastings L.J. 336, 338 (1956).

28. See, e.g., Niles, *Probate Reform in California*, 31 Hastings L.J. 185, 204-08 (1979); Reppy & Wright, *California Probate Code § 229: Making Sense of a Badly Drafted Provision for Inheritance by a Community Property Decedent's Former In-laws*, 8 Community Prop. J. 107, 135 (1981). See also Currie, *Justice Traynor and the Conflict of Laws*, 13 Stan. L. Rev. 719, 733-42 (1961); Ferrier, *Rules of Descent Under Probate Code Sections 228 and 229, and Proposed Amendments*, 25 Calif. L. Rev. 261 (1937) (in-law inheritance statute "productive of complexities, anomalies, and injustices"); Evans, *Comments on the Probate Code of California*, 19 Calif. L. Rev. 602, 614-15 (1931).

29. Niles, *Probate Reform in California*, 31 Hastings L.J. 185, 204-08 (1979); Reppy & Wright, *California Probate Code § 229: Making Sense of a Badly Drafted Provision for Inheritance by a Community Property Decedent's Former In-laws*, 8 Community Prop. J. 107, 135 (1981). See also Fellows, Simon & Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 Am. B. Foundation Research J. 321, 344.

problems of tracing, commingling, and apportionment.[30] Two recent cases illustrate these problems.[31]

The tracing problem is illustrated by *Estate of Luke*.[32] In the *Luke* case, the decedent died intestate in California, having been predeceased by his spouse. The court examined property transactions going back more than 50 years because the decedent had owned a business before marriage which he sold during the marriage. In holding that the decedent's estate was subject to in-law inheritance, the court was forced to "unravel a snarl of conflicting presumptions and cases reaching apparently inconsistent conclusions . . . . The task is not an easy one."[33]

The apportionment problem is illustrated by *Estate of Nereson*.[34] Oberlin Nereson died intestate having been predeceased by his spouse, Ethel. Their home had been community property. After Ethel's death, Oberlin continued to make mortgage payments, and the home appreciated in value. The case involved a dispute between Oberlin's sister and Ethel's two sisters. Because the home had been community property, it was clear that the in-law inheritance statute applied, and that Ethel's sisters were entitled to an interest. But Oberlin's sister asked for a share, arguing that Oberlin had made mortgage payments after Ethel's death out of his separate property.[35] The court agreed, and held that it

30. Reppy & Wright, *California Probate Code § 229: Making Sense of a Badly Drafted Provision for Inheritance by a Community Property Decedent's Former In-laws*, 8 Community Prop. J. 107, 134 (1981).

31. Estate of Luke, 194 Cal. App. 3d 1006, 240 Cal. Rptr. 84 (1987); Estate of Nereson, 194 Cal. App. 3d 865, 239 Cal. Rptr. 865 (1987).

32. 194 Cal. App. 3d 1006, 240 Cal. Rptr. 84 (1987).

33. Estate of Luke, 194 Cal. App. 3d 1006, 1010-11, 240 Cal. Rptr. 84, 86 (1987). California's in-law inheritance statute has been called "almost incomprehensible." Estate of McInnis, 182 Cal. App. 3d 949, 956, 227 Cal. Rptr. 604, 609 (1986).

34. Estate of Nereson, 194 Cal. App. 3d 865, 239 Cal. Rptr. 865 (1987).

35. In the *Nereson* case, there was also an apportionment issue concerning fire insurance proceeds. The home was damaged by fire shortly before Oberlin's death. Fire insurance proceeds were paid into his estate. The fire insurance premium had been paid out of Oberlin's separate property funds, long after his wife's death. The court agreed that the fire insurance proceeds should not be subject to in-law inheritance. Estate of Nereson, 194 Cal. App. 3d 865, 873-74, 239 Cal. Rptr. 865, 869-70 (1987).

would be equitable to award Oberlin's sister a pro rata share based on the proportion of the mortgage payments after Ethel's death to the total mortgage payments.

The court had to apportion the total value of the home to separate out the portion attributable to the predeceased spouse from the portion not so attributable.[36] Apportionment requires resort to community property law as well as to intestate succession law.[37] Under community property law, when there have been both community and separate property contributions to property that has appreciated in value, the court must allocate the proper portion of enhanced value to the separate and community interests.[38] There is no invariable formula or precise standard; allocation is a question of fact governed by the circumstances of each case.[39] The trial court has considerable discretion in choosing the method for allocating separate and community property interests.[40] Thus, it is impossible to tell what the actual apportionment will be without litigating the issue.

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36. Apportionment under in-law inheritance is an exception to intestate succession law generally, under which there is no apportionment.

37. Estate of Nereson, 194 Cal. App. 3d 865, 871, 239 Cal. Rptr. 865, 868 (1987).

38. 7 B. Witkin, Summary of California Law *Community Property* §25, at 5119 (8th ed. 1974).

39. 7 B. Witkin, Summary of California Law *Community Property* §26, at 5120 (8th ed. 1974).

40. Estate of Nereson, 194 Cal. App. 3d 865, 876, 239 Cal. Rptr. 865, 872 (1987). One commonly used rule of apportionment in community property law is that of Pereira v. Pereira, 156 Cal. 1, 103 P. 488 (1909). Under *Pereira*, the separate property contribution to community property is allowed the usual interest on a long-term investment well secured — for example, seven percent. 7 B. Witkin, Summary of California Law *Community Property* §28, at 5121 (8th ed. 1974). In *Nereson*, the mortgage payments made from separate property were $7,177. If we apply the *Pereira* rule and allow seven percent interest on the mortgage payments, that yields about $2,000 as the return on separate property. The result is that most of the appreciation (about $115,000) accrues to the community property interest, not the separate property interest.

The other commonly used rule of apportionment in community property law is that of Van Camp v. Van Camp, 53 Cal. App. 17, 199 P. 885 (1921). In *Van Camp*, the husband formed a corporation with his separate property funds. He worked for the corporation and received a salary. The salary was obviously community property, but the court held that corporate dividends were his separate property. The court declined to apportion any of the corporate earnings to the husband's skill and labor, a community contribution. Under *Van Camp*, the reasonable value of the husband's services is allocated to the community

Rights of Relatives of Predeceased Spouse Under Recently Enacted Laws

A number of recently enacted laws provide rules to deal with situations where equitable considerations favor inheritance by relatives of a predeceased spouse. These new laws do not depend on identifying the source of the property, nor do they require complex tracing and apportionment or burdensome search and notice. The enactment of these new laws has made the in-law inheritance statute no longer necessary or desirable.

The strongest case for inheritance by a child of a predeceased spouse is one where the decedent would have adopted the child of the predeceased spouse but for a legal barrier. Probate Code Section 6408, enacted in 1983, provides that in this case a child of the predeceased spouse takes by intestate succession:

> (b) For the purpose of determining intestate succession by a person or his or her decedents from or through a . . . stepparent, the relationship of parent and child exists between that person and his or her . . . stepparent if (1) the relationship began during the person's minority and continued throughout the parties' joint lifetimes and (2) it is established by clear and convincing evidence that the . . . stepparent would have adopted the person but for a legal barrier.

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interest. The rest of the increase in value remains separate property. This is the reverse of the *Pereira* rule (reasonable return to separate contribution, bulk of appreciation to community interest). If we apply the *Van Camp* rule to the *Nereson* case and allow a seven percent return to the community interest, that yields about $24,000 as the return on community property. The result is that most of the appreciation in value (about $93,000) accrues to the separate property interest, not the community interest.

In summary, the *Pereira* and *Van Camp* rules yield the following results in the *Nereson* case:

	Community property portion	*Separate property portion*
Pereira rule:	$115,000	$2,000
Van Camp rule:	$24,000	$93,000

This repeal of the in-law inheritance statute would not affect this provision which provides significantly greater protection to the stepchild than the in-law inheritance statute, since the in-law inheritance statute applies only where the decedent leaves no surviving spouse or issue and only to property attributable to the predeceased spouse.

Another compelling case for inheritance by relatives of a predeceased spouse exists where one spouse kills the other and then dies. Without special provisions to cover this case, the killer spouse would inherit from the predeceased spouse, and then relatives of the killer spouse would take the property of the killer spouse, including the property inherited from the predeceased spouse. But Probate Code Sections 250-257 prevent a person who feloniously and intentionally kills another from receiving any property from the decedent, whether by will, intestate succession, nonprobate transfer, or otherwise. Thus, if one spouse kills another, the property of the deceased spouse goes to heirs of the deceased spouse excluding the killer spouse. The in-law inheritance statute is unnecessary to deal with this situation.

In an unusual case, it may be possible for the killer spouse to predecease the victim spouse and thus to take advantage of the in-law inheritance statute:[41] In a murder-suicide case about fifteen years ago, the husband shot his wife and then shot himself. He died a few minutes before his wife did. They were both intestate. There were no children of the marriage. On the husband's death, all the community property passed to his wife. When she died a few minutes later, the former community property was subject to the in-law inheritance statute — the beneficiaries were children of the killer by a prior marriage.[42] Repeal of the in-law inheritance

41. See Reppy & Wright, *California Probate Code § 229: Making Sense of a Badly Drafted Provision for Inheritance by a Community Property Decedent's Former In-laws*, 8 Community Prop. J. 107 (1981).

42. Reppy & Wright, *California Probate Code § 229: Making Sense of a Badly Drafted Provision for Inheritance by a Community Property Decedent's Former In-laws*, 8

statute would reduce the likelihood that relatives of the killer spouse could take in such a case.[43]

Under legislation enacted in 1989, a potential heir must live at least 120 hours longer than a decedent who dies without a will in order to inherit property from that decedent.[44] This new rule provides a more just result where a husband and wife each have children of a prior marriage and are both killed in the same accident. Without the new rule, if one spouse survived the other by a fraction of a second, that spouse's children would inherit all the community property and a disproportionate share of the separate property. Under the new rule, the separate property of each spouse and half of the community property passes to that spouse's heirs, a result more consistent with what the spouses probably would have wanted. The in-law inheritance statute did not provide a satisfactory solution to this problem, since the statute does not apply where the last spouse to die has surviving issue. The new rule takes into account the equities of the situation and deals with them in the same way they are dealt with in a number of other states.[45]

Community Prop. J. 107 (1981). In the insurance context, judicial decisions have held that the killer's heirs should not benefit from the crime. See, e.g., 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) (order fixing inheritance tax in murder- suicide case). However, under the in-law inheritance statute, relatives of the predeceased spouse are considered heirs of the last-to-die spouse, not heirs of the predeceased spouse. Note, *Confusion Surrounding the Determination of Heirs by Application of Sections 228 and 229 of the California Probate Code*, 7 Hastings L.J. 336 (1956). Thus it appears that, in the murder-suicide case where the killer dies first, relatives of the killer spouse can take from the victim spouse under the in-law inheritance statute. Because of revisions in the in-law inheritance statute since this murder-suicide case, relatives of the killer spouse would only take the half of the community property that belonged to the killer spouse and passed to the victim spouse on the former's death. See Reppy & Wright, supra, at 108.

43. Relatives of the first-to-die killer spouse could still take from the last-to-die victim spouse under subdivision (g) of Probate Code Section 6402 as a last resort to prevent escheat if the victim spouse had no blood relatives.

44. Prob. Code §6403, as amended by 1989 Cal. Stat. ch. 544, § 5. The 1989 amendment to Section 6403 makes the section the same in substance as Section 2-104 of the Uniform Probate Code (1987) insofar as Section 2-104 applies to taking by intestate succession.

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

In most cases, a person who dies without a will probably would want the children or grandchildren of his or her spouse to take before his or her more remote heirs. The decedent may well have had a close relationship with the spouse's children or grandchildren, and little affection or contact with his or her more remote relatives. This situation is dealt with by a provision added to the general intestate succession statute in 1983[46] to provide that the surviving issue of decedent's predeceased spouse take in preference to more remote heirs of the decedent. This provision deals more adequately with this situation than does the in-law inheritance statute.[47]

A person who dies without a will most likely would want the surviving parents or surviving issue of a parent of his or her predeceased spouse to take in preference to having the property escheat to the state. This situation is dealt with by a provision in the general intestate succession statute[48] which permits these relatives of the predeceased spouse to take when there are no next of kin of the decedent. Repeal of the special rule of in-law inheritance would not disturb this general intestate succession rule.

As discussed above, the in-law inheritance statute is no longer needed to deal with situations where equity calls for inheritance by relatives of a predeceased spouse. The recently-enacted provisions outlined above deal with these situations better and more comprehensively than does the in-law inheritance statute, and without the need to identify the source of the property, without complex tracing and apportionment, and without burdensome search and notice requirements.

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46. Prob. Code §6402 (added by 1983 Cal. Stat. ch. 842, §55).

47. A distinguished law professor has written that the objective of protecting children of the predeceased spouse by a prior marriage may be better accomplished by improving the priority such children have under the general intestate succession law to take all of the decedent's property, instead of creating a special rule for a limited class of property—that attributable to a predeceased spouse. See Niles, *Probate Reform in California*, 31 Hastings L.J. 185, 207 (1979).

48. Prob. Code §6402.

PROPOSED LEGISLATION

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

An act to repeal Section 6402.5 of the Probate Code, relating to intestate succession.

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

Probate Code § 6402.5 (repealed). Portion of estate attributable to decedent's predeceased spouse

SECTION 1. Section 6402.5 of the Probate Code is repealed.

~~6402.5. (a) For purposes of distributing real property under this section if the decedent had a predeceased spouse who died not more than 15 years before the decedent and there is no surviving spouse or issue of the decedent, the portion of the decedent's estate attributable to the decedent's predeceased spouse passes as follows:~~

~~(1) If the decedent is survived by issue of the predeceased spouse, to the surviving issue of the predeceased spouse; if they are all of the same degree of kinship to the predeceased spouse they take equally, but if of unequal degree those of more remote degree take in the manner provided in Section 240.~~

~~(2) If there is no surviving issue of the predeceased spouse but the decedent is survived by a parent or parents of the predeceased spouse, to the predeceased spouse's surviving parent or parents equally.~~

~~(3) If there is no surviving issue or parent of the predeceased spouse but the decedent is survived by issue of a parent of the predeceased spouse, to the surviving issue of the parents of the predeceased spouse or either of them, the issue taking equally if they are all of the same degree of kinship to the predeceased spouse, but if of unequal degree those of more remote degree take in the manner provided in Section 240.~~

~~(4) If the decedent is not survived by issue, parent, or issue of a parent of the predeceased spouse, to the next of kin of the decedent in the manner provided in Section 6402.~~

~~(5) If the portion of the decedent's estate attributable to the decedent's predeceased spouse would otherwise escheat to the state because there is no kin of the decedent to take under Section 6402, the portion of the decedent's estate attributable to the predeceased spouse passes to the next of kin of the predeceased spouse who shall take in the same manner as the next of kin of the decedent take under Section 6402.~~

~~(b) For purposes of distributing personal property under this section if the decedent had a predeceased spouse who died not more than five years before the decedent, and there is no surviving spouse or issue of the decedent, the portion of the decedent's estate attributable to the decedent's predeceased spouse passes as follows:~~

~~(1) If the decedent is survived by issue of the predeceased spouse, to the surviving issue of the predeceased spouse; if they are all of the same degree of kinship to the predeceased spouse they take equally, but if of unequal degree those of more remote degree take in the manner provided in Section 240.~~

~~(2) If there is no surviving issue of the predeceased spouse but the decedent is survived by a parent or parents of the predeceased spouse, to the predeceased spouse's surviving parent or parents equally.~~

~~(3) If there is no surviving issue or parent of the predeceased spouse but the decedent is survived by issue of a parent of the predeceased spouse, to the surviving issue of the parents of the predeceased spouse or either of them, the issue taking equally if they are all of the same degree of kinship to the predeceased spouse, but if of unequal degree those of more remote degree take in the manner provided in Section 240.~~

~~(4) If the decedent is not survived by issue, parent, or issue of a parent of the predeceased spouse, to the next of kin of the decedent in the manner provided in Section 6402.~~

~~(5) If the portion of the decedent's estate attributable to the decedent's predeceased spouse would otherwise escheat to the state because there is no kin of the decedent to take under Section 6402, the portion of the decedent's estate attributable to the predeceased spouse passes to the next of kin of the predeceased spouse who shall take in the same manner as the next of kin of the decedent take under Section 6402.~~

~~(c) For purposes of disposing of personal property under subdivision (b), the claimant heir bears the burden of proof to show the exact personal property to be disposed of to the heir.~~

~~(d) For purposes of providing notice under any provision of this code with respect to an estate that may include personal property subject to distribution under subdivision (b), if the aggregate fair market value of tangible and intangible personal property with a written record of title or ownership in the estate is believed in good faith by the petitioning party to be less than ten thousand dollars ($10,000), the petitioning party need not give notice to the issue or next of kin of the predeceased spouse. If the personal property is subsequently determined to have an aggregate fair market value in excess of ten thousand dollars ($10,000), notice shall be given to the issue or next of kin of the predeceased spouse as provided by law.~~

~~(e) For the purposes of disposing of property pursuant to subdivision (b), "personal property" means that personal property in which there is a written record of title or ownership and the value of which in the aggregate is ten thousand dollars ($10,000) or more.~~

~~(f) For the purposes of this section, the "portion of the decedent's estate attributable to the decedent's predeceased spouse" means all of the following property in the decedent's estate:~~

~~(1) One-half of the community property in existence at the time of the death of the predeceased spouse.~~

~~(2) One-half of any community property, in existence at the time of death of the predeceased spouse, which was given to the decedent by the predeceased spouse by way of gift, descent, or devise.~~

~~(3) That portion of any community property in which the predeceased spouse had any incident of ownership and which vested in the decedent upon the death of the predeceased spouse by right of survivorship.~~

~~(4) Any separate property of the predeceased spouse which came to the decedent by gift, descent, or devise of the predeceased spouse or which vested in the decedent upon the death of the predeceased spouse by right of survivorship.~~

~~(g) For the purposes of this section, quasi-community property shall be treated the same as community property.~~

~~(h) For the purposes of this section:~~

~~(1) Relatives of the predeceased spouse conceived before the decedent's death but born thereafter inherit as if they had been born in the lifetime of the decedent.~~

~~(2) A person who is related to the predeceased spouse through two lines of relationship is entitled to only a single share based on the relationship which would entitle the person to the larger share.~~

Comment. Former Section 6402.5 is not continued. See *Recommendation Proposing Repeal of Probate Code Section 6402.5 (In-Law Inheritance)*, 20 Cal. L. Revision Comm'n Reports 571 (1990).

Uncodified transitional provision

SEC. 2. This act does not apply in any case where the decedent died before the operative date of this act, and such case continues to be governed by the law applicable to the case before the operative date of this act.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Access to Decedent's Safe Deposit Box

December 1989

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

NOTE

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

Cite this recommendation as *Recommendation Relating to Access to Decedent's Safe Deposit Box*, 20 Cal. L. Revision Comm'n Reports 597 (1990).

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

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December 1, 1989

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

This recommendation proposes to make clear that, when a decedent dies having a safe deposit box in a financial institution, a survivor with a key to the box may gain access to remove instructions for the disposition of the decedent's remains, to get a copy of the will, and to inventory the contents of the box. Most, but not all, financial institutions now permit this without explicit legislative authorization.

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

Respectfully submitted,

Edwin K. Marzec
Chairperson

RECOMMENDATION

When a person dies, the person's will and instructions for disposition of his or her remains may be in a safe deposit box in a financial institution. Instructions for disposition of remains are needed immediately so this may be done in accordance with the decedent's wishes. The will is needed before letters are issued so it may be determined who is entitled to appointment as executor.

Most financial institutions permit the attorney and a member of the surviving family to get access to the decedent's safe deposit box to remove a will or instructions for disposition of remains, if the person seeking access has a key and produces a death certificate.[1] However, this practice is not invariably followed: Sometimes financial institutions will not permit access to a safe deposit box until after letters are issued.[2]

The Commission recommends legislation to permit a person who has a key to a decedent's safe deposit box to have immediate access to obtain a copy of the decedent's will, to remove instructions for disposition of decedent's remains, and to inventory the contents of the box.[3] The person seeking access should be required to establish the fact of the decedent's death by furnishing the financial institution with a

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1. See Gould, *First Steps in Handling a Decedent's Estate*, in 1 California Decedent Estate Practice § 2.25 (Cal. Cont. Ed. Bar, Feb. 1989). See also Kellogg, Managing an Estate Planning Practice, Client Communication and Automatic Drafting § 6.4, at 213 (Cal. Cont. Ed. Bar, 3d ed. 1982) (executor, surviving spouse, or close relative may ask bank to open safe deposit box to remove will). Former Section 14344 of the Revenue and Taxation Code prohibited removal from a safe deposit box of anything other than a will or burial instructions without consent of the California Controller. Section 14344 was repealed in 1980 as part of a bill to conform California law to federal law. See 1980 Cal. Stat. ch. 634; *Review of Selected 1980 California Legislation*, 12 Pac. L.J. 235, 569-77 (1981).

2. Letter from Kenneth M. Klug to John H. DeMoully, Executive Secretary of California Law Revision Commission (March 15, 1989).

3. This is consistent with Probate Code Section 330, which authorizes a public administrator, government official, law enforcement agency, hospital or institution in which a decedent died, or decedent's employer, to deliver decedent's personal property to decedent's surviving spouse, relative, conservator, or guardian, without the need for issuance of letters to a personal representative.

certified copy of the decedent's death certificate, or a written statement of death from the coroner, treating physician, or hospital or institution where the decedent died, and to give the financial institution reasonable proof of the identity of the person seeking access.

When the person seeking access has given the financial institution this proof, the financial institution should be required to keep a record of the identity of the person and to permit the person to open the safe deposit box under the supervision of an officer or employee of the financial institution. The financial institution itself should be required to take custody of all wills of the decedent found in the safe deposit box and to do all of the following:

(1) Deliver the wills to the clerk of the superior court of the county in which the estate of the decedent may be administered.[4]

(2) Provide the person given access with a photocopy of all wills of the decedent found in the safe deposit box. If the person is not the named executor, the financial institution should be authorized to impose a reasonable fee for the copy.

(3) Mail a copy of the will to the person named in the will as executor, if the person's whereabouts is known, or if not, to any person named in the will as a beneficiary, if the person's whereabouts is known.

(4) Permit the person given access to remove any instructions for disposition of decedent's remains, and to inventory the contents of the box.

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4. This duty is already imposed on custodians of wills generally by Probate Code Section 8200.

PROPOSED LEGISLATION

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

Heading to Part 10 (commencing with Section 330) (amended).

PART 10. ~~DELIVERY OF~~ *IMMEDIATE STEPS CONCERNING* DECEDENT'S TANGIBLE PERSONAL PROPERTY *AND SAFE DEPOSIT BOX*

Note. This amendment to the heading of Part 10 of Division 2 of the Probate Code is made to the heading as it will be proposed to be enacted at the 1990 legislative session by Assembly Bill 759.

Probate Code § 331 (added). Access to decedent's safe deposit box

331. (a) This section applies only to a safe deposit box in a financial institution rented by the decedent in the decedent's sole name, or rented by the decedent and others where all are deceased.

(b) A person who has a key to the safe deposit box may, before letters have been issued, obtain access to the safe deposit box only for the purposes specified in this section by providing the financial institution with both of the following:

(1) Proof of the decedent's death. Proof may be provided by a certified copy of the decedent's death certificate or by a written statement of death from the coroner, treating physician, or hospital or institution where decedent died.

(2) Reasonable proof of the identity of the person seeking access. Reasonable proof of identity is provided for the purpose of this paragraph if the requirements of Section 13104 are satisfied.

(c) When the person seeking access has satisfied the requirements of subdivision (b), the financial institution shall do all of the following:

(1) Keep a record of the identity of the person.

(2) Permit the person to open the safe deposit box under the supervision of an officer or employee of the financial institution, and to make an inventory of its contents.

(3) Take custody of all wills of the decedent found in the safe deposit box.

(4) Deliver the wills to the clerk of the superior court and mail or deliver a copy to the person named in the will as executor or beneficiary as provided in Section 8200.

(5) If the person given access is not entitled to a copy under paragraph (4), on payment of a reasonable fee by the person, provide the person with a photocopy of any will of the decedent found in the safe deposit box.

(6) Permit the person given access to remove any instructions for disposition of the decedent's remains if the instructions are not an integral part of the decedent's will.

(d) Except as provided in subdivision (c), the person given access shall not remove any of the contents of the decedent's safe deposit box.

(e) Nothing in this section prevents collection of a decedent's property pursuant to Division 8 (commencing with Section 13000).

Comment. Section 331 is new, and permits a person who has a key to a decedent's safe deposit box to gain immediate access in order to obtain a copy of the decedent's wills, remove instructions for disposition of the decedent's remains, and inventory the contents of the box. If no other directions have been given by the decedent, the right to control the disposition of the decedent's remains devolves, in order, on the surviving spouse, children, parents, other kindred, and the public administrator. Health & Safety Code § 7100.

If the person seeking access does not have a key to the safe deposit box and is not the public administrator, the person must obtain letters from the court to gain access to the box. Concerning the authority of the public administrator, see Section 7603.

Paragraph (4) of subdivision (b) requires the financial institution to deliver the wills to the clerk of the superior court and mail or deliver a copy to the person named in the will as executor or beneficiary "as provided in Section 8200." Section 8200 requires the custodian to

deliver the will to the clerk of the superior court in the county in which the estate of the decedent may be administered, and to mail a copy of the will to the person named in the will as executor, if the person's whereabouts is known to the custodian, or if not, to a person named in the will as a beneficiary, if the person's whereabouts is known to the custodian. For the county in which the estate of the decedent may be administered, see Sections 7051 (for California domiciliary, county of domicile), 7052 (nondomiciliary). See also Sections 40 ("financial institution" defined), 52 ("letters" defined), 88 ("will" includes a codicil).

Note. This new section is added to the Probate Code proposed to be enacted at the 1990 legislative session by Assembly Bill 759.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Priority of Conservator or Guardian for Appointment as Administrator

December 1989

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

NOTE

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

Cite this recommendation as *Recommendation Relating to Priority of Conservator or Guardian for Appointment as Administrator*, 20 Cal. L. Revision Comm'n Reports 607 (1990).

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

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ANN E. STODDEN
VAUGHN R. WALKER

December 1, 1989

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

This recommendation proposes to limit the priority of a guardian or conservator of the estate of a ward or conservatee who dies without a will to be appointed as administrator of the estate. At present, such a guardian or conservator has priority over the public administrator and the decedent's creditors. To have the priority, the recommendation requires that the guardian or conservator have filed a first account, and not be serving as guardian or conservator for any other person.

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

Respectfully submitted,

Edwin K. Marzec
Chairperson

RECOMMENDATION

If a person dies without a will and it is necessary to appoint an administrator of the estate, priority for appointment goes first to relatives of the decedent, then to parents or issue of the decedent's predeceased spouse.[1] If none of these is available to serve, next priority goes to a conservator or guardian of the estate of the decedent acting in that capacity at the time of death, and then to the public administrator.[2]

If the decedent has a conservator or guardian who has not properly performed the duties of the office and the conservator or guardian is appointed administrator of the estate, there is a danger that the malfeasance of the conservator or guardian will not receive careful scrutiny. In order to lessen this danger, the Law Revision Commission recommends that the priority of a conservator or guardian for appointment as administrator be limited to the case where the conservator or guardian has filed a first account with the court[3] and is not serving as guardian or conservator for anyone else.

The filing of the first account will permit the court to review the performance of the conservator or guardian before appointment as administrator. The requirement that the guardian or conservator not be serving in that capacity for anyone else will deny automatic priority to an institutional conservator or guardian with responsibility for many conservatees or wards. For good cause, the court should have discretion to give priority notwithstanding that a first account has not been filed or that the conservator or guardian is also acting in that capacity for someone else.

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1. Prob. Code § 8461.
2. Prob. Code § 8461.
3. The first account of a conservator or guardian is required one year after appointment. Prob. Code § 2620.

PROPOSED LEGISLATION

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

Probate Code § 8461 (amended). Priority for appointment as administrator

8461. Subject to the provisions of this article, a person in the following relation to the decedent is entitled to appointment as administrator in the following order of priority:

(a) Surviving spouse.
(b) Children.
(c) Grandchildren.
(d) Other issue.
(e) Parents.
(f) Brothers and sisters.
(g) Issue of brothers and sisters.
(h) Grandparents.
(i) Issue of grandparents.
(j) Children of a predeceased spouse.
(k) Other issue of a predeceased spouse.
(*l*) Other next of kin.
(m) Parents of a predeceased spouse.
(n) Issue of parents of a predeceased spouse.
(o) Conservator or guardian of the estate acting in that capacity at the time of death *who has filed a first account and is not acting as conservator or guardian for any other person.*
(p) Public administrator.
(q) Creditors.
(r) Any other person.

Comment. Subdivision (o) of Section 8461 is amended to limit the priority for a conservator or guardian of the estate to the case where a first account has been filed (Prob. Code § 2620) and the conservator or guardian is not acting in that capacity for any other person. See also

Section 8469 (court discretion to give priority to conservator or guardian where requirements of Section 8461 not met).

Note. This amendment to Section 8461 is made to Section 8461 of the Probate Code as it will be proposed to be enacted at the 1990 legislative session by Assembly Bill 759.

Probate Code § 8469 (added). Conservator or guardian who does not meet requirements of Section 8461

8469. (a) For good cause, the court may allow the priority given by Section 8461 to a conservator or guardian of the estate of the decedent serving in that capacity at the time of death that has not filed a first account, or that is acting as guardian or conservator for another person, or both.

(b) If the petition for appointment as administrator requests the court to allow the priority permitted by subdivision (a), the petitioner shall, in addition to the notice otherwise required by statute, serve notice of the hearing by mail or personal delivery on the public administrator.

Comment. Section 8469 is new. It permits the court to allow the priority given by Section 8461 to a guardian or conservator of the estate of the decedent serving in that capacity at the time of death, notwithstanding that the guardian or conservator fails to satisfy the other requirements of Section 8461.

Note. This new section is added to the Probate Code proposed to be enacted at the 1990 legislative session by Assembly Bill 759.

TABLE OF SOURCES

Note. The recommendations in this publication would be effectuated by enactment of several bills in the 1990 session of the Legislature. The following table gives the source of background material relating to a particular section in the recommendations in this publication. In the column of page numbers, the first number is the beginning page where a section and its Comment appears. The page numbers in parenthesis indicate the inclusive pages of the recommendation in which the section appears.

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