

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

## Relocation of Powers of Appointment Statute

September 1991

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 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 *Relocation of Powers of Appointment Statute*, 21 Cal. L. Revision Comm'n Reports 91 (1991).

STATE OF CALIFORNIA

PETE WILSON, Governor

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September 12, 1991

To: The Honorable Pete Wilson  
*Governor of California*, and  
The Legislature of California

This recommendation proposes relocation of the power of appointment statute from the Civil Code to the Probate Code, where it appropriately belongs with other estate planning tools. The proposed legislation would also codify the case-law and Restatement rules concerning compliance with special requirements on exercise of a power of appointment specified by the creator of the power.

This recommendation was prepared pursuant to Resolution Chapter 81 of the Statutes of 1988 and Resolution Chapter 37 of the Statutes of 1980, continued in Resolution Chapter 33 of the Statutes of 1991.

Respectfully submitted,

Edwin K. Marzec  
*Chairperson*



## RELOCATION OF POWERS OF APPOINTMENT STATUTE

### *Relocation of Statute*

The power of appointment statute is located in the Civil Code.<sup>1</sup> The Commission proposes relocating the statute to the Probate Code where it more logically belongs.<sup>2</sup>

Powers of appointment are estate planning tools commonly created by wills and trusts and thus are logically related to statutes now included in the Probate Code. There is no compelling reason for locating powers of appointment in the Civil Code provisions concerning acquisition of property. It would be much more convenient for attorneys, judges, and nonlawyers if powers of appointment were covered in the Probate Code. Several other statutes once in the Civil Code have been moved to the Probate Code in the course of the Commission's preparation of the new code.<sup>3</sup> The existing statute makes several references to other statutes, all of them in the Probate Code.<sup>4</sup> Relocating the power of appointment statute also has the advantage of making the

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1. Civ. Code §§ 1380.1-1392.1. This statute was originally enacted and later revised on Commission recommendation. See *Recommendation and a Study Relating to Powers of Appointment*, 9 Cal. L. Revision Comm'n Reports 301 (1969); *Background Statement Concerning Reasons for Amending Statute Relating to Powers of Appointment*, 14 Cal. L. Revision Comm'n Reports 257 (1978); *Recommendation Relating to Revision of the Powers of Appointment Statute*, 15 Cal. L. Revision Comm'n Reports 1667 (1980); see also *Tentative Recommendation Relating to Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301, 2484 (1982); *Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Reports 501, 755 (1986); *Recommendation Relating to Uniform Statutory Rule Against Perpetuities*, 20 Cal. L. Revision Comm'n Reports 2501, 2538-39 (1990).

2. The new statute would become Part 14 (commencing with Section 600) of Division 2 (General Provisions) of the Probate Code.

3. See 1990 Cal. Stat. ch. 79, operative July 1, 1991.

4. See Civ. Code §§ 1388.3 (reference to Prob. Code § 1460 *et seq.*), 1389.4 (reference to Prob. Code § 240), 1391 (reference to Prob. Code § 21200 *et seq.*), 1392.1 (reference to Prob. Code § 15400).

common definitions of the Probate Code applicable in a consistent fashion.<sup>5</sup>

*Judicial Relief from Formalities Specified by Donor*

The existing statute provides that, if the instrument creating the power of appointment “specifies requirements as to the manner, time, and conditions” of its exercise, the “power can be exercised only by complying with those requirements.”<sup>6</sup> However, case law has applied a more forgiving standard. In *Estate of Wood*<sup>7</sup> the court upheld exercise of a power of appointment that did not strictly comply with the donor’s requirement of delivery on the grounds that there was substantial compliance and that no presumed purpose of the donor would be thwarted. The Restatement (Second) of Property (Donative Transfers) also provides for judicial relief from strict compliance with special requirements imposed by the donor on exercise of the power.<sup>8</sup>

The Commission recommends revision of the strict compliance rule to codify the general rule of *Estate of Wood* and make the statute consistent with the Restatement rule.<sup>9</sup> The Commission believes the proposed rule to be preferable, and the revision will eliminate the danger that persons reading the statute literally will be misled.

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5. See, e.g., Prob. Code §§ 50 (issue), 56 (person), 62 (property), 68 (real property), 82 (trust), 84 (trustee), 88 (will). The special definitions applicable to powers of appointment will be continued in the relocated statute. See Civ. Code § 1381.1.

6. Civ. Code § 1385.1.

7. 32 Cal. App. 3d 862, 881-83, 108 Cal. Rptr. 522 (1973).

8. See Restatement (Second) of Property (Donative Transfers) § 18.3 & comment (1986). The Restatement adopts an equitable approximation rule.

9. See proposed Prob. Code § 631 in the Recommended Legislation, *infra*. The proposal to codify the rule in *Estate of Wood*, *supra* note 7, was first proposed in a California State Bar Conference of Delegates Resolution. See Cal. Stat. Bar Conf. Delegates Res. 7-15-90 (1990).

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§ 695. Authority to revoke or release power of appointment

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## **Prob. Code §§ 600-695 (added). Powers of appointment**

### **PART 14. POWERS OF APPOINTMENT**

**Comment.** This part supersedes Title 7 (commencing with Section 1380.1) of Part 4 of Division 2 of the Civil Code. The former power of appointment statute is continued in this part without change, except as noted in the Comments to the new sections. The former statute was originally enacted and later revised on recommendation of the California Law Revision Commission. See *Recommendation and a Study Relating to Powers of Appointment*, 9 Cal. L. Revision Comm'n Reports 301 (1969); *Background Statement Concerning Reasons for Amending Statute Relating to Powers of Appointment*, 14 Cal. L. Revision Comm'n Reports 257 (1978); *Recommendation Relating to Revision of the Powers of Appointment Statute*, 15 Cal. L. Revision Comm'n Reports 1667 (1980); see also *Tentative Recommendation Relating to Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301, 2484 (1982); *Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Reports 501, 755 (1986); *Recommendation Relating to Uniform Statutory Rule Against Perpetuities*, 20 Cal. L. Revision Comm'n Reports 2501, 2538-39 (1990).

This part does not codify all of the law relating to powers of appointment. Its provisions deal with the problems most likely to arise and afford positive statutory rules to govern these problems. Many minor matters are not covered by this part or other statutes; these are left to court decisions under the common law which remains in effect. See Section 600 & Comment. This approach was taken in other states. See Mich. Stat. Ann. § 26.155(119) (Callaghan 1984); Minn. Stat. Ann. § 502.62 (West 1990); N.Y. Est. Powers & Trusts Law § 10-1.1 (McKinney 1967); Wis. Stat. Ann. § 702.19 (West Supp. 1990).

### **CHAPTER 1. GENERAL PROVISIONS**

#### **§ 600. Common law applies unless modified by statute**

600. Except to the extent that the common law rules governing powers of appointment are modified by statute, the common law as to powers of appointment is the law of this state.

**Comment.** Section 600 continues former Civil Code Section 1380.1 without change. This section codifies the holding in *In re Estate of Sloan*, 7 Cal. App. 2d 319, 46 P.2d 1007 (1935), that the common law of powers

of appointment is in effect in California unless modified by statute. See also *In re Estate of Elston*, 32 Cal. App. 2d 652, 90 P.2d 608 (1939); *In re Estate of Davis*, 13 Cal. App. 2d 64, 56 P.2d 584 (1936). As used in this section, the “common law” does not refer to the common law as it existed in 1850 when the predecessor of Civil Code Section 22.2 was enacted. Rather, the reference is to the contemporary and evolving rules of decisions developed by the courts in exercise of their power to adapt the law to new situations and to changing conditions. See, e.g., *Fletcher v. Los Angeles Trust & Sav. Bank*, 182 Cal. 177, 187 P. 425 (1920).

### **§ 601. Law applicable to powers created prior to July 1, 1970**

601. If the law existing at the time of the creation of a power of appointment and the law existing at the time of the release or exercise of the power of appointment or at the time of the assertion of a right given by this part differ, the law existing at the time of the release, exercise, or assertion of a right controls. Nothing in this section makes invalid a power of appointment created before July 1, 1970, that was valid under the law in existence at the time it was created.

**Comment.** Section 601 continues former Civil Code Section 1380.2 without substantive change. This section makes this part applicable where a release is executed, a power is exercised, or a right is asserted on or after July 1, 1970 (operative date of former Civil Code Sections 1380.1-1392.1), regardless of when the power was created. However, Section 601 deals only with the “release” or “exercise” of a power of appointment or the “assertion of a right” given by this part. The section does not deal with “creation” of powers of appointment, and nothing in the section makes invalid a power of appointment created before July 1, 1970, where the power was valid under the law in effect at the time it was created.

Under this section, the rights of creditors after July 1, 1970, with respect to a power of appointment — whether created before or after July 1, 1970 — are controlled by Sections 680-683. Likewise, after July 1, 1970, such matters as the exercise of a power of appointment are governed by this part, even though the power of appointment was created before July 1, 1970.

Provisions similar to this section have been enacted in other states. See Mich. Stat. Ann. § 26.155(122) (Callaghan 1984); Wis. Stat. Ann. § 702.21 (West 1981).

## CHAPTER 2. DEFINITIONS; CLASSIFICATION OF POWERS OF APPOINTMENT

### § 610. Definitions

610. As used in this part:

(a) “Appointee” means the person in whose favor a power of appointment is exercised.

(b) “Appointive property” means the property or interest in property that is the subject of the power of appointment.

(c) “Creating instrument” means the deed, will, trust, or other writing or document that creates or reserves the power of appointment.

(d) “Donee” means the person to whom a power of appointment is given or in whose favor a power of appointment is reserved.

(e) “Donor” means the person who creates or reserves a power of appointment.

(f) “Permissible appointee” means a person in whose favor a power of appointment can be exercised.

**Comment.** Section 610 continues former Civil Code Section 1381.1 without substantive change. The definitions have been reorganized in alphabetical order. See also Sections 56 (“person” defined), 62 (“property” defined), 82 (“trust” defined), 88 (“will” defined).

The definitions of “appointee,” “donee,” and “donor” are substantially the same as provided in Restatement of Property Section 319 (1940). *Accord* Restatement (Second) of Property (Donative Transfers) § 11.2 (1986). The definition of “creating instrument” in subdivision (c) is similar to a Michigan provision. See Mich. Stat. Ann. § 26.155(102)(g) (Callaghan 1984). The definitions of “appointive property” and “permissible appointee” are different from the Restatement, but are substantially the same in meaning as Restatement of Property Section 319(3), (6) (1940). See also Restatement (Second) of Property (Donative Transfers) § 11.3 (1986).

### § 611. “General” and “special” powers of appointment

611. (a) A power of appointment is “general” only to the extent that it is exercisable in favor of the donee, the donee’s estate, the

donee's creditors, or creditors of the donee's estate, whether or not it is exercisable in favor of others.

(b) A power to consume, invade, or appropriate property for the benefit of a person in discharge of the donee's obligation of support that is limited by an ascertainable standard relating to their health, education, support, or maintenance is not a general power of appointment.

(c) A power exercisable by the donee only in conjunction with a person having a substantial interest in the appointive property that is adverse to the exercise of the power in favor of the donee, the donee's estate, the donee's creditors, or creditors of the donee's estate is not a general power of appointment.

(d) A power of appointment that is not "general" is "special."

(e) A power of appointment may be general as to some appointive property, or an interest in or a specific portion of appointive property, and be special as to other appointive property.

**Comment.** Section 611 continues former Civil Code Section 1381.2 without substantive change. The reference to "persons" in subdivision (b) has been omitted as surplus. See Section 10 (singular includes plural).

This part generally codifies the common law and adopts the prevailing professional usage, which is in accord with the definitions contained in the federal estate tax law and provisions in other states. See I.R.C. § 2041 (b)(1); Mich. Stat. Ann. § 26.155(102)(h), (i) (Callaghan 1984); N.Y. Est. Powers & Trusts Law § 10-3.2(b), (c) (McKinney 1967); Wis. Stat. Ann. § 702.01(3) (West Supp. 1990); Restatement (Second) of Property (Donative Transfers) § 11.4 (1986).

A power of appointment is "general" only to the extent that it is exercisable in favor of the donee, the donee's estate, the donee's creditors, or creditors of the donee's estate. Thus, for example, *A* places property in trust, and gives *B* a power to consume the income from the trust in such amounts as are necessary to support *B* in accordance with *B*'s accustomed manner of living whenever *B*'s annual income from all other sources is less than \$15,000. *B*'s power is limited to consumption of the income from the trust; in no event can *B* (or *B*'s creditors under Section 682) reach the trust principal. Moreover, *B*'s power is limited by one of a variety of commonly

used ascertainable standards and is therefore under this section a “general” power only to the extent that that standard is satisfied. Finally, *B*’s power is subject to the condition that *B*’s annual income from all other sources must be less than \$15,000, and is not, therefore, presently exercisable until that condition is met.

A power is general so long as it can be exercised in favor of any one of the following: the donee, the donee’s estate, the donee’s creditors, or the creditors of the donee’s estate. To be classified as general, the power does not have to give the donee a choice among all of this group; it is sufficient if the power enables the donee to appoint to any one of them. However, a power that is not otherwise considered to be a general power is not classified as general merely because a particular permissible appointee may, in fact, be a creditor of the donee or the donee’s estate. A similar rule obtains under the federal estate tax and gift tax regulations. Treas. Reg. §§ 20.2041-1(c), 25.2514-1(c) (1991). Moreover, the mere fact that the donee has a power to appoint for the benefit of persons in discharge of an obligation of support does not make the power a general one if it is limited by an ascertainable standard relating to their support. See subdivision (b). This exception is not found in the tax law definition.

Subdivision (c) sets forth the “adverse party” exception contained in both the federal and state tax laws.

A special power generally is one that permits the donee to appoint to a class that does not include the donee, the donee’s estate, the donee’s creditors, or the creditors of the donee’s estate. If the class among whom the donee may appoint includes only specified persons but also includes the donee, the donee’s estate, the donee’s creditors, or the creditors of the donee’s estate, the power to that extent is general rather than special.

Subdivision (e) is included to make clear that a power of appointment may be general as to part of the appointive property and special as to the rest. Thus, where *A* devises property to *B* for life and at *B*’s death to be distributed, one-half to any person *B* by will directs, and one-half to *C*, *D*, or *E* as *B* by will directs, *B* has a general testamentary power as to one-half the property and a special testamentary power as to the remaining one-half.

See also Sections 610(b) (“appointive property” defined), 610(d) (“donee” defined).

## § 612. “Testamentary” and “presently exercisable” powers of appointment

612. (a) A power of appointment is “testamentary” if it is exercisable only by a will.

(b) A power of appointment is “presently exercisable” at the time in question to the extent that an irrevocable appointment can be made.

(c) A power of appointment is “not presently exercisable” if it is “postponed.” A power of appointment is “postponed” in either of the following circumstances:

(1) The creating instrument provides that the power of appointment may be exercised only after a specified act or event occurs or a specified condition is met, and the act or event has not occurred or the condition has not been met.

(2) The creating instrument provides that an exercise of the power of appointment is revocable until a specified act or event occurs or a specified condition is met, and the act or event has not occurred or the condition has not been met.

**Comment.** Section 612 continues former Civil Code Section 1381.3 without substantive change. This section differentiates among powers of appointment by focusing on the time at which the power may be effectively exercised. A power of appointment that can be exercised by inter vivos instrument as well as by will is not a power that can be exercised “only by a will,” and hence is not a testamentary power under subdivision (a).

A power may be neither “testamentary” nor “presently exercisable” if it is “postponed,” as provided in subdivision (c). When the term “power not presently exercisable” is used in this part, it includes both testamentary powers and powers that are otherwise postponed. The following is an example of a “postponed” power of appointment: The creating instrument provides that a wife’s power of appointment over certain property held in trust by a bank is exercisable “only by a written instrument other than a will on file with the trustee at the death of my wife” and, to ensure that the wife retains unlimited discretion throughout her lifetime, the creating instrument further provides that any instrument of appointment shall be revocable

during the donee's lifetime. Although the wife has filed a written instrument with the trustee designating the appointees, she is still alive.

See also Section 610(c) ("creating instrument" defined).

### **§613. "Imperative" and "discretionary" powers of appointment**

613. A power of appointment is "imperative" where the creating instrument manifests an intent that the permissible appointees be benefited even if the donee fails to exercise the power. An imperative power can exist even though the donee has the privilege of selecting some and excluding others of the designated permissible appointees. All other powers of appointment are "discretionary." The donee of a discretionary power is privileged to exercise, or not to exercise, the power as the donee chooses.

**Comment.** Section 613 continues former Civil Code Section 1381.4 without substantive change. A power of appointment is either imperative or discretionary. If a power is imperative, the donee must exercise it or the court will divide the appointive property among the potential appointees. See Section 671. The duty to make an appointment is normally considered unenforceable during the life of the donee. See Restatement of Property § 320 special note, at 1830 (1940). A discretionary power, on the other hand, may be exercised or not exercised as the donee chooses. Nonexercise will result in the property passing to the takers in default or returning to the donor's estate. See Section 672.

Section 613 does not state what constitutes a manifestation of intent that "the permissible appointees be benefited even if the donee fails to exercise the power." The common law determines when such an intent has been manifested. See Section 600 & Comment. See also *O'Neil v. Ross*, 98 Cal. App. 306, 277 P. 123 (1929) (discussion of "mandatory" powers but no holding concerning them).

Section 613 is similar to a New York provision. See N.Y. Est. Powers & Trusts Law § 10-3.4 (McKinney 1967).

See also Sections 610(a) ("appointee" defined), 610(c) ("creating instrument" defined), 610(d) ("donee" defined).

### CHAPTER 3. CREATION OF POWERS OF APPOINTMENT

#### § 620. Donor's capacity

620. A power of appointment can be created only by a donor having the capacity to transfer the interest in property to which the power relates.

**Comment.** Section 620 continues former Civil Code Section 1382.1 without change. This section codifies case law. See *Swart v. Security-First Nat'l Bank*, 48 Cal. App. 2d 824, 120 P.2d 697 (1942). See also Section 610(e) ("donor" defined); Code Civ. Proc. § 1971 (creation of power relating to real property).

### CHAPTER 4. EXERCISE OF POWERS OF APPOINTMENT

#### Article 1. Donee's Capacity

#### § 625. Donee's capacity

625. (a) A power of appointment can be exercised only by a donee having the capacity to transfer the interest in property to which the power relates.

(b) Unless the creating instrument otherwise provides, a donee who is a minor may not exercise a power of appointment during minority.

**Comment.** Section 625 continues former Civil Code Section 1384.1 without change. Under this section, the normal rules for determining capacity govern the capacity of the donee to exercise a power of appointment. See *Swart v. Security-First Nat'l Bank*, 48 Cal. App. 2d 824, 120 P.2d 697 (1942). Subdivision (a) states the common law rule embodied in Section 345 of the Restatement of Property (1940) and is substantially the same as provisions in Michigan and Wisconsin. See Mich. Stat. Ann. § 26.155(105)(1) (Callaghan 1984); Wis. Stat. Ann. § 702.05(1) (West 1981). *Accord* Restatement (Second) of Property (Donative Transfers) § 18.1(1) (1986).

Subdivision (b) states a requirement applicable to a donee who is a minor. This requirement is in addition to the general requirement stated in subdivision (a) (e.g., that the donee has not been judicially determined to be incapacitated) that a minor donee also must satisfy.

See also Sections 610(c) (“creating instrument” defined), 610(d) (“donee” defined).

## Article 2. Scope of Donee’s Authority

### § 630. Scope of donee’s authority generally

630. (a) Except as otherwise provided in this part, if the creating instrument specifies requirements as to the manner, time, and conditions of the exercise of a power of appointment, the power can be exercised only by complying with those requirements.

(b) Unless expressly prohibited by the creating instrument, a power stated to be exercisable by an inter vivos instrument is also exercisable by a written will.

**Comment.** Section 630 continues former Civil Code Section 1385.1 without substantive change. Subdivision (a) codifies the common law rule embodied in Section 346 of the Restatement of Property (1940). *Accord* Restatement (Second) of Property (Donative Transfers) § 18.2 (1986); see also Restatement of Property § 324 (1940).

Subdivision (b) states an exception to the rule codified in subdivision (a). This exception is not found in the common law, but a similar exception is found in the law of other states. See Mich. Stat. Ann. § 26.155(105)(2) (Callaghan 1984); Minn. Stat. Ann. § 502.64 (West 1990); N.Y. Est. Powers & Trusts Law § 10-6.2(a)(3) (McKinney 1967). Often a directive in the creating instrument that a power be exercised by an inter vivos instrument places an inadvertent and overlooked limitation on the exercise of the power. If and when such a prescription is encountered, it is reasonable to say that, “All the purposes of substance which the donor would have had in mind are accomplished by a will of the donee.” See Restatement of Property § 347 comment b (1940). However, if the donor expressly prohibits the testamentary exercise of the power, the donor’s clear intent should be enforced. For example, if the creating instrument requires exercise of the power “only by an instrument other than a will,” subdivision (b) is not applicable. See also Code Civ. Proc. § 1971 (power relating to real property).

See also Section 610(c) (“creating instrument” defined).

**§ 631. Judicial relief from formalities specified by donor**

631. (a) Where an appointment does not satisfy the formal requirements specified in the creating instrument as provided in subdivision (a) of Section 630, the court may excuse compliance with the formal requirements and determine that exercise of the appointment was effective if both of the following requirements are satisfied:

(1) The appointment approximates the manner of appointment prescribed by the donor.

(2) The failure to satisfy the formal requirements does not defeat the accomplishment of a significant purpose of the donor.

(b) This section does not permit a court to excuse compliance with a specific reference requirement under Section 632.

**Comment.** Section 631 is new. Subdivision (a) is drawn from Section 18.3 of the Restatement (Second) of Property (Donative Transfers) (1986). See also Restatement of Property § 347 (1940). The general rule in subdivision (a) is consistent with *Estate of Wood*, 32 Cal. App. 3d 862, 881-83, 108 Cal. Rptr. 522 (1973).

The formal requisites of an appointment described in subdivision (a) include both the formal requirements imposed by the donor that are significant and those that are of minor importance. For an exception, however, see subdivision (b). Unless some significant purpose is accomplished by an additional formal requirement imposed by the donor, equitable relief from the rigid enforcement of the additional formality is available. The rule stated in this subdivision arose in the English courts of Chancery and is still expressed as a rule that “equity will aid the defective execution of a power.” Restatement (Second) of Property (Donative Transfers) § 18.3 comment *a* (1986).

Under subdivision (a), where the donor imposes formal requirements with respect to the instrument of appointment that exceed the requirements imposed by law for the instrument, the donor’s purpose in imposing additional formal requirements must be determined. To the extent the failure to comply with the additional formal requirements will not undermine the accomplishment of a significant purpose, the court in applying equitable principles may save the appointment if the appointment approximates the formal requirements imposed by the donor. See Restatement (Second) of

Property (Donative Transfers) § 18.3 comment *c* (1986). The rule in Section 631(a) is not limited to the favored class of appointees described in the Restatement rule.

Subdivision (b) makes clear that the donor's requirement that the donee specifically refer to the power of appointment or the instrument creating it, as provided in Section 632, is not subject to equitable relief under this section.

### **§ 632. Requirement of specific reference to power of appointment**

632. If the creating instrument expressly directs that a power of appointment be exercised by an instrument that makes a specific reference to the power or to the instrument that created the power, the power can be exercised only by an instrument containing the required reference.

**Comment.** Section 632 continues former Civil Code Section 1385.2 without substantive change. This section permits a donor to require an express reference to the power of appointment to ensure a conscious exercise by the donee. In such a case, the specific reference to the power is a condition to its exercise. This condition precludes the use of form wills with "blanket" clauses exercising all powers of appointment owned by the testator. The use of blanket clauses may result in passing property without knowledge of the tax consequences and may cause appointment to unintended beneficiaries. This section embodies the rule set out in Michigan and Wisconsin law. See Mich. Stat. Ann. § 26.155(104) (Callaghan 1984); Wis. Stat. Ann. § 702.03(1) (West 1981).

See also Section 610(c) ("creating instrument" defined).

### **§ 633. Power of appointment requiring consent of donor or other person**

633. (a) If the creating instrument requires the consent of the donor or other person to exercise a power of appointment, the power can only be exercised when the required consent is contained in the instrument of exercise or in a separate written instrument, signed in each case by the person whose consent is required.

(b) Unless expressly prohibited by the creating instrument:

(1) If a person whose consent is required dies, the power may be exercised by the donee without the consent of that person.

(2) If a person whose consent is required becomes legally incapable of consenting, the person's guardian or conservator may consent to an exercise of the power.

(3) A consent may be given before or after the exercise of the power by the donee.

**Comment.** Section 633 continues former Civil Code Section 1385.3 without substantive change. The reference to "persons" in subdivision (a) has been omitted as surplus. See Section 10 (singular includes plural). Section 633 reflects a policy similar to provisions in other states. See Mich. Stat. Ann. § 26.155(105) (Callaghan 1984); Minn. Stat. Ann. § 502.68 (West 1990); N.Y. Est. Powers & Trusts Law § 10-6.4 (McKinney 1967); Wis. Stat. Ann. § 702.05(3) (West 1981). It is important to note that additional formalities may be necessary to entitle the instrument of exercise and the consent to be recorded. For example, under Government Code Section 27287, a consent apparently must be acknowledged to be recordable.

See also Sections 610(c) ("creating instrument" defined), 610(d) ("donee" defined), 610(e) ("donor" defined).

### **§ 634. Power of appointment created in favor of two or more donees**

634. A power of appointment created in favor of two or more donees can only be exercised when all of the donees unite in its exercise. If one or more of the donees dies, becomes legally incapable of exercising the power, or releases the power, the power may be exercised by the others, unless expressly prohibited by the creating instrument.

**Comment.** Section 634 continues former Civil Code Section 1385.4 without change. This section is consistent with the rule applicable trustees under Section 15620 and the law of other states. See Mich. Stat. Ann. § 26.155(105)(5) (Callaghan 1984); Minn. Stat. Ann. § 502.67 (West 1990); N.Y. Est. Powers & Trusts Law § 10-6.7 (McKinney 1967); Wis. Stat. Ann. § 702.05(4) (West 1981).

See also Sections 610(c) ("creating instrument" defined), 610(d) ("donee" defined).

**§ 635. Power of court to remedy defective exercise**

635. Nothing in this chapter affects the power of a court of competent jurisdiction to remedy a defective exercise of an imperative power of appointment.

**Comment.** Section 635 continues former Civil Code Section 1385.5 without change. This section is included to make clear that this chapter does not limit the power of a court under Section 671. The same provision is included in New York law. See N.Y. Est. Powers & Trusts Law § 10-6.2 (McKinney 1967).

See also Section 613 (“imperative” power defined).

**Article 3. Donee’s Required Intent****§ 640. Manifestation of intent to exercise power of appointment**

640. (a) The exercise of a power of appointment requires a manifestation of the donee’s intent to exercise the power.

(b) A manifestation of the donee’s intent to exercise a power of appointment exists in any of the following circumstances:

(1) The donee declares, in substance, that the donee exercises specific powers or all the powers the donee has.

(2) The donee purports to transfer an interest in the appointive property that the donee would have no power to transfer except by virtue of the power.

(3) The donee makes a disposition that, when considered with reference to the property owned and the circumstances existing at the time of the disposition, manifests the donee’s understanding that the donee was disposing of the appointive property.

(c) The circumstances described in subdivision (b) are illustrative, not exclusive.

**Comment.** Section 640 continues former Civil Code Section 1386.1 without substantive change. This section codifies case law and the common law generally. See *Childs v. Gross*, 41 Cal. App. 2d 680, 107 P.2d 424 (1940); *Reed v. Hollister*, 44 Cal. App. 533, 186 P. 819 (1919); Restatement of Property §§ 342, 343 (1940).

Subdivision (b) gives examples of when the donee has sufficiently manifested the intent under this section to exercise the power. The list is not exclusive, as provided in subdivision (c), and is similar to New York law. See N.Y. Est. Powers & Trusts Law § 10-6.1(a)(1)-(3) (McKinney 1967); see also Mich. Stat. Ann. § 26.155(104) (Callaghan 1984).

See also Sections 610(b) (“appointive property” defined), 610(d) (“donee” defined).

### **§ 641. Exercise of power of appointment by residuary clause or other language**

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

(b) This section applies in a case where the donee dies on or after July 1, 1982.

**Comment.** Subdivision (a) of Section 641 continues former Civil Code Section 1386.2 without substantive change. The word “intention” has been changed to “intent” for conformity with Section 640(a). Subdivision (b) codifies the transitional provision in 1981 Cal. Stat. ch. 63, §§ 10(d) & 11.

Section 641 adopts the substance of Uniform Probate Code Section 2-610 (1989). Under this section, a power of appointment is not exercised unless there is some manifestation of intent to exercise the power. A general residuary clause or disposition of all of the testator’s property, alone, is not such a manifestation of intent. This section recognizes that donees today may frequently intend that assets subject to a power of appointment pass to the takers in default, particularly assets held in a marital deduction trust. See Unif. Prob. Code § 2-610 comment (1989); French, *Exercise of Powers of Appointment: Should Intent to Exercise Be Inferred from a General Disposition of Property?*, 1979 Duke L.J. 747; cf. Unif. Prob. Code § 2-608 (1990) (revised rule).

Under Section 641, a general disposition of property in the donee’s will may exercise a power of appointment if there is some other indication of intent to include the appointive property in the disposition made. Such other indication of intent to exercise the power may be found in the will or in other evidence apart from the will. Section 640 sets forth a nonexclusive list of

types of evidence that indicate an intent to exercise a power of appointment. An exercise of a power of appointment may be found if a preponderance of the evidence indicates that the donee intended to exercise the power. See *Bank of New York, v. Black*, 26 N.J. 276, 286-87, 139 A.2d 393, 398 (1958). Section 641 does not apply where the donor has conditioned the exercise of the power on a specific reference to the power or to the instrument that created the power or has specified a specific method of exercise of the power. See Sections 630, 632.

### **§ 642. Will executed before creation of power of appointment**

642. If a power of appointment existing at the donee's death, but created after the execution of the donee's will, is exercised by the will, the appointment is effective except in either of the following cases:

(a) The creating instrument manifests an intent that the power may not be exercised by a will previously executed.

(b) The will manifests an intent not to exercise a power subsequently acquired.

**Comment.** Section 642 continues former Civil Code Section 1386.3 without substantive change. This section codifies the rule of *California Trust Co. v. Ott*, 59 Cal. App. 2d 715, 140 P.2d 79 (1943). It also states the rule in Section 344 of the Restatement of Property (1940). This section requires that a power of appointment be one "existing at the donee's death." Thus, where the donor executes a will creating a power exercisable by will, the donee executes a will purporting to exercise that power and thereafter dies, and later the donor dies without having changed his or her will, the attempted exercise by the donee is ineffective. This conclusion follows because the power of appointment was not one "existing at the donee's death" since the donor could have revoked or changed the will at any time before the donor died.

See also Section 610(d) ("donee" defined).

## **Article 4. Types of Appointments**

### **§ 650. General power of appointment**

650. (a) The donee of a general power of appointment may make an appointment:

(1) Of all of the appointive property at one time, or several partial appointments at different times, where the power is exercisable inter vivos.

(2) Of present or future interests or both.

(3) Subject to conditions or charges.

(4) Subject to otherwise lawful restraints on the alienation of the appointed interest.

(5) In trust.

(6) Creating a new power of appointment.

(b) The listing in subdivision (a) is illustrative, not exclusive.

**Comment.** Section 650 continues former Civil Code Section 1387.1 without change. This section embodies the common law rules found in Sections 356 and 357 of the Restatement of Property (1940). See also Restatement (Second) of Property (Donative Transfers) §§ 19.1, 19.2 (1986). It makes clear that, under a general power of appointment, the donee has the same freedom of disposition that the donee has with respect to property he or she owns. The types of appointment mentioned in subdivision (a) are those about which questions have most often arisen.

See also Sections 610(b) (“appointive property” defined), 610(d) (“donee” defined), 611 (“general” power of appointment defined).

### § 651. Special power of appointment

651. Subject to the limitations imposed by the creating instrument, the donee of a special power may make any of the types of appointment permissible for the donee of a general power under Section 650.

**Comment.** Section 651 continues former Civil Code Section 1387.2 without substantive change. This section embodies the rules stated in Sections 358 and 359 of the Restatement of Property (1940), except that this section authorizes the donee of a special power to exercise the power by creating a special power of appointment in a permissible appointee. Under Section 359 of the Restatement of Property, the donee could only exercise the power by creating a new special power under certain circumstances. Since the donee can appoint outright to one of the permissible appointees of the special power, it would be undesirable to refuse to allow the donee to give such a person a special power to appoint. See 3 R. Powell, Real

Property ¶ 398 (1991); see also Restatement (Second) of Property (Donative Transfers) §§ 19.3, 19.4 (1986). A special power is not, of course, the substantial equivalent of outright ownership and the creation of a special power in a permissible appointee may fail therefore to constitute a valid exercise of an imperative power. For example, where each of the permissible appointees under an imperative power is to receive not less than 10 percent of the appointive property, the creation of a special power in a permissible appointee would not satisfy this 10-percent requirement.

The donee of a special power of appointment may not have the same freedom as to types of appointments that the donee of a general power has. Other rules of law may limit the donee's ability to appoint in a particular manner. For example, although the donee of a special power may create a new power or appoint a future interest under this section, the appointment may be subject to a different method of computing the applicable period under the rule against perpetuities than under a general power. See Section 690 & Comment. In addition, the common law rules against fraud on a special power by appointing to persons who are not permissible appointees are not affected by this section. See *In re Estate of Carroll*, 153 Misc. 649, 275 N.Y.S. 911 (1934), *modified sub. nom. In re Content*, 247 App. Div. 11, 286 N.Y.S. 307 (1936), *modified sub. nom. In re Will of Carroll*, 274 N.Y. 288, 8 N.E.2d 864 (1937).

See also Sections 610(c) (“creating instrument” defined), 611 (“general” and “special” powers of appointment defined).

## § 652. Exclusive and nonexclusive powers of appointment

652. (a) Except as provided in subdivision (b), the donee of a special power of appointment may appoint the whole or any part of the appointive property to any one or more of the permissible appointees and exclude others.

(b) If the donor specifies either a minimum or maximum share or amount to be appointed to one or more of the permissible appointees, the exercise of the power must conform to the specification.

**Comment.** Section 652 continues former Civil Code Section 1387.3 without substantive change. This section deals with the problem of whether the donee of a special power of appointment can appoint all of the property to one appointee and exclude others, or must appoint some of the property

to each of the permissible appointees. For example, if the donee is given power “to appoint to his children,” there is a question whether the donee must give each child a share or whether the donee can appoint all of the assets to one child. If the donee may appoint to one or more of the permissible appointees and exclude others, the power is “exclusive.” If the donee must appoint a minimum share or amount specified in the creating instrument to each member of the class of permissible appointees, the power is “nonexclusive.” This section provides, in effect, that all powers are construed to be exclusive except to the extent that the donor has specified a minimum or maximum amount. It embodies the constructional preference for exclusive powers contained in Section 360 of the Restatement of Property (1940). *Accord* Restatement (Second) of Property (Donative Transfers) § 21.1 (1986).

The rule in this section changed California law as developed in *In re Estate of Sloan*, 7 Cal. App. 2d 319, 46 P.2d 1007 (1935), which was contrary to many common law decisions. See Annot., 69 A.L.R.2d 1285 (1960). Similar provisions have been adopted in other states. See Mich. Stat. Ann. § 26.155(107) (Callaghan 1984); N.Y. Est. Powers & Trusts Law § 10-5.1 (McKinney Supp. 1991); Wis. Stat. Ann. § 702.07 (West 1981).

See also Sections 610(a) (“appointee” defined), 610(b) (“appointive property” defined), 610(d) (“donee” defined), 610(e) (“donor” defined), 610(f) (“permissible appointee” defined), 611 (“special” power of appointment defined).

## **Article 5. Contracts to Appoint; Releases**

### **§ 660. Contracts to appoint**

660. (a) The donee of a power of appointment that is presently exercisable, whether general or special, can contract to make an appointment to the same extent that the donee could make an effective appointment.

(b) The donee of a power of appointment cannot contract to make an appointment while the power of appointment is not presently exercisable. If a promise to make an appointment under such a power is not performed, the promisee cannot obtain either specific performance or damages, but the promisee is not

prevented from obtaining restitution of the value given by the promisee for the promise.

(c) Unless the creating instrument expressly provides that the donee may not contract to make an appointment while the power of appointment is not presently exercisable, subdivision (b) does not apply to the case where the donor and the donee are the same person. In this case, the donee can contract to make an appointment to the same extent that the donee could make an effective appointment if the power of appointment were presently exercisable.

**Comment.** Section 660 continues former Civil Code Section 1388.1 without substantive change.

Under subdivision (a), a contract by a donee to make an appointment in the future that the donee could have made at the time the contract was executed does not conflict with any rule of the law of powers of appointment. The objection to such promises under a testamentary power — that if the promise is given full effect, the donee is accomplishing by contract what is forbidden by appointment — is inapplicable to a power of appointment that is presently exercisable. Subdivision (a) states the common law rule. See Restatement of Property § 339 (1940). It is substantially the same as the law in Michigan and New York. See Mich. Stat. Ann. § 26.155(110)(1) (Callaghan 1984); N.Y. Est. Powers & Trusts Law § 10-5.2 (McKinney 1967).

Section 660 is not intended to deal with the question of the extent to which an appointment is invalid when the donee of a special power appoints, either directly or indirectly to a person who is not a permissible appointee. This problem — fraud on special power — is left to the common law. See *In re Estate of Carroll*, 153 Misc. 649, 275 N.Y.S. 911 (1934), *modified sub. nom.* *In re Content*, 247 App. Div. 11, 286 N.Y.S. 307 (1936), *modified sub. nom.* *In re Will of Carroll*, 274 N.Y. 288, 8 N.E.2d 864 (1937).

Under subdivision (b), by giving a testamentary or postponed power to the donee, the donor expresses the desire that the donee's discretion be retained until the donee's death or such other time as is stipulated. To allow the donee to contract to appoint under such a power would permit the donor's intent to be defeated. The rule stated in subdivision (b) applies to all promises that are, in substance, promises to appoint. This would include,

for example, a promise not to revoke an existing will that makes an appointment in favor of the promisee. The rule with respect to releases of testamentary and postponed powers is similar. See Section 661. Subdivision (b) states the common law rule. See Restatement of Property § 340 (1940); *accord* Restatement (Second) of Property (Donative Transfers) § 16.2 (1986); *cf.* *Briggs v. Briggs*, 122 Cal. App. 2d 766, 265 P.2d 587 (1954); *Childs v. Gross*, 41 Cal. App. 2d 680, 107 P.2d 424 (1940).

Subdivision (b) also provides that the promisee can obtain neither specific performance nor damages for the breach of a promise to appoint although the donee is not prevented from obtaining restitution of value given for the promise to appoint. Restitution generally will be available unless precluded by other factors. This is the common law rule. Restatement of Property § 340 (1940); *accord* Restatement (Second) of Property (Donative Transfers) § 16.2 (1986).

Subdivision (c) restricts the prohibition in subdivision (b) to cases where the donor and the donee are different persons. This follows a revision in New York law. See N.Y. Est. Powers & Trusts Law § 10-5.3 (McKinney Supp. 1991); N.Y. Law Revision Comm'n, *Recommendation Relating to the Ability of a Donee of a Testamentary Power of Appointment to Contract to Appoint and to the Donee's Release of the Power, Under the Estates, Powers and Trusts Law*, N.Y. Leg. Doc. No. 65(C) (1977).

The purpose of subdivision (b) is to prevent the donor's intent from being defeated by the donee contracting to appoint under a power of appointment that is not presently exercisable. By giving a testamentary or postponed power to the donee, the donor expresses the desire that the donee's discretion be retained until the donee's death or such other time as is stipulated. However, where the donor and the donee are the same person, the donor's intent is better protected by an exception permitting the option of dealing with the power during the donor-donee's lifetime. Subdivision (c) makes clear that the donee of a power of appointment may contract to make an appointment while the power of appointment is not presently exercisable if the donor and donee are the same person, unless the creating instrument expressly provides that the donor-donee may not make an appointment while the power of appointment is not presently exercisable.

Subdivision (c) reflects a policy consistent with Section 683 which makes an unexercised general power of appointment created by the donor in the donor's own favor, whether or not presently exercisable, subject to the claims of creditors of the donor or of the donor's estate and to the expenses

of administration of the estate. A similar policy is reflected in Section 695(a) which permits the donor to revoke the creation of a power of appointment when the power is created in connection with a revocable trust.

See also Sections 610(c) (“creating instrument” defined), 610(d) (“donee” defined), 610(e) (“donor” defined), 611 (“general” and “special” powers of appointment defined), 612(b) (“presently exercisable” defined).

### **§ 661. Release of discretionary power of appointment**

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

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

(c) A release shall be delivered as follows:

(1) If the creating instrument specifies a person to whom a release is to be delivered, the release shall be delivered to that person, but delivery need not be made as provided in this paragraph if the person cannot with due diligence be found.

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

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

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

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

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

(e) This section does not impair the validity of a release made before July 1, 1970.

**Comment.** Section 661 continues former Civil Code Section 1388.2 without substantive change.

Subdivision (b) requires that, where the donor designated persons or a class to take in default of the donee's exercise of the power, a release of a power that is not presently exercisable must benefit all those so designated as provided by the donor. This requirement, added in 1981, substituted for the former rule that no release of a power was permissible when the result of the release was the present exercise of a power not presently exercisable. The language of the last sentence of subdivision (b) is taken from New York law. See N.Y. Est. Powers & Trusts Law § 10-5.3(b) (McKinney Supp. 1991). This provision is necessary to ensure that the release of a power not presently exercisable does not defeat the donor's intent by benefiting some but not all of the takers in default.

Subdivision (c) deals only with "delivery" of the release. Nothing in subdivision (c) precludes the recording of a release delivered in accordance

with paragraph (1), (2), or (3)(A) of subdivision (c). See Civ. Code §§ 1213-1215.

Subdivision (d) makes clear that a subsequent purchaser or encumbrancer, in good faith and for a valuable consideration, who first records is protected. See Civ. Code § 1214. The unrecorded instrument is valid as between the parties thereto and those who have notice thereof if the instrument is otherwise effective. See Civ. Code § 1217.

See also Sections 610(b) (“appointive property” defined), 610(c) (“creating instrument” defined), 610(d) (“donee” defined), 610(f) (“permissible appointee” defined), 611 (“general” and “special” powers of appointment defined), 612(a) (“testamentary” power of appointment defined), 612(c) (“not presently exercisable” power of appointment defined), 613 (“discretionary” power of appointment defined).

### **§ 662. Release on behalf of minor donee**

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

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

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

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

(2) The donor of the power, if alive.

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

(4) Other persons as ordered by the court.

(d) After hearing, the court in its discretion may make an order authorizing or requiring the guardian to release on behalf of the ward a general or special power of appointment as permitted under Section 661, if the court determines, taking into consideration all the relevant circumstances, that the ward as a prudent person would make the release of the power of appointment if the ward had the capacity to do so.

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

**Comment.** Section 662 continues former Civil Code Section 1388.3 without substantive change. This section provides a procedure for the release of a general or special power of a minor donee. The extent to which a general or special power of a minor donee may be released is determined by Section 661. The court in which a conservatorship proceeding is pending has authority to make an order authorizing or requiring the conservator on behalf of the conservatee to exercise or release the conservatee's powers as donee of a power of appointment. See Sections §§ 2580-2586. Section 662 gives the court in which the guardianship proceeding is pending authority to make an order authorizing or requiring the guardian to release the ward's powers as donee of a power of appointment, but the court is not authorized to order an exercise of the power of appointment. Section 625 provides that a minor donee may not exercise a power of appointment during minority unless the creating instrument otherwise provides. The court may make an order authorizing or requiring the guardian to release the power of appointment only if the court determines, taking into consideration all the relevant circumstances, that the ward as a prudent person would release the power if the ward had the capacity to do so. For example, to avoid unfavorable tax consequences, it may be desirable that the power of appointment be disclaimed or released in whole or in part.

See also Section 610(d) ("donee" defined).

## CHAPTER 5. EFFECT OF FAILURE TO MAKE EFFECTIVE APPOINTMENT

### § 670. Validity of unauthorized appointment

670. An exercise of a power of appointment is not void solely because it is more extensive than authorized by the power, but is valid to the extent that the exercise was permissible under the terms of the power.

**Comment.** Section 670 continues former Civil Code Section 1389.1 without substantive change. This section is based on a New York rule. See N.Y. Est. Powers & Trusts Law § 10-6.6(a)(1) (McKinney 1967).

Section 670 makes clear that, when a power is exercised partly in favor of an unauthorized person, the exercise is valid to the extent that it is permissible under the terms of the power. However, if a fraud on a special power is involved, the appointment is not permissible under the terms of the power and the disposition of the property should be determined by common law principles. See *In re Estate of Carroll*, 153 Misc. 649, 275 N.Y.S. 911 (1934), *modified sub. nom. In re Content*, 247 App. Div. 11, 286 N.Y.S. 307 (1936), *modified sub. nom. In re Will of Carroll*, 274 N.Y. 288, 8 N.E.2d 864 (1937).

Section 670 also covers other types of nonpermissible exercises of the power. For example, if the donor of a power specifies that the donee is to appoint 20 percent or less of the corpus of a trust to each of six permissible appointees and the donee appoints 25 percent to one of the permissible appointees, this section permits the appointee to receive 20 percent of the assets. Thus, an appointment of an excess amount will not invalidate the appointment, but will instead be deemed to be an appointment of the maximum amount.

### § 671. Nonexercise or improper exercise of imperative power of appointment

671. (a) Unless the creating instrument or the donee, in writing, manifests a contrary intent, where the donee dies without having exercised an imperative power of appointment either in whole or in part, the persons designated as permissible appointees take equally of the property not already appointed. Where the creating instrument establishes a minimum distribution

requirement that is not satisfied by an equal division of the property not already appointed, the appointees who have received a partial appointment are required to return a pro rata portion of the property they would otherwise be entitled to receive in an amount sufficient to meet the minimum distribution requirement.

(b) Where an imperative power of appointment has been exercised defectively, either in whole or in part, its proper execution may be adjudged in favor of the person intended to be benefited by the defective exercise.

(c) Where an imperative power of appointment has been created so that it confers on a person a right to have the power exercised in the person's favor, the proper exercise of the power can be compelled in favor of the person, or the person's assigns, creditors, guardian, or conservator.

**Comment.** Section 671 continues former Civil Code Section 1389.2 without substantive change. The reference to "persons" in subdivision (b) has been omitted as surplus. See Section 10 (singular includes plural).

Section 671 states the consequences flowing from the imperative character of a power of appointment. Under subdivision (a), if an imperative power of appointment is created and the donee of the power dies without exercising it, the appointive assets go equally to the permissible objects of the power. Where there has been a partial appointment, unless the creating instrument or the donee has manifested a contrary intent, the assets already appointed are not thrown into a hotchpot and are considered only to the extent necessary to satisfy a requirement set by the donor that each of the permissible appointees receive a certain minimum amount. The following illustrates these rules. The donor of a power specifies that the donee is to appoint at least 25 percent of the corpus of a trust to each of three permissible appointees (*A*, *B*, and *C*). (1) Donee appoints 10 percent to *A*, but fails to appoint the remainder. *B* and *C* each take 30 percent and *A* takes 40 percent (30 plus 10). (2) Donee appoints 40 percent to *A*, but fails to appoint the remainder. Since 60 divided by 3 equals 20, the donee failed to satisfy the minimum distribution requirement set by the donor. *A* therefore must "return" a portion of the property received. The appointive property will be distributed 25 percent (20 plus 5) each to *B* and *C* and 50 percent (40 plus 20 minus 10) to *A*. (3) Donee appoints 60 percent to *A*, 40 percent to *B*. This

again fails to satisfy the minimum distribution requirement. To obtain the 25 percent required, *A* and *B* must “return” on a pro rata basis and distribution is made accordingly — 45 percent (60 minus 15) to *A*, 30 percent (40 minus 10) to *B*, and 25 percent to *C*. The arithmetic can become quite complex but the principle remains the same. Unless the creating instrument or the donee, in writing, manifests a contrary intent, a partial appointment is to be treated as reflecting an intended preference. The requirement of a writing by the donee is consistent with Sections 6174 and 6409 concerning advancements.

Under subdivision (b), if the donee exercises the power defectively (e.g., without proper formalities), the court may allow the intended appointment to pass the assets to the person whom the donee attempted to benefit. A similar rule obtains in California concerning the defective exercise of a power of attorney. *Gerdes v. Moody*, 41 Cal. 335 (1871).

Under subdivision (c), if the power creates a right in the permissible appointee to compel the exercise of the power (e.g., where the donee must appoint to the donee’s children within ten years of the creation of the power and at the end of ten years the donee has only one child), that person may compel exercise of the power by the donee. In addition, the assignees or creditors of the appointee who possesses the right to compel exercise may also compel its exercise.

See also Sections 610(b) (“appointive property” defined), 610(c) (“creating instrument” defined), 610(d) (“donee” defined), 610(f) (“permissible appointee” defined), 613 (“imperative” power of appointment defined).

### **§ 672. Effect of failure to make effective appointment**

672. (a) Except as provided in subdivision (b), if the donee of a discretionary power of appointment fails to appoint the property, releases the entire power, or makes an ineffective appointment, in whole or in part, the appointive property not effectively appointed passes to the person named by the donor as taker in default or, if there is none, reverts to the donor.

(b) If the donee of a general power of appointment makes an ineffective appointment, an implied alternative appointment to the donee’s estate may be found if the donee has manifested an

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

**Comment.** Section 672 continues former Civil Code Section 1389.3 without substantive change. The reference to “persons” in subdivision (a) has been omitted as surplus. See Section 10 (singular includes plural).

Section 672 states the rules determining to whom property passes that has not been effectively appointed. Subdivision (a) states the accepted common law rule. See Restatement of Property § 365(1) (1940); see also Restatement (Second) of Property (Donative Transfers) §§ 23.1, 23.2 (1986). It also accords with the established rule in California. Estate of Baird, 120 Cal. App. 2d 219, 260 P.2d 1052 (1953); Estate of Baird, 135 Cal. App. 2d 333, 287 P.2d 365 (1955) (later decision in same case on different point). Under this section, the property passes directly from the donor to the ultimate takers.

Subdivision (b) provides a uniform rule as to the application of the doctrine of capture in cases where the donee of a general power of appointment makes an ineffective appointment. The distinction formerly made between appointments upon a trust that fails and other ineffective appointments has not been continued. In other respects Section 672 is intended to adopt the substance of the common law doctrine of capture or implied alternative appointment to the donee’s estate. See L. Simes, Handbook of the Law of Future Interests § 69 (2d ed. 1966); Restatement of Property § 365(2)-(3) (1940); see also Restatement (Second) of Property (Donative Transfers) § 23.2 (1986).

See also Sections 610(b) (“appointive property” defined), 613 (“discretionary” power of appointment defined), 610(d) (“donee” defined), 610(e) (“donor” defined), 611 (“general” power of appointment defined).

### **§ 673. Death of appointee before effective date of appointment**

673. (a) Except as provided in subdivision (b), if an appointment by will or by instrument effective only at the death of the donee is ineffective because of the death of an appointee before the appointment becomes effective and the appointee leaves issue surviving the donee, the surviving issue of the appointee take the appointed property in the same manner as the appointee would have taken had the appointee survived the donee, except that the property passes only to persons who are permissible appointees,

including appointees permitted under Section 674. If the surviving issue are all of the same degree of kinship to the deceased appointee, they take equally, but if of unequal degree, then those of more remote degree take in the manner provided in Section 240.

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

**Comment.** Section 673 continues former Civil Code Section 1389.4 without substantive change.

Section 673 embodies the theory of Sections 349 and 350 of the Restatement of Property (1940). It is broadened to cover special powers by employing the language used by Michigan law. Mich. Stat. Ann. § 26.155(120) (Callaghan 1984). This section is necessary because the general anti-lapse provision in Section 6147 does not specifically deal with lapse of a testamentary appointment. This section is not intended to cover the attempt to appoint property inter vivos to a predeceased appointee, but does apply to an instrument other than a will effective only at the death of the donee. Such an instrument is for all practical purposes identical to a will and is accorded the same effect.

Section 673 permits issue of an appointee to take the appointed property where an appointee dies before the appointment becomes effective and leaves issue surviving the donee, whether or not the issue is related to the donee. Prior to the 1981 amendment of former Civil Code Section 1389.4, the section apparently permitted only issue of an appointee related to the donee to take the appointed property where the appointee died before the appointment becomes effective. See French, *Application of Antilapse Statutes to Appointments Made by Will*, 53 Wash. L. Rev. 405, 432 (1978).

Section 673 provides a more liberal antilapse provision than the general antilapse provision of Section 6147, because Section 673 does not require that the issue of the predeceased appointee be related either to the donor or donee. This section permits the children of the donee's spouse to take if the donee's spouse is the appointee and dies before the appointment becomes effective. Likewise, an appointment to a brother, sister, niece, or nephew of the donee's spouse will not lapse. A person may not take under Section 673 unless the person is a permissible appointee.

Section 673 adopts the general rule of representation provided by Section 240. See also Sections 230-234 (proceeding to determine whether issue of an appointee survived the donee).

As provided in subdivision (b), this section applies only in the absence of a manifestation of a contrary intent by the donor or donee. It is intended to fill the gap if there is no discernible intent of the donor or donee as to the desired disposition of the property when an intended taker dies before the effective date of the disposition.

See also Sections 610(a) (“appointee” defined), 610(b) (“appointive property” defined), 610(d) (“donee” defined), 610(e) (“donor” defined), 610(f) (“permissible appointee” defined).

#### **§ 674. Death of permissible appointee before exercise of special power of appointment**

674. (a) Unless the creating instrument expressly provides otherwise, if a permissible appointee dies before the exercise of a special power of appointment, the donee has the power to appoint to the issue of the deceased permissible appointee, whether or not the issue was included within the description of the permissible appointees, if the deceased permissible appointee was alive at the time of the execution of the creating instrument or was born thereafter.

(b) This section applies whether the special power of appointment is exercisable by inter vivos instrument, by will, or otherwise.

(c) This section applies to a case where the power of appointment is exercised on or after July 1, 1982, but does not affect the validity of any exercise of a power of appointment made before July 1, 1982.

**Comment.** Subdivisions (a) and (b) of Section 674 continue former Civil Code Section 1389.5 without substantive change. Subdivision (a) permits an appointment under a special power to the issue of a predeceased permissible appointee. A special power of appointment is usually designed to permit flexibility in the ultimate disposition of the property by permitting the donee to take into account changing family circumstances. Permitting the donee to select not only among the primary class members, but also

among the issue of those who are deceased, is necessary to permit effectuation of the donor's purpose. Section 674 applies the principle of the antilapse statute to this situation without regard to whether the substitute takers are included within the permissible appointees. See generally French, *Application of Antilapse Statutes to Appointments Made by Will*, 53 Wash. L. Rev. 405 (1978).

As provided in subdivision (b), this section applies in the absence of an express contrary provision in the creating instrument. The section is designed to fill the gap if the creating instrument is silent as to the desired disposition of the property when a permissible appointee dies before the time of the exercise of the power.

Subdivision (c) codifies the operative date rule in 1981 Cal. Stat. ch. 63, §§ 10(c) & 11.

See also Sections 610(c) ("creating instrument" defined), 610(d) ("donee" defined), 611 ("special" power of appointment defined), 610(f) ("permissible appointee" defined).

## CHAPTER 6. RIGHTS OF CREDITORS

### § 680. Authority of donor to alter rights of creditors of donee

680. The donor of a power of appointment cannot nullify or alter the rights given creditors of the donee by Sections 682, 683, and 684 by any language in the instrument creating the power.

**Comment.** Section 680 continues former Civil Code Section 1390.1 without substantive change. This section deals with a question that has not been considered by the California appellate courts. It is patterned after a provision adopted in New York. See N.Y. Est. Powers & Trusts Law § 10-4.1(4) (McKinney 1967). This section prevents instruments utilizing Treasury Regulations Section 20.2056(b)-5(f)(7) (allowing a marital deduction despite a spendthrift clause in the instrument creating the power) from nullifying the rights given creditors under Sections 682 and 683. The addition of the reference to Section 684 protects the dependents' support rights from being avoided by language in the creating instrument.

See also Sections 610(c) ("creating instrument" defined), 610(d) ("donee" defined), 610(e) ("donor" defined).

### **§ 681. Creditor claims against property subject to special power of appointment**

681. Property covered by a special power of appointment is not subject to the claims of creditors of the donee or of the donee's estate or to the expenses of the administration of the donee's estate.

**Comment.** Section 681 continues former Civil Code Section 1390.2 without substantive change. This section codifies the common law rule that bars creditors from reaching the property covered by a special power of appointment. See Restatement of Property § 326 (1940). The section is the same in substance as a New York provision. See N.Y. Est. Powers & Trusts Law § 10-7.1 (McKinney 1967).

See also Section 610(d) ("donee" defined).

### **§ 682. Creditor claims against property subject to general power of appointment**

682. (a) To the extent that the property owned by the donee is inadequate to satisfy the claims of the donee's creditors, property subject to a general power of appointment that is presently exercisable is subject to the claims to the same extent that it would be subject to the claims if the property were owned by the donee.

(b) Upon the death of the donee, to the extent that the donee's estate is inadequate to satisfy the claims of creditors of the estate and the expenses of administration of the estate, property subject to a general testamentary power of appointment or to a general power of appointment that was presently exercisable at the time of the donee's death is subject to the claims and expenses to the same extent that it would be subject to the claims and expenses if the property had been owned by the donee.

(c) This section applies whether or not the power of appointment has been exercised.

**Comment.** Section 682 continues former Civil Code Section 1390.3 without substantive change. This section states the rule with respect to the

availability of property subject to a general power of appointment to satisfy the donee's debts. It is intended to make appointive property available to satisfy creditors' claims where the donee has the equivalent of full ownership of the property. See Comment to Section 611.

Subdivision (a) provides that the creditors of a donee possessing a power of appointment that is both general and presently exercisable can reach the appointive property for the satisfaction of their claims. However, these creditors must first exhaust the remainder of the donee's assets before resorting to the appointive property. See *Estate of Masson*, 142 Cal. App. 2d 510, 298 P.2d 619 (1956). Subject to this limitation, appointive property is treated just as property owned by the donee. Thus, where the property has been appointed by an inter vivos instrument, the property is liable if, had it been owned by the donee, the transfer would have been subject to the rules relating to fraudulent conveyances. See Restatement of Property § 330 (1940); see also Restatement (Second) of Property (Donative Transfers) § 13.5 (1986).

Subdivision (b) provides that the same rule applies to property covered by a general testamentary power (or equivalent) that has, in effect, become presently exercisable because of the donee's death. In this case, the appointive property has come under the power of disposition of the debtor-donee and hence is treated the same as other property of the decedent.

Subdivision (c) provides that the rights of creditors are not dependent on the exercise of the power. Unlike the common law rule, which requires the exercise of the power, the mere existence of the power is the operative fact essential to the rights of creditors. In addition, the nature of the donee's interest in the property is irrelevant. The property available to creditors can be either a present or a future interest.

See also Sections 610(d) ("donee" defined), 611 ("general" power of appointment defined), 612(a) ("testamentary" power of appointment defined), 612(b) ("presently exercisable" power of appointment defined).

### **§ 683. Creditor claims against property subject to unexercised general power of appointment created by donor in donor's favor**

683. Property subject to an unexercised general power of appointment created by the donor in the donor's favor, whether or not presently exercisable, is subject to the claims of the

donor's creditors or the donor's estate and to the expenses of the administration of the donor's estate.

**Comment.** Section 683 continues former Civil Code Section 1390.4 without substantive change. This section provides that, when the donor of a general power of appointment is also its donee, creditors of the donor-donee can reach the appointive property even though it is in terms exercisable only at a future date (as, for example, by will of the donor-donee). This section codifies the common law rule. See Restatement of Property § 328 (1940); *accord* Restatement (Second) of Property (Donative Transfers) § 13.3 (1986).

See also Sections 610(e) ("donor" defined), 611 ("general" power of appointment defined), 612(b) ("presently exercisable" power of appointment defined).

### **§ 684. Status of support creditor**

684. For the purposes of Sections 682 and 683, a person to whom the donee owes an obligation of support shall be considered a creditor of the donee to the extent that a legal obligation exists for the donee to provide the support.

**Comment.** Section 684 continues former Civil Code Section 1390.5 without substantive change. This section makes clear that the donee's support obligations can be enforced against (1) property subject to a general power of appointment that is presently exercisable (Section 682), and (2) property subject to an unexercised general power of appointment created in the donor's own favor, whether or not presently exercisable (Section 683).

See also Section 610(d) ("donee" defined).

## **CHAPTER 7. RULE AGAINST PERPETUITIES**

### **§ 690. Beginning of permissible perpetuities period**

690. The statutory rule against perpetuities provided by Part 2 (commencing with Section 21200) of Division 11 applies to powers of appointment governed by this part.

**Comment.** Section 690 continues former Civil Code Section 1391 without substantive change. See Sections 21206 (statutory rule against perpetuities as to general power of appointment not presently exercisable because of condition precedent), 21207 (statutory rule against perpetuities as to nongeneral power of appointment or general testamentary power of

appointment), 21210 (when power of appointment created), 21211 (postponement of time of creation of power of appointment), 21212 (time of creation of power of appointment arising from transfer to trust or other arrangement).

## **CHAPTER 8. REVOCABILITY OF CREATION, EXERCISE, OR RELEASE OF POWER OF APPOINTMENT**

### **§ 695. Authority to revoke or release power of appointment**

695. (a) Unless the power to revoke is in the creating instrument or exists pursuant to Section 15400, the creation of a power of appointment is irrevocable.

(b) Unless made expressly irrevocable by the creating instrument or the instrument of exercise, an exercise of a power of appointment is revocable if the power to revoke exists pursuant to Section 15400 or so long as the interest in the appointive property, whether present or future, has not been transferred or become distributable pursuant to the appointment.

(c) Unless the power to revoke is reserved in the instrument releasing the power, a release of a power of appointment is irrevocable.

**Comment.** Section 695 continues former Civil Code Section 1392.1 without substantive change. Under subdivision (a), the creation of a power of appointment is irrevocable unless the power to revoke is reserved in the instrument creating the power or unless the power is created in connection with a trust that is revocable under the presumption in Section 15400. In the latter case, to avoid a conflict between this section and Section 15400, the power of appointment is revocable to the same extent that the trust in connection with which it is created is revocable.

Under subdivision (b), an exercise of a power of appointment is revocable as long as the interest in the appointive property has not been transferred or become distributable, unless the creating instrument or instrument of exercise provides otherwise. This subdivision embodies a policy that the donee should be permitted to modify or revoke an exercise of the power as long as the appointive property has not been effectively transferred. A donee may exercise the power of appointment by creating a trust for the benefit of permissible appointees. To avoid conflict with Section 15400 (presumption

of revocability of trusts), subdivision (b) permits the donee to revoke the exercise, even though there has been an effective transfer, if the power to revoke exists pursuant to Section 15400.

Under subdivision (c), the release of a power of appointment is irrevocable, unless the power to revoke is reserved in the instrument of release. The procedure necessary to effect a release is provided in Section 661.

See also Sections 610(b) (“appointive property” defined), 610(c) (“creating instrument” defined).

## DISPOSITION TABLE

### **Civ. Code §§ 1380.1-1392.1 (repealed). Powers of appointment**

**Comment.** The powers of appointment statute in former Civil Code Sections 1380.1-1392.1 is continued without substantive change in Probate Code Sections 600-695, except as otherwise noted in the Comments to the new sections. The following table indicates the disposition of each of the former Civil Code sections in the Probate Code.

<i>Civ. Code</i>	<i>Prob. Code</i>	<i>Civ. Code</i>	<i>Prob. Code</i>
1380.1 . . . . .	600	1387.2 . . . . .	651
1380.2 . . . . .	601	1387.3 . . . . .	652
1381.1 . . . . .	610	1388.1 . . . . .	660
1381.2 . . . . .	611	1388.2 . . . . .	661
1381.3 . . . . .	612	1388.3 . . . . .	662
1381.4 . . . . .	613	1389.1 . . . . .	670
1382.1 . . . . .	620	1389.2 . . . . .	671
1384.1 . . . . .	625	1389.3 . . . . .	672
1385.1 . . . . .	630	1389.4 . . . . .	673
1385.2 . . . . .	632	1389.5 . . . . .	674
1385.3 . . . . .	633	1390.1 . . . . .	680
1385.4 . . . . .	634	1390.2 . . . . .	681
1385.5 . . . . .	635	1390.3 . . . . .	682
1386.1 . . . . .	640	1390.4 . . . . .	683
1386.2 . . . . .	641	1390.5 . . . . .	684
1386.3 . . . . .	642	1391 . . . . .	690
1387.1 . . . . .	650	1392.1 . . . . .	695

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

## Miscellaneous Creditors' Remedies Matters

November 1991

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 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 *Miscellaneous Creditors' Remedies Matters*, 21 Cal. L. Revision Comm'n Reports 135 (1991).

STATE OF CALIFORNIA

PETE WILSON, Governor

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November 1, 1991

To: The Honorable Pete Wilson  
*Governor of California*, and  
The Legislature of California

This recommendation proposes changes in two areas of debtor and creditor law:

(1) The Wage Garnishment Law needs revision to resolve several technical issues arising since the 1989 repeal of the 90-day earnings withholding period. These issues involve procedures for obtaining full satisfaction of judgments, return date for writs of execution, accrual of interest and addition of costs to outstanding earnings withholding orders, limitations on dormancy and suspension of wage garnishments, and satisfaction of final earnings withholding orders for costs and interest.

(2) The procedure for propounding interrogatories to judgment debtors would be revised to make clear that the 35-interrogatory limit in the general civil discovery statute is not cumulative but is applied to each round of interrogatories propounded in post-judgment enforcement proceedings.

This recommendation was prepared pursuant to Resolution Chapter 40 of the Statutes of 1983, continued in Resolution Chapter 33 of the Statutes of 1991.

Respectfully submitted,

Edwin K. Marzec  
*Chairperson*



## MISCELLANEOUS CREDITORS' REMEDIES MATTERS

### Interrogatories to Judgment Debtor

The Enforcement of Judgments Law permits a judgment creditor to propound written interrogatories to the judgment debtor.<sup>1</sup> The general discovery statute has been revised to provide a 35-interrogatory limit on specially prepared interrogatories in an action.<sup>2</sup>

The Commission is informed that this limitation has been applied to limit the cumulative number of judgment creditor interrogatories to judgment debtors. This application of the general discovery statute unduly limits the interrogatory remedy. The interrogatory remedy under the Enforcement of Judgments Law is already limited to one set of interrogatories every 120 days. The Commission recommends an amendment to make clear that the 35-interrogatory limit applies to the set of interrogatories propounded to a judgment debtor in each round and is not applied cumulatively.

### Wage Garnishment

#### *Background*

The Wage Garnishment Law was enacted on Commission recommendation in 1978.<sup>3</sup> As enacted, this statute provided for a continuing levy on a debtor's earnings for a period of 90 days,

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1. Code Civ. Proc. § 708.020.

2. Code Civ. Proc. § 2030(c).

3. 1978 Cal. Stat. ch. 1133, § 7 (enacting Code Civ. Proc. § 723.010 *et seq.*); renumbered as Code Civ. Proc. § 706.010 *et seq.*, as part of the Enforcement of Judgments Law, 1982 Cal. Stat. ch. 1364, § 2). For recommendations relating to wage garnishment, see 10 Cal. L. Revision Comm'n Reports 701 (1971); 11 Cal. L. Revision Comm'n Reports 101 (1973); 12 Cal. L. Revision Comm'n Reports 901 (1974); 13 Cal. L. Revision Comm'n Reports 601, 1703 (1976); 15 Cal. L. Revision Comm'n Reports 2001 (1980); 16 Cal. L. Revision Comm'n Reports 1001 (1982); 17 Cal. L. Revision Comm'n Reports 975 (1984).

starting 10 days after service and concluding 100 days after service. The judgment creditor was not permitted to relevel on the debtor's earnings for a 10-day period following the conclusion of the 100-day period.

In 1989 the 90-day withholding period was repealed,<sup>4</sup> with the result that a wage garnishment may continue as long as the underlying judgment is enforceable.<sup>5</sup> Repeal of the 90-day withholding period reduced paperwork for levying officers, court clerks, and judgment creditors, and eliminated the expense of obtaining and levying new earnings withholding orders and writs of execution. Tracking a single continuing levy is more convenient for employers than complying with a series of 90-day withholding periods separated by 10-day grace periods. For debtors, the new scheme saves expenses for which they are ultimately liable and perhaps avoids the danger of being fired for repeated wage garnishments.<sup>6</sup>

However, since the 90-day withholding period was part of a detailed statutory scheme, its repeal resulted in a number of gaps and inconsistencies in the Wage Garnishment Law. In this recommendation, the Commission proposes a number of revisions of the Wage Garnishment Law to resolve these technical problems. The Commission has not reexamined the policy behind the 1989 legislation.

### *Return Procedures*

The Enforcement of Judgments Law was drafted on the assumption that wage garnishment activity by a general creditor

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4. 1989 Cal. Stat. ch. 263, § 1.

5. A money judgment (other than an installment judgment) becomes unenforceable 10 years after entry unless renewed within that time, and all enforcement procedures cease when the judgment becomes unenforceable. See Code Civ. Proc. §§ 683.020, 683.030, 683.110. If a judgment is renewed, existing liens may be extended and existing enforcement proceedings commenced pursuant to a writ or order may be continued. See Code Civ. Proc. §§ 683.190, 683.200.

6. It is illegal to fire an employee for garnishments on one judgment. Lab. Code § 2929(b).

7. Code Civ. Proc. § 699.560.

will have concluded by the time the writ of execution needs to be returned to the court. A writ of execution is required to be returned two years after issuance or, if no levy is made within the first 180 days, promptly after 180 days from issuance.<sup>7</sup> A levy, including service of an earnings withholding order, may be made under a writ only during its first 180 days. These rules are intended to ensure that enforcement papers are relatively current so that they will reflect the correct amount owing on the judgment, taking into account partial satisfactions as well as costs and interest added to the judgment.

The proposed law would (1) continue the important rule concerning the return of writs of execution, but provide for a “supplemental return” at the time the earnings withholding order terminates, and (2) since the order may terminate long after the writ is returned, require the levying officer to account to the court at least biennially so that court records will be periodically updated.

### *Costs, Interest, and Fees*

The amount of an earnings withholding order is based on the amount of the writ of execution, and includes costs and interest added to the judgment, daily interest between the date of issuance of the writ and the date of issuance of the earnings withholding order, and specified levying officer fees that are controlled by statute.<sup>8</sup> There is a problem in fully satisfying a judgment by wage garnishment under existing law since costs and interest continue to accrue after issuance of the order. This problem is magnified as the life of the earnings withholding order is extended, for there is no explicit authority to adjust the amount

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8. See Code Civ. Proc. §§ 706.121(e), 706.125(e); Gov't Code §§ 26746 (levying officer's disbursement fee), 26750 (fee for performing duties under Wage Garnishment Law).

9. But see Judicial Council Form 982.5(2), “Earnings Withholding Order” (April 1, 1991), which provides that the “levying officer will notify [the employer] of an assessment

stated in an outstanding order to reflect interest, costs, or fees after issuance of the order.<sup>9</sup>

It is in the interest of both debtors and creditors to get a full satisfaction where feasible. The proposed statute provides two methods for obtaining full satisfaction. Both procedures adopt a new rule that cuts off the right to interest and additional costs when the judgment is near full satisfaction. This rule is similar to the general rule that terminates the right to interest on the date of levy where the proceeds of the collection are sufficient to fully satisfy the amount due on that date.<sup>10</sup>

First, the levying officer is permitted, in the officer's discretion, to adjust the amount due on the earnings withholding order by deducting partial satisfactions and adding accrued interest, costs added to the judgment, and statutory fees accruing after issuance of the order. The officer would give notice by first-class mail to the employer to withhold the additional amount and, when that amount is paid, the judgment would be satisfied.

Second, where the first earnings withholding order is returned and costs and interest remain due, the judgment creditor would be able to obtain a "final earnings withholding order for costs and interest." If such a final order is satisfied, the judgment would be satisfied.

### *Dormant and Suspended Earnings Withholding Orders*

If an employee whose wages are subject to garnishment leaves employment, the earnings withholding order remains in effect and will reattach to the employee's earnings if the debtor is

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you should withhold in addition to the amount due," implementing Gov't Code § 26746 (disbursement fee).

10. See Code Civ. Proc. § 685.030 (cessation of interest).

11. See Code Civ. Proc. § 706.022 & Comment. An earnings withholding order for support, which otherwise is open-ended, terminates one year after the debtor's employment

reemployed during the withholding period.<sup>11</sup> A similar difficulty can occur where an earnings withholding order is in effect and another order with priority, such as for support or taxes, is served on the employer. In this situation, the first order waits in line indefinitely until the order with higher priority is satisfied, and then revives.<sup>12</sup>

Dormancy and suspension of general earnings withholding orders did not present any special problems when the withholding period was limited to 90 days. But now that the withholding period runs indefinitely, the reattachment feature can place unrealistic burdens on the filing systems of levying officers and employers.

It is useful to provide a limited period during which an earnings withholding order may lie dormant. The debtor may have been temporarily laid off or may be a seasonal worker. In such situations it is more efficient to keep the existing order on file than return it and incur the delay and expense of obtaining a new writ and order. Similarly, in some cases a supervening order may be satisfied or removed within a short time. For example, if the supervening garnishment is a tax order for a limited amount, it makes sense to suspend the first order for a while until the supervening order can be satisfied. But if the supervening order is for a large amount or is for a continuing support obligation that consumes all withholdable earnings, it makes no sense to keep the first order on file indefinitely.

The proposed statute would terminate an earnings withholding order to collect a general money judgment where no amounts have been withheld under the order for a continuous period of

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terminates. See Code Civ. Proc. § 706.030(b)(1).

12. See Code Civ. Proc. § 706.022 & Comment.

13. This time period is approximately half the suspense period applicable to earnings withholding orders for support and to earnings withholding orders for taxes where the debtor

180 days.<sup>13</sup> This limit would apply regardless of the reason for the noncollection, and thus would apply both to dormancy where the debtor has left employment and to subordination to other orders.

*Ten-Day Moratorium Between Garnishments*

The 10-day moratorium between garnishments by the same creditor<sup>14</sup> has no purpose in a statute permitting unlimited continuing garnishments. Accordingly, the proposed statute eliminates this rule.

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has left employment. See Code Civ. Proc. §§ 706.030(b)(1), 706.078(c). The longer period is appropriate in the case of support and tax orders on the grounds of public policy.

14. See Code Civ. Proc. § 706.107. The 10-day delay at the start of withholding is retained, since this delay is needed for the convenience of employers. See Code Civ. Proc. § 706.022(a).

## RECOMMENDED LEGISLATION

### Outline

#### CODE OF CIVIL PROCEDURE

- § 685.030 (amended). Cessation of interest
- § 685.050 (amended). Costs and interest under writ
- § 685.090 (amended). Addition of costs to judgment
- § 699.560 (amended). Return of writ of execution
- § 706.022 (amended). Duty to withhold earnings
- § 706.024 (added). Amount required to satisfy earnings withholding order
- § 706.026 (amended). Receipt, account, and disbursement by levying officer
- § 706.028 (repealed). Subsequent earnings withholding order for costs and interest
- § 706.028 (added). Final earnings withholding order for costs and interest
- § 706.030 (technical amendment). Withholding order for support
- § 706.032 (added). Termination of dormant or suspended order
- § 706.033 (added). Supplemental return on writ
- § 706.107 (repealed). Service of additional order by same judgment creditor
- § 706.121 (amended). Application for issuance of earnings withholding order
- § 706.125 (amended). Contents of earnings withholding order
- § 708.020 (amended). Written interrogatories to judgment debtor

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#### **Code Civ. Proc. § 685.030 (amended). Cessation of interest**

685.030. (a) If a money judgment is satisfied in full pursuant to a writ under this title, interest ceases to accrue on the judgment:

(1) If the proceeds of collection are paid in a lump sum, on the date of levy.

(2) *If the money judgment is satisfied pursuant to an earnings withholding order, on the date and in the manner provided in Section 706.024 or Section 706.028.*

(2) (3) In any other case, on the date the proceeds of sale or collection are actually received by the levying officer.

(b) If a money judgment is satisfied in full other than pursuant to a writ under this title, interest ceases to accrue on the date the judgment is satisfied in full.

(c) If a money judgment is partially satisfied pursuant to a writ under this title or is otherwise partially satisfied, interest ceases to accrue as to the part satisfied on the date the part is satisfied.

(d) For the purposes of subdivisions (b) and (c), the date a money judgment is satisfied in full or in part is the earliest of the following times:

(1) The date satisfaction is actually received by the judgment creditor.

(2) The date satisfaction is tendered to the judgment creditor or deposited in court for the judgment creditor.

(3) The date of any other performance that has the effect of satisfaction.

(e) The clerk of a municipal or justice court may enter in the Register of Actions a writ of execution on a money judgment as returned wholly satisfied when the judgment amount, as specified on the writ, is fully collected and only an interest deficit of no more than ten dollars (\$10) exists, due to automation of the continual daily interest accrual calculation.

**Comment.** Subdivision (a) of Section 685.030 is amended to recognize the special rules applicable to cessation of interest with regard to collections by wage garnishment. See Sections 706.024 (amount required to satisfy earnings withholding order), 706.028 (final earnings withholding order for costs and interest).

**Code Civ. Proc. § 685.050 (amended). Costs and interest under writ**

685.050. (a) If a writ is issued pursuant to this title to enforce a judgment, the costs and interest to be satisfied in a levy under the writ are the following:

(1) The statutory fee for issuance of the writ.

(2) The amount of interest that has accrued from the date of entry or renewal of the judgment to the date of issuance of the writ, as adjusted for partial satisfactions, if the judgment creditor has filed an affidavit with the court clerk stating such amount.

(3) The amount of interest that accrues on the principal amount of the judgment remaining unsatisfied from the date of issuance of the writ until the date interest ceases to accrue.

(4) The levying officer's statutory costs for performing the duties under the writ.

(b) In a levy under the writ, the levying officer shall do all of the following:

(1) Collect the amount of costs and interest entered on the writ pursuant to paragraphs (1) and (2) of subdivision (a).

(2) Compute and collect the amount of additional interest required to be collected by paragraph (3) of subdivision (a) by reference to the daily interest entered on the writ. *If amounts collected periodically do not fully satisfy the money judgment, the levying officer may, in the officer's discretion, adjust the amount of daily interest to reflect the partial satisfactions, and make later collections by reference to the adjusted amount of daily interest.*

(3) Determine and collect the amount of additional costs pursuant to paragraph (4) of subdivision (a).

**Comment.** Subdivision (b) of Section 685.050 is amended to permit recomputation of the amount of daily interest accruing on a money judgment in the case of partial satisfactions, in the discretion of the levying officer. See also Sections 685.010 (rate of interest on judgments), 685.030 (cessation of interest). The levying officer may condition recomputation on receiving adequate instructions from the judgment creditor. See Section 687.010. The benefit of recomputing the amount of daily interest is evident in the case of a continuing levy under an earnings withholding order. See Section 706.024 (amount required to satisfy earnings withholding order). The purpose of recomputation is to permit the full satisfaction of a money judgment during

the course of a continuing levy, without the need to seek issuance of a new writ of execution or final earnings withholding order for costs and interest. See Section 685.030(a)(2), (c) (interest ceases to accrue on amount of partial satisfaction when amount received by levying officer); see also Sections 706.024(c) (cessation of interest on earnings withholding order), 706.028(d) (cessation of interest on final earnings withholding order for costs and interest). Recomputation also avoids the potential of collecting an excessive amount, which would occur if the full amount of daily interest noted on the writ of execution were collected without adjustment for partial satisfactions.

**Code Civ. Proc. § 685.090 (amended). Addition of costs to judgment**

685.090. (a) Costs are added to and become a part of the judgment:

(1) Upon the filing of an order allowing the costs pursuant to this chapter.

(2) If a memorandum of costs is filed pursuant to Section 685.070 and no motion to tax is made, upon the expiration of the time for making the motion.

(b) The costs added to the judgment pursuant to this section are included in the principal amount of the judgment remaining unsatisfied.

(c) If a writ or *earnings withholding order* is outstanding at the time the costs are added to the judgment pursuant to this section, the levying officer shall add the amount of such costs to the amount to be collected pursuant to the writ or *earnings withholding order* if the levying officer receives either of the following before the writ or *earnings withholding order* is returned:

(1) A certified copy of the court order allowing the costs.

(2) A certificate from the clerk of the court that the costs have been added to the judgment where the costs have been added to the judgment after a memorandum of costs has been filed

pursuant to Section 685.070 and no motion to tax has been made within the time allowed for making the motion.

(d) The levying officer shall include the costs described in subdivision (c) in the amount of the sale or collection distributed to the judgment creditor only if the levying officer receives the certified copy of the court order or the clerk's certificate before the distribution is made.

**Comment.** Subdivision (c) of Section 685.090 is amended to authorize the addition of costs to a judgment in a case where collection is being made under an earnings withholding order. See Sections 706.010-706.154 (Wage Garnishment Law). The procedure under subdivision (c) may be applied where the writ of execution has been returned pursuant to Section 699.560 and collection continues under the earnings withholding order. See Section 706.022. In this situation, costs may be added to the amount to be collected under the earnings withholding order without the need to obtain another writ of execution.

**Code Civ. Proc. § 699.560 (amended). Return of writ of execution**

699.560. (a) Except as provided in subdivisions (b) and (c), the levying officer to whom the writ of execution is delivered shall return the writ to the court, together with a report of the levying officer's actions and an accounting of amounts collected and costs incurred, at the earliest of the following times:

- (1) Two years from the date of issuance of the writ.
- (2) Promptly after all of the duties under the writ are performed.
- (3) When return is requested in writing by the judgment creditor.
- (4) If no levy takes place under the writ within 180 days after its issuance, promptly after the expiration of the 180-day period.
- (5) Upon expiration of the time for enforcement of the money judgment.

(b) If a levy has been made under Section 700.200 upon an interest in personal property in the estate of a decedent, the writ shall be returned within the time prescribed in Section 700.200.

(c) If a levy has been made under Section 4383 of the Civil Code on the judgment debtor's right to the payment of benefits from an employee pension benefit plan, the writ shall be returned within the time prescribed in that section.

*(d) If a levy has been made under the Wage Garnishment Law, Chapter 5 (commencing with Section 706.010), and the earnings withholding order remains in effect, the writ of execution shall be returned as provided in subdivision (a) and a supplemental return shall be made as provided in Section 706.033.*

**Comment.** Subdivision (d) is added to Section 699.560 to recognize the special rule concerning returns where an earnings withholding order continues in force after the writ of execution is required to be returned.

**Code Civ. Proc. § 706.022 (amended). Duty to withhold earnings**

706.022. (a) As used in this section, "withholding period" means the period which commences on the 10th day after service of an earnings withholding order upon the employer and which continues until the earliest of the following dates:

(1) The date the employer has withheld the full amount specified in *required to satisfy* the order.

(2) The date of termination specified in a court order served on the employer.

(3) The date of termination specified in a notice of termination served on the employer by the levying officer.

*(4) The date of termination of a dormant or suspended earnings withholding order as determined pursuant to Section 706.032.*

(b) Except as otherwise provided by statute, an employer shall withhold the amounts required by an earnings withholding order

from all earnings of the employee payable for any pay period of the employee which ends during the withholding period.

(c) An employer is not liable for any amounts withheld and paid over to the levying officer pursuant to an earnings withholding order prior to service upon the employer pursuant to paragraph (2) or (3) of subdivision (a).

**Comment.** Subdivision (a)(1) of Section 706.022 is amended for conformity with Section 706.024 (amount required to satisfy earnings withholding order). Subdivision (a)(4) is added to reflect the automatic termination of earnings withholding orders under Section 706.032.

The remainder of this Comment is drawn from the Comment to Section 706.022 as enacted in 1982, with revisions to reflect the amendment of this section in 1989. See 1982 Cal. Stat. ch. 1364, § 2; 1989 Cal. Stat. ch. 263, § 1.

Section 706.022 states the basic rules governing the employer's duty to withhold pursuant to an earnings withholding order.

Subdivision (b) requires the employer to withhold from all earnings of an employee payable for any pay period of such employee which *ends* during the "withholding period." The "withholding period" is described in subdivision (a). It should be noted that *only* earnings for a pay period ending during the withholding period are subject to levy. Earnings for prior periods, even though still in the possession of the employer, are not subject to the order. An employer may not, however, defer or accelerate any payment of earnings to an employee with the intent to defeat or diminish the satisfaction of a judgment pursuant to this chapter. See Section 706.153.

Under subdivision (a), the withholding period generally commences 10 calendar days (not working or business days) after service of an earnings withholding order is completed. See Section 706.101 (when service completed). For example, if an order is served on Friday, the withholding period would commence on the second following Monday. See Section 12 (computation of time). The 10-day delay affords the employer time to process the order within its organization, i.e., deliver the order to the employer's bookkeeper, make bookkeeping adjustments, and so on.

The introductory clause to subdivision (b) recognizes certain exceptions to the general rule stated in subdivision (b). An employer is not generally required to withhold pursuant to two orders at the same time, except in special cases involving withholding orders for support or taxes. Thus, an

ordinary earnings withholding order served when an earlier order is in place will not be given effect. See Section 706.023 (priority of orders) & Comment. See also Section 706.104(a) (no withholding if debtor not employed and no earnings due).

The withholding period does not end until the first of the events described in paragraphs (1) through (4) of subdivision (a) occurs. The employer has a *continuing* duty to withhold during the withholding period. See also Section 706.032 (termination of dormant or suspended order).

Paragraph (1) requires the employer to stop withholding when the full amount required to satisfy the earnings withholding order has been withheld. See Section 706.024 (amount required to satisfy order).

Paragraph (2) reflects the fact that the court may order the termination of the earnings withholding order. See Section 706.105(g). Of course, in some situations, the court will only modify the prior order, and the employer then must comply with the order as modified for the remainder of the withholding period.

Paragraph (3) requires the employer to stop withholding when served with a notice of termination. See Section 706.101 (manner of service). A notice of termination is served (1) where the levying officer is notified of the satisfaction of the judgment or (2) where the judgment debtor has claimed an exemption for the entire amount of earnings but the judgment creditor has failed within the time allowed to file with the levying officer a notice of opposition to claim of exemption and a notice of the hearing on the exemption. See Sections 706.027 (satisfaction of judgment), 706.105(f) (grounds for termination of withholding order in exemption proceeding). The levying officer may also serve a notice of termination where the order has been dormant or suspended for 180 days. See Section 706.032 (termination for dormancy or suspension).

Paragraph (4) recognizes the special rule for termination of earnings withholding orders that have been dormant or suspended for a period of 180 days. See Section 706.032 & Comment.

The judgment creditor has an affirmative duty to inform the levying officer of the satisfaction of the judgment. See Section 706.027.

Service of an order for the collection of state taxes suspends the duty of an employer to withhold pursuant to a prior order (other than an order for support). See Section 706.077 (tax orders). However, this is only a suspension. After the tax order is satisfied, if the withholding period for the prior order has not ended, the employer must again withhold pursuant to the

prior order. See Section 706.032 (termination in case of suspension for 180 days by supervening order).

Similarly, the duty to withhold is not terminated by the layoff, discharge, or suspension of an employee and, if the employee is rehired or returns to work during the withholding period, the employer must resume withholding pursuant to the order. See Section 706.032 (termination in case of dormancy for 180 days).

The termination of certain types of orders — orders for the collection of state taxes and support orders — is governed by separate rules. See Sections 706.030 (support orders), 706.078 (tax orders).

Sometimes an order will be terminated without the employer's prior knowledge. Subdivision (c) makes clear that an employer will not be subject to liability for having withheld and paid over amounts pursuant to an order prior to service of a written notice of termination of the order. In such a case, the employee must look to the judgment creditor for the recovery of amounts previously paid to the judgment creditor. See Section 706.154 (employer entitled to rely on documents actually served). See also Section 706.105(i) (recovery from levying officer or judgment creditor of amounts received after order terminated).

An earnings withholding order may also be affected by federal bankruptcy proceedings. See Comment to Section 706.020.

**Code Civ. Proc. § 706.024 (added). Amount required to satisfy earnings withholding order**

706.024. (a) The amount required to satisfy an earnings withholding order is the total amount required to satisfy the writ of execution on the date the order is issued, with the following additions and subtractions:

(1) The addition of the statutory fee for service of the order and any other statutory fees for performing duties under the order.

(2) The addition of costs added to the order pursuant to Section 685.090.

(3) The subtraction of the amount of any partial satisfactions.

(4) The addition of daily interest accruing after issuance of the order, as adjusted for partial satisfactions.

(b) From time to time the levying officer, in the levying officer's discretion, may give written notice to the employer of

the amount required to satisfy the earnings withholding order and the employer shall determine the total amount to withhold based upon the levying officer's notice, notwithstanding a different amount stated in the order originally served on the employer.

(c) If the full amount required to satisfy the earnings withholding order as stated in the order or in the levying officer's notice under subdivision (b) is withheld from the judgment debtor's earnings, interest ceases to accrue on that amount.

**Comment.** Section 706.024 is new. This section provides for adjustment of the total amount required to satisfy an earnings withholding order. Since an active order continues in force until it is satisfied, full satisfaction of the judgment may not occur unless the total amount due as stated in the order as issued is adjusted as provided in subdivision (a).

See also Sections 685.030 (accrual of interest and satisfaction), 685.050 (costs and interest under writ), 685.090 (c) (costs added to writ or order after issuance), 695.210 (amount required to satisfy money judgment), 699.520(e) (amount enforceable under writ of execution), 706.101(c) (notice by first class mail).

**Code Civ. Proc. § 706.026 (amended). Receipt, account, and disbursement by levying officer**

706.026. (a) The levying officer shall receive and account for all amounts received *paid by the employer* pursuant to Section 706.025 and shall pay the amounts so received over to the person entitled thereto at least once every 30 days.

(b) *At least once every two years, the levying officer shall file an account with the court for all amounts collected under the earnings withholding order, including costs and interest added to the amount due.*

**Comment.** Subdivision (b) is added to Section 706.026 to provide for an accounting to the court of activities under an earnings withholding order. See Section 680.160 ("court" defined). This account is in the nature of a return on a writ and is required whether or not the writ has been returned. See Section 699.560 (return of writ of execution). When the earnings withholding

order terminates, the levying officer is to make a supplemental return on the writ. See Section 706.033 (supplemental return).

The change in subdivision (a) is a technical, nonsubstantive change intended to conform the language of this section to Section 706.025.

**Code Civ. Proc. § 706.028 (repealed). Subsequent earnings withholding order for costs and interest**

~~706.028. Subject to Section 706.107, after the amount stated as owing in the earnings withholding order is paid, the judgment creditor may apply for issuance of another earnings withholding order covering costs and interest that may have accrued since application for the prior order.~~

**Comment.** Section 706.028 is superseded by new Section 706.028 (final earnings withholding order for costs and interest). See new Section 706.028 & Comment.

**Code Civ. Proc. § 706.028 (added). Final earnings withholding order for costs and interest**

706.028. (a) “Final earnings withholding order for costs and interest” means an earnings withholding order for the collection only of unsatisfied costs and interest, which is issued after an earlier earnings withholding order has been returned satisfied.

(b) After the amount stated as owing in a prior earnings withholding order is paid, the judgment creditor may obtain a final earnings withholding order for costs and interest to collect amounts of costs and interest that were not collected under the prior earnings withholding order.

(c) A final earnings withholding order for costs and interest shall be enforced in the same manner as other earnings withholding orders.

(d) Satisfaction of the amount stated as owing in a final earnings withholding order for costs and interest is equivalent to satisfaction of the money judgment. For this purpose, interest ceases to accrue on the date of issuance of the final earnings

withholding order and no additional costs may be added after that date, except for the statutory fee for service of the order and any other statutory fees for performing duties under the order.

**Comment.** Section 706.028 is new. This section provides for a final earnings withholding order for costs and interest and supersedes former Section 706.028 (subsequent order for costs and interest). The new “final order” differs from the “subsequent order” under former law since it permits a full satisfaction of the money judgment through wage garnishment by stopping the running of interest on the remaining balance due on the judgment (which balance comprises earlier costs and interest). The amount stated as due on a final earnings withholding order may be increased only by statutory costs. See Gov’t Code §§ 26746 (disbursement fee), 26750 (fee for service and other duties under earnings withholding order). In other respects, as provided in subdivision (c), a final earnings withholding order is treated the same as any other earnings withholding order.

If the principal amount of the judgment is not fully satisfied before an earnings withholding order is terminated, another order may be issued to collect the balance due on the judgment pursuant to this chapter. See Section 706.102 (issuance of earnings withholding order). This later earnings withholding order is distinct from a final earnings withholding order for costs and interest provided by this section.

A final earnings withholding order is not available where the full amount due on the judgment has been collected under the initial earnings withholding order pursuant to the optional procedure set forth in Section 706.024.

**Code Civ. Proc. § 706.030 (technical amendment). Withholding order for support**

706.030. (a) A “withholding order for support” is an earnings withholding order issued on a writ of execution to collect delinquent amounts payable under a judgment for the support of a child, or spouse or former spouse, of the judgment debtor. A withholding order for support shall be denoted as such on its face.

(b) Notwithstanding any other provision of this chapter:

(1) An employer shall continue to withhold pursuant to a withholding order for support until the earliest of the dates specified in paragraph (1), (2), or (3), ~~or (4)~~ of subdivision (a) of

Section 706.022, except that a withholding order for support shall automatically terminate one year after the employment of the employee by the employer terminates.

(2) A withholding order for support has priority over any other earnings withholding order. An employer upon whom a withholding order for support is served shall withhold and pay over earnings of the employee pursuant to such order notwithstanding the requirements of another earnings withholding order.

(3) Subject to paragraph (2) and to Article 3 (commencing with Section 706.050), an employer shall withhold earnings pursuant to both a withholding order for support and another earnings withholding order simultaneously.

**Comment.** Section 706.030(b)(1) is amended to correct the cross-reference to Section 706.022 (as amended by 1989 Cal. Stat. ch. 263, § 1). This is a technical, nonsubstantive change.

**Code Civ. Proc. § 706.032 (added). Termination of dormant or suspended order**

706.032. (a) Except as otherwise provided by statute, an earnings withholding order terminates at the conclusion of any continuous 180-day period in which no amounts are withheld under the order, whether because the judgment debtor's employment has terminated or earnings are being withheld under an order or assignment with higher priority, or for any other reason.

(b) If an earnings withholding order has terminated pursuant to subdivision (a), the employer shall return the order to the levying officer along with a statement of the reasons for returning the order.

**Comment.** Section 706.032 is new. This section provides for the automatic termination of dormant or suspended earnings withholding orders in favor of general creditors. If the debtor leaves employment after an earnings withholding order has become effective, the duty to withhold

continues for 180 days under subdivision (a). If the debtor returns to work during this period, the employer is required to resume withholding pursuant to the order. Similarly, if withholding under a general creditor's earnings withholding order is suspended because of withholding under an earnings withholding order or assignment for support or an earnings withholding order for taxes, the suspended order remains in effect until 180 days have elapsed with no withholding. See Sections 706.030 (support orders), 706.031 (wage assignment for support), 706.078 (tax orders).

The employer has a duty under subdivision (b) to determine whether an earnings withholding order has terminated under subdivision (a) and to return the order to the levying officer.

For a special rule concerning termination of earnings withholding orders for support, see Section 706.030(b)(1). For a special rule concerning termination of earnings withholding orders for taxes, see Section 706.078(c).

If the debtor is not employed and no earnings are due when the withholding period would begin under Section 706.022, the service of the order is ineffective and is not subject to the 180-day rule of this section. See Section 706.104(a).

**Code Civ. Proc. § 706.033 (added). Supplemental return on writ**

706.033. If the writ is returned before the earnings withholding order terminates, on termination of the earnings withholding order the levying officer shall make a supplemental return on the writ. The supplemental return shall contain the same information as an original return pursuant to Section 699.560.

**Comment.** Section 706.033 is new. This section provides explicit authority for making a supplemental return on a writ where withholding under an earnings withholding order continues after the writ is returned. See also Section 706.026 (account of levying officer for amounts collected).

**Code Civ. Proc. § 706.107 (repealed). Service of additional order by same judgment creditor**

~~706.107. If an employer withholds earnings pursuant to an earnings withholding order, the judgment creditor who obtained the order may not cause another earnings withholding order to be served on the same employer requiring the employer to withhold~~

earnings of the same employee during the 10 days following the expiration of the prior earnings withholding order.

**Comment.** Section 706.107 is repealed. The provision for a 10-day grace period before serving another earnings withholding order became obsolete with the deletion of the 100-day provision from Section 706.022(a). See 1989 Cal. Stat. ch. 263, § 1. An overlapping earnings withholding order involving the same parties on the same judgment is ineffective. See Section 706.023(c).

**Code Civ. Proc. § 706.121 (amended). Application for issuance of earnings withholding order**

706.121. The “application for issuance of earnings withholding order” shall be executed under oath and shall include all of the following:

(a) The name, the last known address, and, if known, the social security number of the judgment debtor.

(b) The name and address of the judgment creditor.

(c) The court where the judgment was entered and the date the judgment was entered.

(d) The date of issuance of a writ of execution to the county where the earnings withholding order is sought.

(e) The total amount to be withheld pursuant to *required to satisfy* the order *on the date of issuance* (which shall *may* not exceed the amount required to satisfy the writ of execution on the date of the issuance of the order plus the levying officer’s statutory fee for service of the order).

(f) The name and address of the employer to whom the order will be directed.

(g) The name and address of the person to whom the withheld money is to be paid by the levying officer.

**Comment.** Subdivision (e) of Section 706.121 is amended for consistency with Section 706.024 which governs the amount required to satisfy an earnings withholding order and Section 706.125(e) (contents of earnings withholding order). See Section 706.024 & Comment.

**Code Civ. Proc. § 706.125 (amended). Contents of earnings withholding order**

706.125. The “earnings withholding order” shall include all of the following:

(a) The name, address, and, if known, the social security number of the judgment debtor.

(b) The name and address of the employer to whom the order is directed.

(c) The court where the judgment was entered, the date the judgment was entered, and the name of the judgment creditor.

(d) The date of issuance of the writ of execution to the county where the earnings withholding order is sought.

(e) The total amount ~~that may be withheld pursuant to~~ *required to satisfy the order on the date of issuance* (which may not exceed the amount required to satisfy the writ of execution on the date of issuance of the order plus the levying officer’s statutory fee for service of the order).

(f) A description of the withholding period and an order to the employer to withhold from the earnings of the judgment debtor for each pay period the amount required to be withheld under Section 706.050 or the amount specified in the order *subject to Section 706.024*, as the case may be, for the pay periods ending during ~~such~~ *the* withholding period.

(g) An order to the employer to pay over to the levying officer at a specified address the amount required to be withheld and paid over pursuant to the order in the manner and within the times provided by law.

(h) An order that the employer fill out the “employer’s return” and return it by first-class mail, postage prepaid, to the levying officer at a specified address within 15 days after service of the earnings withholding order.

(i) An order that the employer deliver to the judgment debtor a copy of the earnings withholding order and the “notice to employee of earnings withholding order” within 10 days after service of the earnings withholding order; but, if the judgment debtor is no longer employed by the employer and the employer does not owe the employee any earnings, the employer is not required to make such delivery.

(j) The name and address of the levying officer.

**Comment.** Subdivisions (e) and (f) of Section 706.125 are amended for consistency with Section 706.024 which governs the amount required to satisfy an earnings withholding order. See Section 706.024 & Comment.

**Code Civ. Proc. § 708.020 (amended). Written interrogatories to judgment debtor**

708.020. (a) The judgment creditor may propound written interrogatories to the judgment debtor in the manner provided in Section 2030 requesting information to aid in enforcement of the money judgment. The judgment debtor shall answer the interrogatories in the manner and within the time provided by Section 2030.

(b) The judgment creditor may not serve interrogatories pursuant to this section within 120 days after the judgment debtor has responded to interrogatories previously served pursuant to this section or within 120 days after the judgment debtor has been examined pursuant to Article 2 (commencing with Section 708.110), and the judgment debtor is not required to respond to any interrogatories so served.

(c) Interrogatories served pursuant to this section may be enforced, to the extent practicable, in the same manner as interrogatories in a civil action.

*(d) The limitation provided by Section 2030 on the number of interrogatories that may be propounded applies to each set of interrogatories propounded from time to time pursuant to this*

*section, but does not apply cumulatively to interrogatories propounded by the judgment creditor to the judgment debtor.*

**Comment.** Subdivision (d) is added to Section 708.020 to make clear that the 35 interrogatory limit in Section 2030(c) is not a cumulative limitation on interrogatories to judgment debtors. Thus, for example, a judgment creditor may propound 25 interrogatories to the judgment debtor and then 120 days later propound 30 more interrogatories without running afoul of the limitations in Section 2030. See also Section 2016(c) (discovery article applies in enforcement of judgment as provided in this article).

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Nonprobate Transfers of  
Community Property

November 1991

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 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.

Citethisrecommendationas*Nonprobate Transfers of Community Property*, 21 Cal. L. Revision Comm'n Reports 163 (1991).

STATE OF CALIFORNIA

PETE WILSON, Governor

**CALIFORNIA LAW REVISION COMMISSION**

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ANN E. STODDEN

November 1, 1991

To: The Honorable Pete Wilson  
*Governor of California*, and  
The Legislature of California

This recommendation resolves problems created by *Estate of MacDonald*, 51 Cal. 3d 262 (1990), in estate planning for married persons. The recommendation makes clear that, while spousal consent to a nonprobate transfer of community property is not a transmutation, the right to revoke consent terminates on death of either spouse. The recommendation also clarifies other rights of parties involved in a nonprobate transfer of community property.

The recommendation was prepared and is submitted pursuant to Resolution Chapter 37 of the Statutes of 1980 (Probate Code) and Resolution Chapter 40 of the Statutes of 1983 (family law), continued in Resolution Chapter 33 of the Statutes of 1991.

Respectfully submitted,

Edwin K. Marzec  
*Chairperson*



## NONPROBATE TRANSFERS OF COMMUNITY PROPERTY

### Introduction

A married person may dispose of the person's one-half interest in community property by will<sup>1</sup> or by nontestamentary transfer effective at death.<sup>2</sup> Case law has extended the statutory limitation on lifetime gifts of community property<sup>3</sup> to donative transfers at death: A married person may not make a transfer of community property effective at death without the written consent of the person's spouse; after the death of the transferor, a donative transfer made without the required consent may be set aside as to the one-half interest of the nonconsenting spouse.<sup>4</sup>

The rudimentary framework of statutory and case law governing nonprobate transfers of community property has proved to be inadequate to handle this increasingly important area of law.

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1. See Prob. Code § 100. A married person may also make a testamentary disposition of the person's interest in the person's quasi-community property. See Prob. Code § 101. This recommendation does not deal with a nonprobate transfer of quasi-community property, however, since such a transfer may present different policy considerations. The Commission has reserved this matter for future review.

2. While the ability of a married person to will the property is statutory (Prob. Code § 6101), to determine the existing law on nonprobate transfers requires both a close reading of the statutes and a knowledge of the cases. See, e.g., *Tyre v. Aetna Life Ins. Co.*, 54 Cal. 2d 399, 353 P.2d 725, 6 Cal. Rptr. 13 (1960) (beneficiary designation in community property life insurance policy); *Estate of Wilson*, 183 Cal. App. 3d 67, 227 Cal. Rptr. 794 (1986) (Totten Trust account for benefit of third party).

So fundamental a principle — that a married person may make a nonprobate transfer of the person's one-half interest in community property — should be clear, and the Commission's recommendations on nonprobate transfers of community property will have the incidental effect of clarifying the matter.

3. Civ. Code § 5125(b).

4. See, e.g., *Travelers Ins. Co. v. Fancher*, 219 Cal. 351, 26 P.2d 482 (1933) and *Blethen v. Pacific Mutual Life Ins. Co.*, 198 Cal. 91, 243 P. 431 (1926) (beneficiary designation under life insurance policy); *Estate of Wilson*, 183 Cal. App. 3d 67, 227 Cal. Rptr. 794 (1986) (Totten trust accounts).

Typical problems are revealed in two recent cases — *Estate of MacDonald*<sup>5</sup> in the California Supreme Court and *Ablamis v. Roper*<sup>6</sup> in the United States Court of Appeals for the Ninth Circuit.

*MacDonald* involved a husband who moved community property from an employee pension plan to an Individual Retirement Account (IRA), naming as beneficiary under the IRA a trust for his children from a former marriage. The wife signed a written consent to the beneficiary designation, but after her death and while her husband was still alive her personal representative revoked the consent and sought to recover the wife's one-half interest in the community property for the wife's estate. The California Supreme Court held that the wife's consent to a beneficiary designation was not a transmutation of the wife's interest in the community property into the husband's separate property, with the result that the consent remained revocable and the revocation could be exercised after the wife's death by her personal representative.

*Ablamis* also involved a wife's interest in her husband's community property pension plans. In that case the wife did *not* consent to any particular disposition of the property, and died leaving her interest in community property to a trust for her children of a former marriage. When the wife's personal representative claimed a one-half interest in each of the husband's pension plans, the United States Court of Appeals (9th Circuit) held that the federal Employee Retirement Income Security Act of 1974 (ERISA) preempts state community property laws and precludes the wife's estate from asserting its interest in the community property pensions.

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5. 51 Cal. 3d 262, 794 P.2d 911, 272 Cal. Rptr. 153 (1990).

6. 937 F.2d 1450 (9th Cir. 1991).

These cases illustrate a paradox in the law governing this area: The wife's estate in *MacDonald* could recover the wife's community property interest despite the wife's consent to the husband's disposition, whereas the wife's estate in *Ablamis* could not recover the wife's community property interest even though the husband's disposition was made without the wife's consent. The cases also demonstrate both the confusion in the law over the relevant legal principles that control a nonprobate transfer of community property and a spousal consent to a transfer, and the need for statutory clarification. The cases have caused consternation in the estate planning community over the inability of a spouse to make a coherent estate plan using standard nonprobate transfer techniques with any assurance that the law will honor the proposed disposition.

### Recommendations

The California Law Revision Commission recommends codification of the general principles governing nonprobate transfers of community property. This is an area of law that has assumed major importance as increasing amounts of wealth are passed through nonprobate devices such as beneficiary designations in employee benefit plans, life insurance policies, living trusts, multiple party bank accounts, and the like.<sup>7</sup> The law has not caught up with practice in the area, and cases have developed on a piecemeal and inconsistent basis. Codification of the general principles will benefit both practitioners and the courts in dealing with this area of law.

The Commission has adhered to the following general principles in developing specific recommendations for legislation to govern nonprobate transfers of community property:

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7. Typical nonprobate transfer devices are cataloged in Probate Code Section 5000.

(1) As an equal owner of community property, each spouse should have an equal right to control disposition of half the property at death.

(2) A spouse's written expression of intent should control over contrary statutory default rules governing disposition of a spouse's interest in community property at death.

(3) A third party acting under the terms of a nonprobate transfer instrument should be protected in making the transfer notwithstanding the existence of contrary rights in the property. Thus, for example, a pension plan trustee may make a transfer under the terms of the plan, whether or not the transfer corresponds to community property rights of spouses and beneficiaries. Disputes should be resolved among the interested parties and should not involve the neutral stakeholder.

### *Spousal Consent Requirement*

Existing case law recognizes that a nonprobate transfer of community property at death is a donative transfer, and as such treats it in a manner similar to a gift of community property.<sup>8</sup> The Commission recommends express codification of the gift rule for nonprobate transfers of community property. Thus a donative transfer of community property is voidable as to the one-half interest of the donor's spouse if made without the written consent of the spouse.

While existing law governing gifts provides for recovery of one-half of the community property gift on the death of a spouse, this remedy is unduly restrictive. The Commission recommends that for nonprobate transfers of community property made without consent, the court should have discretion to fashion an appropriate remedy, depending on the circumstances of the case. The court may, for example, order return of the value of the property instead of the property itself, or may order return of a

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8. See discussion at notes 3 and 4, *supra*.

particular item of property while allowing an item of offsetting value to pass. Likewise, the spouse should be able to proceed against the donor's estate in addition to proceeding against the beneficiary of the nonprobate transfer. It may be proper, for example, simply to allow the surviving spouse a setoff for the value of the property transferred out of the share of the decedent or to give the surviving spouse a reimbursement right.

### *Effect of Consent*

The *MacDonald* case points out that a spousal consent to a nonprobate transfer of community property does not transmute the consenting spouse's community interest into separate property of the other spouse. A person who consents to a particular disposition of community property on death of the person's spouse is consenting only to its disposition at death. Until then, the property retains its community character and is subject to all incidents of community property, including division at dissolution of marriage. This rule should be codified, but would not preclude a spouse from making a transmutation of community property if so desired by an express declaration of intent.<sup>9</sup>

Since a nonprobate transfer of community property, like a will, is not intended to take effect until death, it should remain revocable until that time.<sup>10</sup> To impose some structure on the revocation process and because the original consent is in writing, a consent should only be revocable in writing. Revocation should not be effective unless the other spouse is informed of the revocation before death; this will ensure that any corresponding changes in the spouse's estate plan necessitated by the revocation can be made.

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9. See Civ. Code § 5110.730(a) ("A transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected.").

10. This rule would not apply to a consent that by its terms is irrevocable.

After the donor spouse dies, the ability of the consenting spouse to revoke and make a different disposition of the community property should terminate. The nonprobate transfer has become a completed gift at this point, beyond the spouses' power to change.

*Effect of Death of Consenting Spouse*

The most difficult issues involve the situation presented in *MacDonald* — rights among the parties after the death of the consenting spouse but before the death of the donor spouse. May the consenting spouse's successors revoke the consent before the nonprobate transfer becomes a completed gift? May the donor spouse make changes in the terms of the gift that conflict with the terms consented to by the deceased spouse?

The court in *MacDonald* did not question the exercise of the revocation right by the consenting spouse's personal representative after the consenting spouse's death. The Commission believes the consent of a spouse to a nonprobate transfer of community property is itself a nonprobate transfer, and should become irrevocable on the death of the consenting spouse. The consenting spouse's successors should not, after the spouse's death, be permitted to undo the decedent's estate plan for their own benefit. The recommended law would honor the clearly expressed written intent of the deceased spouse with respect to disposition of the decedent's interest in the community property.

During the interim period between the death of the consenting spouse and the death of the donor spouse, the donor spouse may seek to change the terms of the proposed nonprobate transfer, for example by designating a different beneficiary or by revoking the transfer in whole or in part. In this case, the Commission recommends that the law recognize the authority of the surviving spouse to deal with and dispose of the survivor's half of the

community property, but not the decedent's half. The deceased spouse is no longer able to give consent to changed terms,<sup>11</sup> and therefore the decedent's half should pass in accordance with the decedent's last expressed intent, as indicated in the consent to the nonprobate transfer. This has the effect of preserving the right of the deceased spouse to control disposition of the decedent's one-half interest in the community property on the decedent's death.

It should be noted, however, that the surviving spouse may be in a position to judge the needs of potential beneficiaries as circumstances change in the interim period after the death of the first spouse to die. For this reason the proposed law recognizes that the spouses may determine ahead of time that by consenting to or joining in a nonprobate transfer, the spouses express confidence in the survivor to make appropriate changes in the disposition of both halves of the community property. Statutory recognition of such an agreement will enable the spouses to allow the survivor to make controlling decisions, in place of the statutory default rule that freezes the terms of the proposed disposition of the decedent's interest on death.

### *Federal Preemption*

The Commission recommends enactment of the foregoing principles as part of California law. However, it is clear from the *Ablamis* case that the California rule permitting a nonemployee spouse to make a separate disposition of a one-half interest in a community property pension plan may not be applied to employee pension plans under ERISA.<sup>12</sup> The Commission plans to give this matter further review.

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11. If the donor spouse makes a change in terms during the lifetime of the consenting spouse, on the other hand, the consenting spouse is in a position to respond. In this situation the proposed law provides that the change in terms revokes the consent, unless the consenting spouse gives further consent to the changed terms.

12. See 29 U.S.C.A. § 1056(d) (Supp. 1991) (assignment or alienation of benefits under a covered retirement plan precluded).

*Retroactivity*

Before *MacDonald*, a person who executed a consent to a nonprobate transfer of community property would ordinarily have assumed that the consent would dispose of the person's interest in the community in the manner consented to. Such a consent should be saved to the greatest extent possible, and an estate plan should not be destroyed by allowing the heirs of the consenting spouse to overturn it after the spouse's death. For this reason the Commission recommends that codification of the law governing nonprobate transfers of community property should also be applied to a spousal consent executed before the operative date of the codification.

Retroactive operation would be subject to an exception that where the consenting spouse died before the operative date of the codification, former law continues to apply. This would preserve rights of the decedent's successors that may have vested under the *MacDonald* doctrine and cannot constitutionally be disturbed.<sup>13</sup>

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13. Cf. *In re Marriage of Buol*, 39 Cal. 3d 751, 705 P.2d 354, 218 Cal. Rptr. 31 (1985); *In re Marriage of Fabian*, 41 Cal. 3d 440, 715 P.2d 253, 224 Cal. Rptr. 333 (1986) (constitutional limitation on retroactive operation of Civ. Code §§ 4800.1 and 4800.2).

**RECOMMENDED LEGISLATION****Outline****PROBATE CODE****DIVISION 5. NONPROBATE TRANSFERS****PART 1. PROVISIONS RELATING TO  
EFFECT OF DEATH****CHAPTER 1. GENERAL PROVISIONS**

- § 5000. Nonprobate transfer on death
- § 5001. [Reserved for future use]
- § 5002. Limitations imposed by instrument
- § 5003. Protection of holder of property

**CHAPTER 2. NONPROBATE TRANSFERS OF  
COMMUNITY PROPERTY****Article 1. General Provisions**

- § 5010. “Written consent” defined
- § 5011. Governing provision of instrument, law, or consent
- § 5012. Community property rights independent of transfer obligation
- § 5013. Waiver or agreement that affects rights in community property
- § 5014. Transitional provision

**Article 2. Consent to Nonprobate Transfer**

- § 5020. Written consent required
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- § 5022. Written consent not a transmutation
- § 5023. Effect of modification

**Article 3. Revocation of Consent**

- § 5030. Revocability of written consent
- § 5031. Form and service of revocation
- § 5032. Effect of revocation

**CONFORMING CHANGES**

- Civ. Code § 5110.740 (amended). Estate planning documents
- Prob. Code § 141 (amended). Rights that may be waived

## **PART 1. PROVISIONS RELATING TO EFFECT OF DEATH**

### **Heading to Part 1 (immediately preceding Section 5000) of Division 5 of the Probate Code (added)**

#### **CHAPTER 1. GENERAL PROVISIONS**

#### **Prob. Code § 5000 (unchanged). Nonprobate transfer on death**

5000. (a) A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is not invalid because the instrument does not comply with the requirements for execution of a will, and this code does not invalidate the instrument.

(b) Included within subdivision (a) are the following:

(1) A written provision that money or other benefits due to, controlled by, or owned by a decedent before death shall be paid after the decedent's death to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.

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

(3) A written provision that any property controlled by or owned by the decedent before death that is the subject of the instrument shall pass to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.

(c) Nothing in this section limits the rights of creditors under any other law.

**Comment.** Section 5000 is intended broadly to validate written instruments that provide for nonprobate transfers on death. The listing in the section of types of written instruments is not exclusive, and the section also would validate, for example, a nonprobate transfer provision in a partnership agreement, stock redemption plan, buy-sell agreement, power of appointment, and the like.

*Note.* Section 5000 is unchanged. It is set out here for convenience of reference, together with a supplementary comment.

**Prob. Code § 5001 (reserved for future use).**

**Prob. Code § 5002 (added). Limitations imposed by instrument**

5002. Notwithstanding any other provision of this part, a holder of property under an instrument of a type described in Section 5000 is not required to receive, hold, or transfer the property in compliance with a provision for a nonprobate transfer on death executed by a person who has an interest in the property if either (1) the person is not authorized by the terms of the instrument to execute a provision for transfer of the property, or (2) the provision for transfer of the property does not otherwise satisfy the terms of the instrument.

**Comment.** Section 5002 is added to make clear that this part is not a substantive grant of authority for a person to enforce a nonprobate transfer of the person's interest in property where such a transfer is not authorized by the terms of the instrument under which the property is held. Thus, for example, a nonemployee spouse under an employee benefit plan, or a nonowner spouse under an insurance policy, is not authorized by this part to direct a nonprobate transfer of the spouse's community property interest, if any, in the plan or policy. Although this chapter does not authorize execution of a provision for such a nonprobate transfer, the holder of the property may be required by federal law, by other state law, or by the terms of the instrument itself to recognize the property interest of a spouse.

**Prob. Code § 5003 (added). Protection of holder of property**

5003. (a) A holder of property under an instrument of a type described in Section 5000 may transfer the property in compliance with a provision for a nonprobate transfer on death that satisfies the terms of the instrument, whether or not the transfer is consistent with the beneficial ownership of the property as between the person who executed the provision for transfer of the property and other persons having an interest in the property or their successors.

(b) Except as provided in this subdivision, no notice or other information shown to have been available to the holder of the property affects the right of the holder to the protection provided by subdivision (a). The protection provided by subdivision (a) does not extend to a transfer made after the holder of the property has been served with a contrary court order or with a written notice of a person claiming an adverse interest in the property.

(c) The protection provided by this section does not affect the rights of the person who executed the provision for transfer of the property and other persons having an interest in the property or their successors in disputes among themselves concerning the beneficial ownership of the property.

(d) The protection provided by this section is not exclusive of any protection provided the holder of the property by any other provision of law.

**Comment.** Section 5003 is drawn from portions of Section 5405 (protection of financial institution under California Multiple-Party Accounts Law). A holder of property that is the subject of a nonprobate transfer is not obligated to ascertain the respective separate, community, and quasi-community property interests in the property of participant and nonparticipant, or employee and nonemployee, or covered and noncovered, or insured and noninsured, spouses. Unless the holder of property has been served with a contrary court order or notice of an adverse claim, the holder may transfer the property in accordance with the terms of the instrument, and any adverse rights of a spouse or beneficiaries must be asserted against the estate of the

person who executed the instrument or against the beneficiary, not against the holder of the property. See Sections 5012 (community property rights independent of transfer obligation), 5021 (transfer without consent)

For the manner and proof of service, see Part 2 (commencing with Section 1200) of Division 3.

## **Prob. Code §§ 5010-5032 (added). Nonprobate transfers of community property**

### **CHAPTER 2. NONPROBATE TRANSFERS OF COMMUNITY PROPERTY**

#### **Article 1. General Provisions**

#### **§ 5010. “Written consent” defined**

5010. As used in this chapter, “written consent” to a provision for a nonprobate transfer of community property on death includes a written joinder in such a provision.

**Comment.** Section 5010 is intended for drafting convenience. Written joinder in a provision for a nonprobate transfer includes joint action by both spouses in writing. A written consent, to be effective, need not satisfy the statutory requirements for a transmutation. See Section 5022 (written consent not a transmutation). A written consent becomes irrevocable on death of either spouse. Section 5030 (revocability of written consent).

#### **§ 5011. Governing provision of instrument, law, or consent**

5011. Notwithstanding any other provision of this part, the rights of the parties in a nonprobate transfer of community property on death are subject to all of the following:

(a) The terms of the instrument under which the nonprobate transfer is made.

(b) A contrary state statute specifically applicable to the instrument under which the nonprobate transfer is made.

(c) A written expression of intent of a party in the provision for transfer of the property or in a written consent to the provision.

**Comment.** Section 5011 establishes the principle that the rules in this chapter only apply in the absence of other governing provisions.

Subdivision (a) recognizes that the terms of the instrument may define the rights of the parties. See also Section 5012 (community property rights independent of transfer obligation).

Subdivision (b) makes clear that the general rules set out in this chapter are not intended to override other state statutes that are narrowly drawn to govern rights under specific named instruments. It should also be noted that this chapter cannot override preempting federal law. See, e.g., *Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991) (ERISA precludes testamentary disposition of community property interest of nonparticipant spouse).

Subdivision (c) makes clear that an expression of intent of the spouses in directing a nonprobate transfer of their interests in community property prevails over the default rules in this chapter.

### **§ 5012. Community property rights independent of transfer obligation**

5012. A provision of this chapter concerning rights between a married person and the person's spouse in community property is relevant only to controversies between the person and spouse and their successors and does not affect the obligation of a holder of community property under an instrument of a type described in Section 5000 to hold, receive, or transfer the property in compliance with a provision for a nonprobate transfer on death, or the protection provided the holder by Section 5003.

**Comment.** Section 5012 is drawn from Section 5201 (multiple-party accounts).

### **§ 5013. Waiver or agreement that affects rights in community property**

5013. Nothing in this chapter limits the effect of a surviving spouse's waiver of rights in community property under Chapter 1 (commencing with Section 140) of Part 3 of Division 2 or other instrument or agreement that affects a married person's interest in community property.

**Comment.** Section 5013 recognizes alternate procedures for releasing rights of a surviving spouse in community property.

Waiver of a joint and survivor annuity or survivor's benefits under the federal Retirement Equity Act of 1984 is not a transmutation. Civ. Code § 5110.740 (estate planning instruments).

### **§ 5014. Transitional provision**

5014. (a) Except as provided in subdivision (b), this chapter applies to a provision for a nonprobate transfer of community property on the death of a married person, regardless of whether the provision for transfer of the property was executed by the person, or written consent to the provision for transfer of the property was given by the person's spouse, before, on, or after January 1, 1993.

(b) Subdivision (c) of Section 5030 does not apply, and the applicable law in effect on the date of death does apply, to revocation of a written consent given by a spouse who died before January 1, 1993.

**Comment.** Section 5014 is an exception to the rule stated in Section 3 (general transitional provision). To the extent this chapter changes the law governing the rights of successors of a person who gives written consent to a nonprobate transfer by the person's spouse, this chapter does not seek to apply the change in law to rights that vested as a result of a death that occurred before the operative date of the chapter.

## **Article 2. Consent to Nonprobate Transfer**

### **§ 5020. Written consent required**

5020. A provision for a nonprobate transfer of community property on death executed by a married person without the written consent of the person's spouse (1) is not effective as to the nonconsenting spouse's interest in the property and (2) does not affect the nonconsenting spouse's disposition on death of the nonconsenting spouse's interest in the community property by will, intestate succession, or nonprobate transfer.

**Comment.** Section 5020 is comparable to Civil Code Section 5125(b). It codifies the case law rule that the statutory community property gift limitations apply to nonprobate transfers such as beneficiary designations

in trusts and accounts. See, e.g., *Tyre v. Aetna Life Ins. Co.*, 54 Cal. 2d 399, 353 P.2d 725, 6 Cal. Rptr. 13 (1960) (beneficiary designation in life insurance policy); *Yiatchos v. Yiatchos*, 376 U.S. 306 (1964) (beneficiary designation for United States Savings Bonds).

It should be noted that while Section 5020 makes clear that a nonconsenting spouse retains full dispositional rights over the spouse's community property interest (subject to overriding governing principles as provided in Section 5011), this does not imply that a consenting spouse loses these rights. A written consent is revocable during the spouse's lifetime, and a revocation and contrary disposition may be made by will. See Section 5031 (form and service of revocation).

Section 5020 does not affect the principle that a holder of property may transfer the property as specified in the instrument. Section 5003 (protection of holder of property). But the actions of the holder do not affect rights between the spouses and their successors. See Section 5012 (community property rights independent of transfer obligation).

### **§ 5021. Transfer without written consent**

5021. (a) In a proceeding to set aside a nonprobate transfer of community property on death made pursuant to a provision for transfer of the property executed by a married person without the written consent of the person's spouse, the court shall set aside the transfer as to the nonconsenting spouse's interest in the property, subject to terms and conditions or other remedies that appear equitable under the circumstances of the case, taking into account the rights of all interested persons.

(b) Nothing in subdivision (a) affects any additional remedy the nonconsenting spouse may have against the person's estate for a nonprobate transfer of community property on death without the spouse's written consent.

**Comment.** Subdivision (a) of Section 5021 is consistent with the rule applicable to present gifts of community property at termination of the marriage by dissolution or death. See, e.g., *Ballinger v. Ballinger*, 9 Cal. 2d 330, 70 P. 2d 629 (1937); *In re Marriage of Stephenson*, 162 Cal. App. 3d 1057, 209 Cal. Rptr. 383 (1984). It implements the concept that a nonprobate transfer is a will substitute, and that a person has the right to

direct a transfer of the person's one-half interest in the community property at death, with or without the spouse's consent. See, e.g., Sections 100-102 (effect of death of married person on community and quasi-community property), 6101 (property which may be disposed of by will).

Under subdivision (a) the court has discretion to fashion an appropriate order, depending on the circumstances of the case. The order may, for example, provide for recovery of the value of the property rather than the particular item, or aggregate property received by a beneficiary instead of imposing a division by item.

Subdivision (b) makes clear that this section does not provide the exclusive remedy where a person has directed a nonprobate transfer of community property without the written consent of the other spouse. It may be proper, for example and without limitation, simply to allow the surviving spouse, instead of or in addition to proceeding against the beneficiary of the nonprobate asset, to proceed against the decedent's estate for an offset for the value of the property transferred out of the share of the decedent, or to give the surviving spouse a right of reimbursement.

### **§ 5022. Written consent not a transmutation**

5022. (a) Except as provided in subdivision (b), a spouse's written consent to a provision for a nonprobate transfer of community property on death is not a transmutation of the consenting spouse's interest in the property.

(b) This chapter does not apply to a spouse's written consent to a provision for a nonprobate transfer of community property on death that satisfies Section 5110.730 of the Civil Code. Such a consent is a transmutation and is governed by the law applicable to transmutations.

**Comment.** Section 5022 is consistent with the result in *Estate of MacDonald*, 51 Cal. 3d 262, 794 P.2d 911, 272 Cal. Rptr. 153 (1990). A consent to a nonprobate transfer is in effect a consent to a future gift of the person's interest in community property, and is subject to the legal incidents provided in this chapter. Until the gift is complete, however, it remains community property and is part of the community estate for purposes of division of property at dissolution of marriage until the consent becomes irrevocable by the death of either spouse. See Section 5030 (revocability of written consent). However, if the consent specifies a clear intent to

transmute the property, the expression of intent controls over this section. See Section 5011(c) (governing provision of consent).

### **§ 5023. Effect of modification**

5023. (a) As used in this section “modification” means revocation of a provision for a nonprobate transfer on death in whole or part, designation of a different beneficiary, or election of a different benefit or payment option.

(b) If a married person executes a provision for a nonprobate transfer of community property on death with the written consent of the person’s spouse and thereafter executes a modification of the provision for transfer of the property without written consent of the spouse, the modification is effective as to the person’s interest in the community property and has the following effect on the spouse’s interest in the community property:

(1) If the person executes the modification during the spouse’s lifetime, the modification revokes the spouse’s previous written consent to the provision for transfer of the property.

(2) If the person executes the modification after the spouse’s death, the modification does not affect the spouse’s previous written consent to the provision for transfer of the property, and the spouse’s interest in the community property is subject to the nonprobate transfer on death as consented to by the spouse.

(3) If a written expression of intent of a party in the provision for transfer of the property or in the written consent to the provision for transfer of the property authorizes the person to execute a modification after the spouse’s death, the spouse’s interest in the community property is deemed transferred to the married person on the spouse’s death, and the modification is effective as to both the person’s and the spouse’s interests in the community property.

**Comment.** Subdivision (a) of Section 5023 includes election of a different benefit or payment option among the types of modification covered by the section because the choice of benefit or payment options can

substantially affect the rights of the parties. For example, rights can be substantially altered by selection of a life expectancy as opposed to term payout on a pension plan, or by selection of a cash benefit, annuity, or reinvestment option in a life insurance policy.

Subdivision (b)(1) treats a modification of a nonprobate transfer during the lifetimes of the spouses as a new nonprobate transfer, as to which the living spouse may consent if so desired. If the spouse does not have legal capacity to consent at the time, consent may be obtained through substituted judgment procedures. See Section 2580 (substituted judgment). Failure of consent to the changed terms during the spouse's lifetime revokes the original consent to the nonprobate transfer, and the spouse's interest ultimately passes with the spouse's estate or as otherwise disposed of by the spouse. See Section 5032 (effect of revocation). It should be noted that a modification is subject to the right of the decedent to make a contrary disposition by will. Section 5031 (form and service of revocation).

Under subdivision (b)(2), a modification by the surviving spouse after the death of the other spouse does not affect the nonprobate transfer of the community property interest of the deceased spouse as consented to by the deceased spouse. In effect, the consent is itself a nonprobate transfer which becomes irrevocable on the death of the spouse. See Section 5030 (revocability of consent). The deceased spouse's interest in the community property is transferred as consented to by the deceased spouse, unless by the terms of the consent the deceased spouse has authorized the surviving spouse to make modifications in the nonprobate transfer. See subdivision (b)(3). This is a special instance of the rule stated in Section 5011 that a nonprobate transfer of community property on death is governed by overriding principles, including a written expression of intent.

### **Article 3. Revocation of Consent**

#### **§ 5030. Revocability of written consent**

5030. (a) A spouse's written consent to a provision for a nonprobate transfer of community property on death is revocable during the marriage.

(b) On termination of the marriage by dissolution, the written consent is revocable and the community property is subject to division under Section 4800 of the Civil Code or other disposition on order within the jurisdiction of the court.

(c) On the death of either spouse, the written consent is irrevocable.

**Comment.** Section 5030 is subject to express terms to the contrary. See Section 5011 (governing provision of instrument, law, or consent). If the consent is part of a mutual estate plan, nothing in this section precludes enforcement of the mutual estate plan by appropriate remedies, including an injunction affecting revocation.

Subdivision (c), to the extent it relates to the death of the consenting spouse, overrules the effect of *Estate of MacDonald*, 51 Cal. 3d 262, 794 P.2d 911, 272 Cal. Rptr. 153 (1990). The consent of a spouse to disposition of the spouse's one-half interest in the community property is subject to a contrary disposition in the spouse's will. Section 5031. The spouse's personal representative may not revoke the consent to a nonprobate transfer and impose a different estate plan on the spouse's property.

The surviving spouse may modify a provision for a nonprobate transfer of community property previously consented to by the deceased spouse to the extent provided in Section 5023.

It should be noted that these changes in the law are subject to Section 5014 (transitional provision).

### **§ 5031. Form and service of revocation**

5031. (a) If a married person executes a provision for a nonprobate transfer of community property on death with the written consent of the person's spouse, the consenting spouse may revoke the consent by a writing, including a will, that identifies the provision for transfer of the property being revoked, and that is served on the married person before the married person's death.

(b) Revocation of a spouse's written consent to a provision for a nonprobate transfer of community property on death does not affect the authority of the holder of the property to transfer the property in compliance with the provision for transfer of the property to the extent provided in Section 5003.

**Comment.** Section 5031 is consistent with subdivision (c) of Section 5030 (written consent irrevocable on death). Under this section any specific and served writing is sufficient, including a document purporting to be a

will, whether or not admitted to probate. The will provision would change existing law as to life insurance by allowing the beneficiary designation to be overridden by an express provision in a will.

For the manner and proof of service, see Part 2 (commencing with Section 1200) of Division 3. This section is subject to a contrary provision in the instrument, and the instrument may include terms that specify the manner of revocation of consent. Section 5011 (governing provision of instrument, law, or consent).

### **§ 5032. Effect of revocation**

5032. On revocation of a spouse's written consent to a nonprobate transfer of community property on death, the property passes in the same manner as if the consent had not been given.

**Comment.** Section 5032 governs the substantive rights of the spouses in the community property notwithstanding overriding contractual and legal requirements that bind a holder of the community property. See Sections 5003 (protection of holder of property), 5012 (community property rights independent of transfer obligation). However, this section is subject to contrary terms of the instrument and to overriding law governing the obligation of a holder of community property to deal with the property under the particular type of instrument. See Section 5011 (governing provision of instrument, law, or consent).

For rights of a spouse who has not given written consent, see Section 5020 (written consent required).

## CONFORMING CHANGES

### **Civ. Code § 5110.740 (amended). Estate planning documents**

5110.740. (a) A statement in a will of the character of property is not admissible as evidence of a transmutation of the property in any proceeding commenced before the death of the person who made the will.

(b) *A waiver of a right to a joint and survivor annuity or survivor's benefits under the federal Retirement Equity Act of 1984 is not a transmutation of the community property rights of the person executing the waiver.*

*(c) A written joinder or written consent to a nonprobate transfer of community property on death that satisfies Section 5110.730 is a transmutation and is governed by the law applicable to transmutations and not by Chapter 2 (commencing with Section 5010) of Part 1 of Division 5 of the Probate Code.*

**Comment.** Under subdivision (b) of Section 5110.740, a waiver for federal tax purposes is not a transmutation within the meaning of Section 5110.710.

Subdivision (c) is consistent with Probate Code Section 5022 (written consent not a transmutation).

**Prob. Code § 141 (amended). Rights that may be waived**

141. (a) The right of a surviving spouse to any of the following may be waived in whole or in part by a waiver under this chapter:

(1) Property that would pass from the decedent by intestate succession.

(2) Property that would pass from the decedent by testamentary disposition in a will executed before the waiver.

(3) A probate homestead.

(4) The right to have exempt property set aside.

(5) Family allowance.

(6) The right to have an estate set aside under Chapter 6 (commencing with Section 6600) of Part 3 of Division 6.

(7) The right to elect to take community or quasi-community property against the decedent's will.

(8) The right to take the statutory share of an omitted spouse.

(9) The right to be appointed as the personal representative of the decedent's estate.

*(10) An interest in property that is the subject of a nonprobate transfer on death under Part 1 (commencing with Section 5000) of Division 5.*

(b) Nothing in this chapter affects or limits the waiver or manner of waiver of rights other than those referred to in subdivision (a), including but not limited to the right to property

that would pass from the decedent to the surviving spouse by nonprobate transfer upon the death of the decedent such as the survivorship interest under a joint tenancy, a Totten trust account, or a pay-on-death account.

**Comment.** Paragraph (10) is added to Section 141(a) for purposes of cross-referencing the provisions on nonprobate transfers. See also Section 5013 (waiver or agreement that affects rights in community property).



STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

## Notice of Trustees' Fees

November 1991

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 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 *Notice of Trustees' Fees*, 21 Cal. L. Revision Comm'n Reports 191 (1991).

STATE OF CALIFORNIA

PETE WILSON, Governor

**CALIFORNIA LAW REVISION COMMISSION**

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SANFORD M. SKAGGS

ANN E. STODDEN

November 1, 1991

To: The Honorable Pete Wilson  
*Governor of California*, and  
The Legislature of California

This recommendation addresses two separate issues involving notice of trustees' fees.

(1) Existing law requires a trustee to give notice of a proposed fee increase to each beneficiary whose interest may be affected. This ambiguous standard would be replaced by a requirement of notice to each beneficiary who is entitled to receive or who actually receives accounts, and to each beneficiary who has requested notice.

(2) The virtual representation statute excuses notice to certain beneficiaries of future interests. However, the statute is narrowly limited to notice in judicial proceedings and should be extended to cover other notices, such as a notice of a proposed fee increase.

This recommendation was prepared pursuant to Resolution Chapter 37 of the Statutes of 1980, continued in Resolution Chapter 33 of the Statutes of 1991.

Respectfully submitted,

Edwin K. Marzec  
*Chairperson*



## NOTICE OF TRUSTEES' FEES

Before a trustee may implement an increase in the trustee's fees, the trustee must give notice of the proposed fee increase to each beneficiary of the trust whose interest may be affected by the fee increase.<sup>1</sup> Beneficiaries who are sufficiently concerned may attempt to negotiate the matter with the trustee, petition the court for review of the increased fee,<sup>2</sup> or seek to transfer the trust to another trustee.<sup>3</sup>

### *Standard for Determining Which Beneficiaries Should Receive Notice*

The "affected interest" standard for giving notice has been criticized as being vague and difficult to apply. This standard may impose a significant administrative burden on trust companies in order to determine which beneficiaries' interests would be affected under each trust administered by the trustee. The trustee would need to review and interpret the terms of each trust and then identify and locate beneficiaries of future interests in any situation where the fees are charged in part to the principal account of the trust. It has also been suggested that it is inconsistent as a matter of policy to require notice of an increase in a trustee's fee to be given to beneficiaries who are not receiving trust accounts. As a general rule, income beneficiaries receive trust accounts, but not remainder beneficiaries.<sup>4</sup>

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1. Prob. Code § 15686(b) (operative July 1, 1991). For background, see *Recommendation Relating to Trustees' Fees*, 20 Cal. L. Revision Comm'n Reports 279 (1990).

2. See Prob. Code §§ 15686(c), 17200(b)(9).

3. See Prob. Code §§ 15640(c) (resignation of trustee with consent of adult beneficiaries), 15642(b)(5) (petition for removal of trustee for excessive compensation), 15645 (costs and attorney's fees in proceedings for transfer of trust to successor trust company), 15660(c) (filling vacancy by agreement of adult beneficiaries).

4. With certain exceptions, trustees are required to account "to each beneficiary to whom income or principal is required or authorized in the trustee's discretion to be

The “affected interest” standard does, however, embody an important principle: trust beneficiaries whose interests are chargeable with the payment of the trustee’s fees should have a right to be informed of an increase in fees and an opportunity to take appropriate action. This right should not depend on whether the person is an income beneficiary or remainder beneficiary.

Balancing these competing considerations, the Commission recommends that the “affected interest” standard be replaced by a more specific description of the beneficiaries entitled to notice. The notice of an increase in the trustee’s fee should be given to all beneficiaries (1) who are entitled to accounts under the statute, (2) who were given the last preceding account (whether or not required), or (3) who have made a written request to the trustee for notice of an increased trustee’s fee and supplied an address for mailing notice.

By requiring notice to beneficiaries who are entitled to an account actually receiving accounts, the recommended standard recognizes that proposed fee increases are an important matter of interest to beneficiaries who follow the administration of the trust. The opportunity to request notice of an increased fee is provided to recognize the interest of other beneficiaries in being informed of changes in the expense of administration of the trust. The “notice on written request” standard avoids the administrative burden of existing law and makes it easy for trustees to determine

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currently distributed.” The accounting requirement of Section 16062 does not apply in the following circumstances: (1) under living trusts created before July 1, 1987, (2) under certain testamentary trusts created before July 1, 1987, (3) where the trust waives the account, (4) in the case of a revocable trust to the extent provided by Section 15800, (5) where the beneficiary has waived the account, or (6) where the beneficiary and trustee are the same person. See Prob. Code §§ 16062, 16064. In practice, it does not appear that these exceptions would impair the policy of the fee increase notice statute, since the Commission is informed that corporate trustees give accounts to a broad class of adult beneficiaries even though not strictly required to do so by statute. There is an incentive to account in order to start the running of the statute of limitations under Section 16460.

who is entitled to notice of a proposed fee increase. While this standard imposes a greater burden on remainder beneficiaries, those who are interested in the matter can be expected to take the simple step of making a written request to the trustee.

*Notice Involving Future Interests*

A useful but perhaps overlooked general notice provision in the Trust Law excuses the duty to give notice to certain beneficiaries of future interests.<sup>5</sup> For example, this provision permits notice to be given only to the holder of an interest, without the need to give notice to contingent beneficiaries, such as the holder's spouse, distributees, heirs, issue, or other kindred.<sup>6</sup> The assumption is that the present interest holder can be expected to protect the interest and that requiring notice to be given to those whose interests are contingent would be burdensome and needless duplication. The present interest holder is viewed as representing the entire class of potential holders of the interest.

However, in two respects, this "virtual representation" section is unnecessarily restricted. The statute should be revised to make clear that it applies to service of papers, such as accounts and reports, as well as notices. In addition, the rule for determining membership in a class of beneficiaries by applying the terms of the governing instrument at the time of "commencement of the proceedings"<sup>7</sup> should be expanded to take account of situations that do not involve judicial proceedings. This would avoid any argument that notices in non-hearing matters need to be given to minors or unborns by appointment of guardians ad litem.<sup>8</sup>

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5. Prob. Code § 15804.

6. Prob. Code § 15804(a)(2).

7. Prob. Code § 15804(a)(1).

8. See Prob. Code § 1003.

## RECOMMENDED LEGISLATION

**Prob. Code § 15686 (amended). Notice of increased trustee's fee**

15686. (a) As used in this section, "trustee's fee" includes, but is not limited to, the trustee's periodic base fee, rate of percentage compensation, minimum fee, hourly rate, and transaction charge, but does not include fees for extraordinary services.

(b) A trustee may not charge an increased trustee's fee for administration of a particular trust unless the trustee first gives at least 60 days' written notice of that increased fee to each beneficiary of the trust whose interest may be affected by the increased fee *all of the following persons*:

(1) *Each beneficiary who is entitled to an account under Section 16062.*

(2) *Each beneficiary who was given the last preceding account.*

(3) *Each beneficiary who has made a written request to the trustee for notice of an increased trustee's fee and has given an address for receiving notice by mail.*

(c) If a beneficiary files a petition under Section 17200 for review of the increased trustee's fee or for removal of the trustee and serves a copy of the petition on the trustee before the expiration of the 60-day period, the increased trustee's fee does not take effect as to that trust until otherwise ordered by the court or the petition is dismissed.

**Comment.** Subdivision (b) of Section 15686 is amended to specify the beneficiaries who are to be given notice of a proposed fee increase. The list of beneficiaries entitled to notice replaces the former standard requiring notice to beneficiaries whose interest may be affected by the fee increase. Under the new standard for giving notice of a fee increase, if a beneficiary is not receiving accounts under the trust (whether required by Section 16062 or given as a matter of practice), the beneficiary will need to give the trustee a written request for notice of a fee increase. Under subdivision (b)(3), it is the responsibility of the person requesting notice to provide an address. The

trustee's duty to give notice is satisfied by sending notice to the address supplied by the person requesting the notice.

Subdivision (b) requires notice to be given only to "beneficiaries." Thus, if a person is no longer a beneficiary (as in a case where the person's interest has terminated), subdivision (b) does not require notice of an increased fee to be given the person, even if the person had given the trustee a written request for notice. See also Sections 15802 (notice to person holding power to revoke trust), 15804 (notice in case of future interest).

**Prob. Code § 15804 (amended). Notice to beneficiaries of future interests**

15804. (a) Subject to subdivisions (b) and (c), it is sufficient compliance with a requirement in this division that notice be given to a beneficiary, or to a person interested in the trust, if notice is given as follows:

(1) Where an interest has been limited on any future contingency to persons who will compose a certain class upon the happening of a certain event without further limitation, notice shall be given to the persons in being who would constitute the class if the event had happened immediately before the commencement of the proceedings *proceeding or, if there is no proceeding, if the event had happened immediately before notice is given.*

(2) Where an interest has been limited to a living person and the same interest, or a share therein, has been further limited upon the happening of a future event to the surviving spouse or to persons who are or may be the distributees, heirs, issue, or other kindred of the living person, notice shall be given to the living person.

(3) Where an interest has been limited upon the happening of any future event to a person, or a class of persons, or both, and the interest, or a share of the interest, has been further limited upon the happening of an additional future event to another person, or a class of persons, or both, notice shall be given to the

person or persons in being who would take the interest upon the happening of the first of these events.

(b) If a conflict of interest involving the subject matter of the trust proceeding exists between a person to whom notice is required to be given and a person to whom notice is not otherwise required to be given under subdivision (a), notice shall also be given to persons not otherwise entitled to notice under subdivision (a) with respect to whom the conflict of interest exists.

(c) Nothing in this section affects any of the following:

(1) Requirements for notice to a person who has requested special notice, a person who has filed notice of appearance, or a particular person or entity required by statute to be given notice.

(2) Availability of a guardian ad litem pursuant to Section 1003.

*(d) As used in this section, "notice" includes other papers.*

**Comment.** Subdivision (a)(1) of Section 15804 is amended to clarify its application to notices given under this division outside of judicial proceedings. See, e.g., Section 15686 (notice of trustee's fee).

Subdivision (d) has been added to make clear that other papers, such as accounts to beneficiaries under Section 16062, are covered by the rules governing notice in this section.

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Nonprobate Transfer to  
Trustee Named in Will

November 1991

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 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 *Nonprobate Transfer to Trustee Named in Will*, 21 Cal. L. Revision Comm'n Reports 201 (1991).

STATE OF CALIFORNIA

PETE WILSON, Governor

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SANFORD M. SKAGGS

ANN E. STODDEN

November 1, 1991

To: The Honorable Pete Wilson  
*Governor of California*, and  
The Legislature of California

This recommendation expands existing provisions concerning nonprobate transfers. Existing law permits payment of insurance and employee death benefits directly to a trustee named or to be named in a will without going through probate. The recommended legislation would apply this rule to all kinds of nonprobate transfers, including multiple-party bank accounts.

This recommendation was prepared pursuant to Resolution Chapter 37 of the Statutes of 1980, continued in Resolution Chapter 33 of the Statutes of 1991.

Respectfully submitted,

Edwin K. Marzec  
*Chairperson*



## NONPROBATE TRANSFER TO TRUSTEE NAMED IN WILL

In 1970, the Legislature enacted provisions to permit insurance and employee benefits to be paid at death directly to a trustee named or to be named in the will of the policyholder or employee without going through probate.<sup>1</sup> Before then, there was some question whether the insurance proceeds or employee benefits had to go through probate.<sup>2</sup>

These provisions would be more useful if they were broadened to cover all types of nonprobate transfers made to a trustee named or to be named in a will. The Commission is informed that nonprobate transfers at death, such as multiple-party bank accounts, are often made to an existing inter vivos trust. Since the trust is already in existence, there is no need for a will to establish the trust or to name a trustee, and the property passes directly to the trust without going through probate.

But if the designated beneficiary is a trustee named or to be named in a will and the designation is made in a type of nonprobate transfer not now covered by the statute, the proceeds or benefits may have to go through probate. One of the main

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1. 1970 Cal. Stat. ch. 835 (originally enacted as Prob. Code §§ 175-184, now codified as Prob. Code §§ 6320-6330). Although the insurance proceeds and employee benefits do not go through probate, the will itself must be admitted to probate. Prob. Code § 6323. The court in which the decedent's estate is being administered may determine the validity and terms of the trust and supervise its administration. Prob. Code § 6325.

For the beneficiary designation to be valid, it must be made in accordance with the provisions of the insurance contract or employee benefit plan or, in the absence of such provisions, as approved by the insurer or administrator of the plan. Prob. Code § 6321. The designation is ineffective unless the designator's will contains provisions creating the trust, or makes a disposition valid under the California Uniform Testamentary Additions to Trusts Act. Prob. Code § 6322. Failure to satisfy these requirements does not invalidate an otherwise valid trust created in the will. See Prob. Code § 6329. The consequence of failure to satisfy these requirements is that the benefits may have to go through probate. See *Review of Selected 1970 California Legislation*, 2 Pac. L.J. 275, 292 (1971).

2. See *Review of Selected 1970 California Legislation*, 2 Pac. L.J. 275, 292 (1971).

reasons for a nonprobate transfer is to avoid probate. Although the will itself must be admitted to probate to establish its validity and to construe its terms,<sup>3</sup> there is no need for the proceeds or benefits to pass through probate simply because they are in a bank account and are not insurance proceeds or employee benefits.

The Commission recommends that the existing provisions for insurance and employee benefits be expanded to apply to all types of nonprobate transfers where the designated death beneficiary is a trustee named or to be named in the will.

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3. See Prob. Code § 6323.

## PROPOSED LEGISLATION

**Heading to Chapter 8 (commencing with Section 6320) of Part 1 of Division 6 of the Probate Code (amended)**CHAPTER 8. ~~TRUST FOR INSURANCE OR EMPLOYEE BENEFITS~~ *NONPROBATE TRANSFER TO TRUSTEE NAMED IN DECEDENT'S WILL***Prob. Code § 6320 (amended). Definitions**

6320. As used in this chapter, unless the context otherwise requires:

(a) ~~“Contract or plan” means any “Instrument” includes all of the following:~~

(1) An insurance, annuity, or endowment contract (including any agreement issued or entered into by the insurer in connection therewith, supplemental thereto, or in settlement thereof).

(2) A pension, retirement benefit, death benefit, stock bonus, profit-sharing or employees' saving plan, or contract created or entered into by an employer for the benefit of some or all of his or her employees.

(3) Self-employed retirement plans, and individual annuities or accounts, established or held pursuant to the Internal Revenue Code as now or hereafter amended.

(4) *A multiple-party account as defined in Section 5132.*

(5) *Any other written instrument described in Section 5000.*

(b) “Designation” means a designation made pursuant to Section 6321.

**Comment.** Subdivision (a) of Section 6320 is amended to define “instrument” as used in Section 6321. Formerly, Section 6321 referred to a “contract or plan” which was defined in Section 6320.

The basic definition of “instrument” is in Section 45. The definition of “instrument” in Section 6320 makes clear the scope and application of this chapter.

**Prob. Code § 6321 (amended). Designation of trustee as beneficiary, payee, or owner**

6321. ~~A contract or plan~~ *An instrument* may designate as a primary or contingent beneficiary, payee, or owner a trustee named or to be named in the will of the person entitled to designate the beneficiary, payee, or owner. The designation shall be made in accordance with the provisions of the ~~contract or plan~~ *instrument* or, in the absence of such provisions, in a manner approved by the insurer if an insurance, annuity, or endowment contract is involved, and by the trustee, custodian, or person or entity administering the ~~contract or plan~~ *instrument*, if any. The designation may be made before or after the execution of the designator's will and is not required to comply with the formalities for execution of a will.

**Comment.** Section 6321 is amended to use the term "instrument" in place of the former term "contract or plan." "Instrument" is defined in Section 6320. This amendment broadens the application of this chapter to all kinds of nonprobate transfers permitted under California law, including multiple-party accounts in financial institutions, public employees' death benefits (Gov't Code §§ 21332-21335), and beneficiary designations made under Section 5000.

Before benefits or rights are transferred to the trustee named in decedent's will, the will must be admitted to probate. See Section 6323.

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Preliminary Distribution  
Without Court Supervision

November 1991

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 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 *Preliminary Distribution Without Court Supervision*, 21 Cal. L. Revision Comm'n Reports 209 (1991).

STATE OF CALIFORNIA

PETE WILSON, Governor

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FORREST A. PLANT

SANFORD M. SKAGGS

ANN E. STODDEN

November 1, 1991

To: The Honorable Pete Wilson  
*Governor of California*, and  
The Legislature of California

This recommendation permits a personal representative administering a decedent's estate under the Independent Administration of Estates Act to make preliminary distribution without court approval of specified items to the persons entitled under the will. The personal representative must first give notice of the proposed action to affected persons.

This recommendation was prepared pursuant to Resolution Chapter 37 of the Statutes of 1980, continued in Resolution Chapter 33 of the Statutes of 1991.

Respectfully submitted,

Edwin K. Marzec  
*Chairperson*



## PRELIMINARY DISTRIBUTION WITHOUT COURT SUPERVISION

If the court authorizes a probate estate to be administered under the Independent Administration of Estates Act,<sup>1</sup> the personal representative may take many actions without court approval. Some actions that may be taken without court approval require the personal representative to give notice of the proposed action to affected persons,<sup>2</sup> while for others a notice of proposed action is unnecessary.<sup>3</sup> A few actions may be taken only with court approval.<sup>4</sup> The purpose of this three-tiered scheme is to allow the personal representative to perform routine duties with a minimum of paperwork, to require affected persons to be notified of proposed actions that may have a significant impact on the estate, and to require court approval for crucial steps and in potential conflict of interest situations.

Among the actions that may be taken only with court approval are preliminary distributions of estate property.<sup>5</sup> This restriction

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1. Prob. Code §§ 10400-10592. Sections 10450-10452 permit the court to authorize the personal representative to administer the estate under the Independent Administration of Estates Act.

2. Prob. Code §§ 10510-10519, 10580-10581. Actions that require notice of proposed action include a sale or exchange of real property of the estate, sale or incorporation of a business, abandonment of tangible personal property, borrowing money, encumbering estate property, and determining a third-party claim. Prob. Code §§ 10510-10519.

3. Prob. Code §§ 10550-10564. Actions that may be taken without court approval and without giving notice of proposed action include payment or rejection of claims against the estate, initiating and defending litigation, paying taxes and expenses of administration, exercising security subscription or conversion rights, and repairing or improving estate property. *Id.*

4. Court approval is required for allowance of the personal representative's compensation, allowance of attorney's fees, settlement of accounts, preliminary and final distributions and discharge, and transactions in which the personal representative or estate attorney has an interest. Prob. Code § 10501.

5. Prob. Code § 10501. See also Prob. Code § 11623 (petition for order for preliminary distribution).

allows the court to ensure that the rights of beneficiaries and other interested persons are protected and that there will be enough remaining in the estate after distribution to pay estate creditors.<sup>6</sup>

But a preliminary distribution may be so small that a petition, notice, hearing, and authorizing court order would involve too much time and expense in relation to the importance of the transaction. It may be appropriate to distribute to specific devisees under the decedent's will items of modest value — such as household furniture and furnishings, motor vehicles, clothing, jewelry, and personal effects — and moderate amounts of cash. It may also be desirable to distribute income received during administration to reduce or eliminate income taxation on the estate.<sup>7</sup>

The Independent Administration of Estates Act should permit these kinds of preliminary distributions of estate property without requiring a court proceeding. Affected persons would be protected by requiring the personal representative to give them notice of the proposed action.<sup>8</sup> A person given notice can object and thereby prevent the personal representative from making distributions without court approval.<sup>9</sup>

The Commission recommends that a provision be added to the Independent Administration of Estates Act to permit the personal representative, after giving notice of proposed action, to make preliminary distribution as follows:

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6. See Prob. Code § 11621.

7. See Anderson & Elliott, *Income Taxation of Decedent, Estate, and Beneficiaries*, in 2 California Decedent Estate Practice §§ 14.2, 14.78-14.94 (Cal. Cont. Ed. Bar 1990).

8. Notice of proposed action is given to each known devisee and heir whose interest in the estate would be affected by the proposed action, to each person who has filed a request for special notice, and to the Attorney General of California if any part of the estate is to escheat to the state and its interest would be affected by the proposed action. Prob. Code § 10581.

9. Prob. Code §§ 10587, 10589.

(1) Household furniture and furnishings, motor vehicles, clothing, jewelry, and other tangible articles of a personal nature to the persons entitled to them under the decedent's will, not to exceed a total value of \$50,000.

(2) Cash to the persons entitled to it under the decedent's will, not to exceed \$10,000 to any one person.

(3) Income received during administration to the persons entitled to it under the applicable statute.<sup>10</sup>

This distribution would be authorized only if the time for creditors to file claims has expired<sup>11</sup> and distribution may be made without loss to creditors or injury to the estate or any interested person.<sup>12</sup> Other distributions under the Independent Administration of Estates Act would be made under the provisions for court supervision now applicable.

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10. Persons entitled to receive income on estate property are determined under Probate Code Sections 12000-12007.

11. A creditor must file a claim with the estate before expiration of the later of the following times: (1) Four months after letters are first issued to a general personal representative or (2) 30 days after notice of administration is given to the creditor, if notice is given either within four months after letters are first issued to a general personal representative or within 30 days after the personal representative first has knowledge of the creditor. Prob. Code §§ 9100, 9051.

12. Cf. Prob. Code § 11621 (supervised administration).

## RECOMMENDED LEGISLATION

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

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

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

(2) Allowance of compensation of the attorney for the personal representative.

(3) Settlement of accounts.

(4) *Preliminary Subject to Section 10520, preliminary and final distributions and discharge.*

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

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

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

(8) Allowance, payment, or compromise of a claim of the personal representative, or the attorney for the personal representative, against the estate.

(9) Compromise or settlement of a claim, action, or proceeding by the estate against the personal representative or against the attorney for the personal representative.

(10) Extension, renewal, or modification of the terms of a debt or other obligation of the personal representative, or the attorney

for the personal representative, owing to or in favor of the decedent or the estate.

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

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

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

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

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

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

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

**Comment.** Paragraph (4) of subdivision (a) of Section 10501 is amended to make it subject to Section 10520 (preliminary distribution using notice of proposed action procedure).

**Prob. Code § 10520 (added). Preliminary distribution of specified personal property**

10520. If the time for filing claims has expired and it appears that the distribution may be made without loss to creditors or

injury to the estate or any interested person, the personal representative has the power to make preliminary distributions of the following:

(a) Income received during administration to the persons entitled under Chapter 8 (commencing with Section 12000) of Part 10.

(b) Household furniture and furnishings, motor vehicles, clothing, jewelry, and other tangible articles of a personal nature to the persons entitled to the property under the decedent's will, not to exceed an aggregate fair market value to all persons of fifty thousand dollars (\$50,000) computed cumulatively through the date of distribution. Fair market value shall be determined on the basis of the inventory and appraisal.

(c) Cash to general pecuniary devisees entitled to it under the decedent's will, not to exceed ten thousand dollars (\$10,000) to any one person.

**Comment.** Section 10520 is new. The section permits the personal representative to take the specified action after giving notice of proposed action, but without court approval. Sections 10500, 10510. A person given notice of proposed action who fails to object waives the right to have the court later review the proposed action. Section 10590.

Section 10520 is an optional procedure; the personal representative may seek court approval if the personal representative so desires. See Section 10500(b). If the personal representative seeks court approval of a preliminary distribution, the personal representative may give notice as provided in Section 11623(a)(1) or may give notice as provided in Section 11601, the general provision applicable to court-supervised distribution. See Section 11623(b).

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

## Transfer of Conservatorship Property to Trust

November 1991

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 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 *Transfer of Conservatorship Property to Trust*, 21 Cal. L. Revision Comm'n Reports 219 (1991).

STATE OF CALIFORNIA

PETE WILSON, Governor

**CALIFORNIA LAW REVISION COMMISSION**

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FORREST A. PLANT

SANFORD M. SKAGGS

ANN E. STODDEN

November 1, 1991

To: The Honorable Pete Wilson  
*Governor of California*, and  
The Legislature of California

This recommendation expands the substituted judgment provisions of conservatorship law to permit the court to authorize a conservator to transfer to a trust created by the conservator or conservatee any property unintentionally omitted from the trust.

This recommendation was prepared pursuant to Resolution Chapter 37 of the Statutes of 1980, continued in Resolution Chapter 33 of the Statutes of 1991.

Respectfully submitted,

Edwin K. Marzec  
*Chairperson*



## TRANSFER OF CONSERVATORSHIP PROPERTY TO TRUST

Under the substituted judgment provisions of the Probate Code,<sup>1</sup> the court in a conservatorship proceeding may authorize or require the conservator to take various actions relating to the conservatee's estate plan, including creating revocable or irrevocable trusts for the benefit of the conservatee or others.<sup>2</sup> The trust may be funded with property of the conservatorship estate and may contain testamentary provisions.<sup>3</sup>

Property of the conservatee may be discovered at the conservatee's death that should have been included in the trust, but was inadvertently omitted. Authority should be included in the substituted judgment provisions to permit the court to authorize or require the conservator to transfer to the trust later-discovered property<sup>4</sup> that was unintentionally omitted from the trust.<sup>5</sup>

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1. Prob. Code §§ 2580-2586.

2. Prob. Code § 2580.

3. 2 W. Johnstone & S. House, *California Conservatorships and Guardianships* § 13.3, at 709 (Cal. Cont. Ed. Bar 1990).

4. If property is discovered after the death of the conservatee, the conservator continues to have control of conservatorship assets pending delivery to the conservatee's personal representative "or other disposition according to law." Prob. Code § 2467. See also Prob. Code § 2630 (continuing jurisdiction of court).

5. The Commission is informed that this problem is sometimes dealt with under existing law by obtaining a court order under Probate Code Sections 9860-9868 relating to conveyance or transfer of property claimed to belong to decedent or other person. By adding to the substituted judgment provisions express authority for the court to authorize or require the conservator to transfer later-discovered property to the trust, any doubt about the statutory authority for this practice will be eliminated.

## RECOMMENDED LEGISLATION

### **Prob. Code § 2580 (amended). Petition to authorize proposed action**

2580. (a) The conservator or other interested person may file a petition under this article for an order of the court authorizing or requiring the conservator to take a proposed action for any one or more of the following purposes:

(1) Benefiting the conservatee or the estate.

(2) Minimizing current or prospective taxes or expenses of administration of the conservatorship estate or of the estate upon the death of the conservatee.

(3) Providing gifts for such purposes, and to such charities, relatives (including the other spouse), friends, or other objects of bounty, as would be likely beneficiaries of gifts from the conservatee.

(b) The action proposed in the petition may include, but is not limited to, the following:

(1) Making gifts of principal or income, or both, of the estate, outright or in trust.

(2) Conveying or releasing the conservatee's contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety.

(3) Exercising or releasing the conservatee's powers as donee of a power of appointment.

(4) Entering into contracts.

(5) Creating for the benefit of the conservatee or others, revocable or irrevocable trusts of the property of the estate,

which trusts may extend beyond the conservatee's disability or life.

*(6) Transferring to a trust created by the conservator or conservatee any property unintentionally omitted from the trust.*

~~(6)~~ (7) Exercising options of the conservatee to purchase or exchange securities or other property.

~~(7)~~ (8) Exercising the rights of the conservatee to elect benefit or payment options, to terminate, to change beneficiaries or ownership, to assign rights, to borrow, or to receive cash value in return for a surrender of rights under any of the following:

(i) Life insurance policies, plans, or benefits.

(ii) Annuity policies, plans, or benefits.

(iii) Mutual fund and other dividend investment plans.

(iv) Retirement, profit sharing, and employee welfare plans and benefits.

~~(8)~~ (9) Exercising the right of the conservatee to elect to take under or against a will.

~~(9)~~ (10) Exercising the right of the conservatee to disclaim any interest that may be disclaimed under Part 8 (commencing with Section 260) of Division 2.

~~(10)~~ (11) Exercising the right of the conservatee (i) to revoke a revocable trust or (ii) to surrender the right to revoke a revocable trust, but the court shall not authorize or require the conservator to exercise the right to revoke a revocable trust if the instrument governing the trust (i) evidences an intent to reserve the right of revocation exclusively to the conservatee, (ii) provides expressly that a conservator may not revoke the trust, or (iii) otherwise evidences an intent that would be inconsistent with authorizing or requiring the conservator to exercise the right to revoke the trust.

(11) (12) Making an election referred to in Section 13502 or an election and agreement referred to in Section 13503.

**Comment.** Section 2580 is amended to add paragraph (6) to subdivision (b). If property is discovered after the conservatee's death that has been unintentionally omitted from a trust created by the conservator or conservatee, the conservator has control of the property pending its disposition according to law. Prob. Code § 2467. See also Prob. Code § 2630 (continuing jurisdiction of court).

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

REVISED RECOMMENDATION

## Compensation in Guardianship and Conservatorship Proceedings

September 1991

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 *Compensation in Guardianship and Conservatorship Proceedings*, 21 Cal. L. Revision Comm'n Reports 227 (1991).

STATE OF CALIFORNIA

PETE WILSON, Governor

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ANN E. STODDEN

September 12, 1991

To: The Honorable Pete Wilson  
*Governor of California*, and  
The Legislature of California

This recommendation makes clear that courts under the guardianship-conservatorship law may fix the compensation of counsel, guardians, and conservators to cover all services rendered in the proceeding, not only services rendered after the order of appointment. This recommendation renews in revised form a recommendation submitted in 1990.

This recommendation is submitted pursuant to Resolution Chapter 37 of the Statutes of 1980, continued in Resolution Chapter 33 of the Statutes of 1991.

Respectfully submitted,

Edwin K. Marzec  
*Chairperson*



## COMPENSATION IN GUARDIANSHIP AND CONSERVATORSHIP PROCEEDINGS

### *Compensation of Counsel*

Under existing law, the court in a guardianship or conservatorship proceeding may appoint counsel for a ward or conservatee.<sup>1</sup> On conclusion of the matter, the court fixes a reasonable sum for compensation and expenses of counsel, payable out of the estate of the ward or conservatee.<sup>2</sup> There is some question whether the attorney may be compensated for legal services provided before the order of appointment.<sup>3</sup>

The Commission recommends that it be made clear that the court in a guardianship or conservatorship proceeding may award compensation for legal services provided before, as well as after, the appointment order. Preliminary legal work may be necessary before the court's order of appointment is made. For example, the attorney may need to interview the ward or conservatee and investigate the facts before applying for appointment.<sup>4</sup> The ward or conservatee would be protected by the court's discretion not to make the appointment, or not to award compensation for services rendered before the appointment.

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1. Prob. Code § 1470. See also Prob. Code §§ 1471, 1472.

2. Prob. Code § 1470. If the person for whom counsel is appointed is a minor, the court may order compensation to be paid by the parent or parents of the minor, or out of the minor's estate, or by any combination thereof. *Id.*

3. A recent case held the court in a conservatorship proceeding could not award attorneys' fees for services rendered before the appointment order. *Young, Wooldridge, Paulden, Self, Farr & Griffin v. Thomas*, 258 Cal. Rptr. 574 (1989). The California Supreme Court has ordered that this opinion not be published in the official reports.

4. 11 Est. Plan. & Cal. Prob. Rep. 21 (Cal. Cont. Ed. Bar, Aug. 1989).

*Compensation of Guardian or Conservator*

Similarly, there is some question whether a guardian or conservator may be compensated for services provided before the order of appointment. For a conservator of the estate, some courts allow a larger fee for services rendered during the first accounting period.<sup>5</sup>

The Commission recommends that it be made clear that the court in a guardianship or conservatorship proceeding may award compensation for services provided by a guardian or conservator of the person, estate, or both, before the order of appointment.

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5. See 2 W. Johnstone & S. House, *California Conservatorships and Guardianships* §19.26, at 1069 (Cal. Cont. Ed. Bar 1990). For a conservator of the person, there is no minimum fee as there is in some counties for a conservator of the estate; compensation depends on the time the conservator is required to spend with the conservatee and on the nature of the services performed. *Id.* § 19.13, at 1055-56.

## RECOMMENDED LEGISLATION

**Prob. Code § 1470 (amended). Discretionary appointment of legal counsel**

1470. (a) The court may appoint private legal counsel for a ward, a proposed ward, a conservatee, or a proposed conservatee in any proceeding under this division if the court determines such person is not otherwise represented by legal counsel and that the appointment would be helpful to the resolution of the matter or is necessary to protect the person's interests.

(b) If a person is furnished legal counsel under this section, the court shall, upon conclusion of the matter, fix a reasonable sum for compensation and expenses of counsel, *whether the services were rendered and the expenses incurred before or after the date of the order appointing counsel.*

(c) The court shall order the sum fixed under subdivision (b) to be paid:

(1) If the person for whom legal counsel is appointed is an adult, from the estate of such person.

(2) If the person for whom legal counsel is appointed is a minor, by a parent or the parents of the minor or from the minor's estate, or any combination thereof, in such proportions as the court deems just.

(d) The court may make an order under subdivision (c) requiring payment by a parent or parents of the minor only after the parent or parents, as the case may be, have been given notice and the opportunity to be heard on whether the order would be just under the circumstances of the particular case.

**Comment.** Subdivision (b) of section 1470 is amended to make clear that, when legal counsel is appointed under this section, the court is not precluded from awarding compensation for legal services rendered, and expenses incurred, before the date of appointment.

Although Section 1470(b) provides that the court shall fix compensation of counsel “upon conclusion of the matter,” this does not prevent the court from later making an award of compensation. See 1 W. Johnstone & S. House, California Conservatorships and Guardianships § 7.68, at 374-75 (Cal. Cont. Ed. Bar 1990). The “matter” to which Section 1470 refers is the particular matter for which counsel was appointed. See Section 1471.

Subdivision (b) deals with compensation of appointed counsel for a ward or conservatee. Section 1470 does not affect the right to compensation in cases not covered by the section. Cf. Estate of Moore, 258 Cal. App. 2d 458, 65 Cal. Rptr. 831 (1968) (payment of attorney’s fees of petitioner for conservatorship where another person appointed as conservator); *In re Guardianship of Bundy*, 44 Cal. App. 466, 186 P. 811 (1919) (payment of attorney’s fees of petitioner for adult guardianship where proposed ward contested petition).

**Prob. Code § 1472 (amended). Compensation of mandatory court-appointed counsel**

1472. (a) If a person is furnished legal counsel under Section 1471:

(1) The court shall, upon conclusion of the matter, fix a reasonable sum for compensation and expenses of counsel, *whether the services were rendered and the expenses incurred before or after the date of the order appointing counsel*, and shall make a determination of the person’s ability to pay all or a portion of such sum.

(2) If the court determines that the person has the ability to pay all or a portion of such sum, the court shall order the conservator of the estate or, if none, the person to pay in such installments and in such manner as the court determines to be reasonable and compatible with the person’s financial ability.

(3) In a proceeding under Chapter 3 (commencing with Section 3100) of Part 6 for court authorization of a proposed transaction involving community property, the court may order payment out of the proceeds of the transaction.

(4) If a conservator is not appointed for the person furnished legal counsel, the order for payment may be enforced in the same manner as a money judgment.

(b) If the court determines that a person furnished private counsel under Section 1471 lacks the ability to pay all or a portion of the sum determined under paragraph (1) of subdivision (a), the county shall pay such sum to the private counsel to the extent the court determines the person is unable to pay.

(c) The payment ordered by the court under subdivision (a) shall be made to the county if the public defender has been appointed or if private counsel has been appointed to perform the duties of the public defender and the county has compensated such counsel. In the case of other court-appointed counsel, the payment shall be made to such counsel.

**Comment.** Paragraph (1) of subdivision (a) of Section 1472 is amended to make clear that, when legal counsel is appointed under Section 1471, the court is not precluded from awarding compensation for legal services rendered, and expenses incurred, before the date of appointment.

Although Section 1472(a)(1) provides that the court shall fix compensation of counsel “upon conclusion of the matter,” this does not prevent the court from later making an award of compensation. See 1 W. Johnstone & S. House, *California Conservatorships and Guardianships* § 6.57, at 291-92 (Cal. Cont. Ed. Bar 1990). The “matter” to which Section 1472 refers is the particular matter for which counsel was appointed. See Section 1471.

Section 1472 deals with compensation of counsel appointed under Section 1471. The section does not affect the right to compensation in cases not covered by the section. *Cf.* *Estate of Moore*, 258 Cal. App. 2d 458, 65 Cal. Rptr. 831 (1968) (payment of attorney’s fees of petitioner for conservatorship where another person appointed as conservator); *In re Guardianship of Bundy*, 44 Cal. App. 466, 186 P. 811 (1919) (payment of attorney’s fees of petitioner for adult guardianship where proposed ward contested petition).

**Prob. Code § 2640 (amended). Petition by guardian or conservator of estate**

2640. (a) At any time after the filing of the inventory and appraisal, but not before the expiration of 90 days from the issuance of letters, the guardian or conservator of the estate may petition the court for an order fixing and allowing compensation to any one or more of the following:

(1) The guardian or conservator of the estate for services rendered ~~in that capacity~~ to that time.

(2) The guardian or conservator of the person for services rendered ~~in that capacity~~ to that time.

(3) The attorney for services rendered to that time by the attorney to the guardian or conservator of the person or estate or both.

(b) Notice of the hearing shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

(c) Upon the hearing, the court shall make an order allowing (1) such compensation requested in the petition as the court determines is just and reasonable to the guardian or conservator of the estate for services rendered ~~in that capacity~~ or to the guardian or conservator of the person for services rendered ~~in that capacity~~, or to both, and (2) such compensation requested in the petition as the court determines is reasonable to the attorney for services rendered to the guardian or conservator of the person or estate or both, *whether the services were rendered before or after the date of the order appointing the guardian or conservator*. The compensation so allowed shall thereupon be charged to the estate. Legal services for which the attorney may ~~apply to the court for compensation~~ *be compensated* include those services rendered by any paralegal performing the legal services under

the direction and supervision of an attorney. The petition or application for compensation shall set forth the hours spent and services performed by the paralegal.

**Comment.** Subdivisions (a) and (c) of Section 2640 are amended to make clear the court is not precluded from awarding compensation for services rendered before the date of appointment. See also Sections 1470 (compensation of counsel), 1472 (compensation of counsel), 2623(c) (guardian or conservator allowed all reasonable disbursements made before appointment as guardian or conservator), 2641 (compensation of guardian or conservator of person).

Subdivision (c) is also amended to delete the former reference to compensation for which the attorney may “apply to the court.” Under Section 2640, the application to the court for the attorney’s compensation is made by the guardian or conservator of the estate, not by the attorney.

**Prob. Code § 2641 (amended). Petition by guardian or conservator of person**

2641. (a) At any time permitted by Section 2640 and upon the notice therein prescribed, the guardian or conservator of the person may petition the court for an order fixing and allowing compensation for services rendered to that time ~~in such capacity~~, *whether the services were rendered before or after the date of the order appointing the guardian or conservator.*

(b) Upon the hearing, the court shall make an order allowing such compensation as the court determines just and reasonable to the guardian or conservator of the person for services rendered. The compensation allowed shall thereupon be charged against the estate.

**Comment.** Section 2641 is amended to make clear the court is not precluded from awarding compensation for services rendered before the date of appointment. See also Sections 1470 (compensation of counsel), 1472 (compensation of counsel), 2623(c) (guardian or conservator allowed all reasonable disbursements made before appointment as guardian or conservator), 2640 (compensation of guardian or conservator of estate).

